

ACT Auditor-General's Office

Performance Audit Report

**Development Application
and Approval Process**

ACT Planning and Land Authority

Chief Minister's Department

May 2005



AUDITOR-GENERAL
AUSTRALIAN CAPITAL TERRITORY



PA04/04

The Speaker
ACT Legislative Assembly
Civic Square, London Circuit
CANBERRA ACT 2601

Dear Mr Speaker

I am pleased to forward to you a Performance Audit Report titled "Development Application and Approval Process", 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
4 May 2005

Table of Contents

1. REPORT SUMMARY AND AUDIT OPINION	1
INTRODUCTION	1
BACKGROUND	1
AUDIT OBJECTIVE, SCOPE, AND APPROACH.....	2
AUDIT OPINIONS	3
KEY FINDINGS	4
RECOMMENDATIONS AND RESPONSES TO THE REPORT	7
2. DEVELOPMENT APPLICATION AND APPROVAL PROCESS.....	16
INTRODUCTION	16
SIGNIFICANT FINDINGS.....	16
BACKGROUND	17
ISSUES.....	19
<i>Records management</i>	19
<i>Pre-application process</i>	20
<i>Fees on lodgement of DAs</i>	21
<i>Fast approval of DAs</i>	22
<i>The DA approval process</i>	23
<i>Notification and objections</i>	24
<i>Assessment processes</i>	25
<i>Timeliness of the DA assessment process</i>	26
<i>Data analysis and reporting</i>	28
<i>Data management</i>	29
<i>DA assessment - consultation with other agencies</i>	29
<i>Use of expert advice</i>	33
<i>Appeals against decisions</i>	33
CONCLUSION.....	34
3. LEGISLATION AND GUIDELINES	35
INTRODUCTION	35
SIGNIFICANT FINDINGS.....	35
BACKGROUND	36
ISSUES.....	38
<i>Legislation</i>	38
<i>Guidelines on processes and procedures</i>	38
<i>Checklists, assessments, and approvals</i>	39
<i>Notification, objections, and comments</i>	41
<i>Development conditions</i>	42
<i>Compliance</i>	43
<i>Communication and consultation</i>	47
CONCLUSION.....	48
4. ECOLOGICALLY SUSTAINABLE DEVELOPMENT.....	49
INTRODUCTION	49
SIGNIFICANT FINDINGS.....	49
BACKGROUND	49
ISSUES.....	50
<i>Expert advice and consultation</i>	50
<i>ESD guidelines for development assessment staff</i>	50
<i>Use of environmental assessments</i>	51
<i>Guidelines and training for ESD</i>	52
CONCLUSION.....	53
APPENDIX A	54
CRITERIA FOR THE AUDIT	54

1. REPORT SUMMARY AND AUDIT OPINION

INTRODUCTION

1.1 This report presents the results of a performance audit that reviewed the development application and approval (DAA) process in the Australian Capital Territory (ACT).

BACKGROUND

1.2 Before most development activities can be undertaken in the ACT, an application must be made to the ACT Planning and Land Authority (the Authority). The Authority then assesses the development application (DA) and may approve the application (with or without conditions) or refuse it. The *Land (Planning and Environment) Act 1991* (the Land Act) identifies the requirements of this process. It should be noted that many activities, including variations of a Territory Lease, are defined as 'development' and therefore, require a DA.

1.3 The Authority administers the DAA process, pursuant to the Land Act, the *Land (Planning and Environment) Regulations 1992* and the Territory Plan. The Authority also considers the National Capital Plan when performing its functions.

1.4 Over the last few years, the DAA process has undergone a number of changes including:

- the introduction of the current Territory Plan (last consolidated version in 2002) and associated plan variations;
- the formation of the Authority on 1 July 2003, which is responsible for the administration of the DAA process. This function was previously carried out by Planning and Land Management (PALM), within the Department of Urban Services;
- the implementation of the High Quality Sustainable Design (HQSD) process in 2001 and later its abolition on 30 June 2004; and
- the implementation of a new DAA process on 1 July 2004.

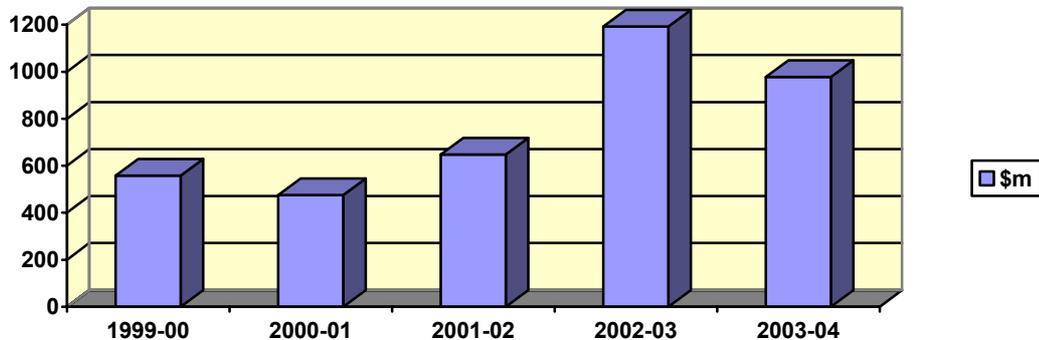
1.5 The Authority has undertaken various reviews, audits, research projects and evaluations over the last few years, to inform decisions on a range of issues affecting the DAA process. This work identified the need for changes to the High Quality Sustainable Design process and led to its abolition. It also led to the introduction of the current DAA process in an attempt to streamline the process.

1.6 The Audit assessed the efficiency and effectiveness of the development application and approval process in the ACT. This process governs an important industry in the ACT – with an average of \$774 million worth of developments having

REPORT SUMMARY AND AUDIT OPINION

been approved annually between the 1999-00 and the 2003-04 financial years (see Figure 1.1 below).

Figure 1.1: Value of approved development (\$m)



Source: Data provided by ACTPLA - Value of DA approvals (with a status of Approved or Approval Conditional) from 1999 - 2004.

AUDIT OBJECTIVE, SCOPE, AND APPROACH

1.7 The objective of this Audit was to provide an independent opinion to the Legislative Assembly on whether the Development Application Approval processes:

- are efficient, timely and fair;
- have been applied in a manner consistent with the relevant guidelines and legislation; and
- have regard to the principles of Ecologically Sustainable Development (ESD) (as defined by the *Environment Protection Act 1997*).

1.8 The Audit covers operations of the Authority and of Environment ACT, which was formerly part of the Department of Urban Services (DUS). In November 2004, Environment ACT moved from DUS to the Chief Minister's Department (CMD). Environment ACT encompasses the Heritage Council, Tree Protection Unit and Environment Protection Authority.

1.9 The Audit also consulted City Operations (part of DUS) and other agencies such as ActewAGL for advice and comment.

1.10 The Audit did not examine the role of the National Capital Authority.

1.11 The Audit approach included identification and review of relevant legislation and policies, and an examination of practices, procedures, reports and information systems applied by the Authority. The Audit Office wishes to thank the Authority and Environment ACT for their assistance and cooperation throughout the Audit.

1.12 Audit also consulted with key stakeholders and for their assistance, the Audit Office wishes to thank:

REPORT SUMMARY AND AUDIT OPINION

- the Housing Industry Association;
- the Master Builders Association;
- the Planning Institute of Australia;
- the Royal Australian Institute of Architects;
- the Property Council of Australia;
- Weston Creek Community Council;
- ActewAGL; and
- the Department of Urban Services.

1.13 The Audit included an examination of the application of the DAA process in a sample of 26 DAs across different development types, including six large and complex developments, which were examined in detail. The DAs examined by Audit consisted of single residential, dual occupancy, multi-unit, old age or supported living units and both government and non-government non-residential developments.

1.14 The criteria for the Audit are listed in Appendix A.

AUDIT OPINIONS

1.15 The Audit opinions, formed against the audit objectives, are set out below.

1. Audit found that DAA processes:
 - are not efficient, primarily due to complexity of legislation and guidelines, lack of consistent documentation and document management, inadequate compliance activities, and shortcomings in the referrals and consultation processes;
 - are often timely for single residential developments;
 - often fail to meet statutory timeframes for non-residential developments; and
 - are fair in most cases.
2. DAA processes have generally been applied in a manner consistent with relevant guidelines and legislation. However, there is a need for significant work to be done to improve the consistency and transparency of processes across various business areas of the Authority. This includes ensuring the availability of qualitative and standardised guidance material, improved documentation and a formalised staff training program.
3. Development approval processes have some regard for the principles of ESD. Although the Authority is one of the leading ACT government agencies implementing the principles of ESD, further work is required to ensure that ESD has clear and measurable impacts on DAA decisions.

KEY FINDINGS

1.16 The above opinions are supported by the following key findings:

Efficiency and timeliness

- The DAA process is not well integrated across the various agencies involved, and referrals to other agencies do not occur in a consistent manner. This can lead to delays, as not all referral agencies have statutory timeframes in which to respond to referrals. The referrals process, in particular, requires a major review, as the ramifications of mistakes, omissions, and delays are significant.
- Much of the assessment process is not well documented, including the consideration of objections, agency comments and the principles of Ecologically Sustainable Development.
- The quality control for document management was poor, especially with hard copy files.
- Although electronic files also had some quality control problems, they were generally found to have a better records management system than hard copy files. The audit log tool currently available in the Authority's IT system, named Objective, together with controls over access to electronic files, should improve quality control and accountability.
- The status of various sources of information, such as guidelines, interim guidelines, advisory notes, and codes for best practice, was not always clear.
- Many DA decisions did not meet statutory timeframes. Where these timeframes were not met, DAs took significantly longer to be determined. When examining DA data provided by the Authority (which covered all DAs assessed during 2003-04), Audit found the time taken for a large number of single residential DAs, for which the statutory timeframe is 30 working days, exceeded 60 working days. Many exceeded 100 working days.
- Performance against statutory timeframes in some cases may be inappropriately enhanced by procedures such as asking the applicant, close to the statutory due date, to apply for an extension of time.
- Pre-application processes, which occur before a DA is lodged, can be very time consuming, but information about the time taken by applicants prior to consulting the Authority is not collected by the Authority, so measures for improvement are difficult to identify.

Fairness

- The small number of appeals, out of the total DAs that are assessed, suggests that the vast majority of DAs do not have major objections to the fairness of decisions.
- The majority of Administrative Appeals Tribunal (AAT) decisions generally find in favour of the Authority, which suggests that the Authority's decisions are generally fair, as they can withstand independent scrutiny.

REPORT SUMMARY AND AUDIT OPINION

- Lack of documentation and the consequent lack of transparency fails to demonstrate that decisions are objective and fair in all cases.
- In less complex cases where a single officer both assessed and approved DAs, this was not checked or reviewed before the development approval was issued. If a review had taken place, it had not been documented. This lack of review may reduce the ability of the Authority to demonstrate objectivity, consistency, and fairness.

Consistency with guidelines and legislation

- The legislation governing the DAA process is very complex and there are many layers of information which impact on the process – such as Regulations, planning guidelines, lease requirements, land use policies, the requirements of other agencies, objections, and the principles of Ecologically Sustainable Development.
- There exists some risk that fast approvals fail to meet legislative requirements unless a greater degree of assurance is required to be provided by the applicant, followed by appropriate compliance activities. For example, applicants should be required to sign a statement that clearly acknowledges that the applicant has read and understood what constitutes a tree damaging activity, and knows that it is an offence to carry out this activity without the appropriate approval.
- The Authority failed to meet statutory requirements for DA assessment timeframes in a number of cases. Audit noted that the data provided by the Authority shows an average of 14% of single residential DAs and 28% of non-single residential DAs failed to meet statutory timeframes during the period July 2002 to March 2005. Of the small sample of DAs examined by Audit, 70% of non-single residential DAs failed to meet their statutory timeframes.
- Guidance material is available to staff and applicants to assist compliance with legislative processes. However, it is so extensive that it can be difficult to understand, and difficult to determine what guidance to follow where a discrepancy exists.
- Checklists are used to help ensure consistency with legislation and guidelines (such as planning guidelines) but they are not used consistently and not always completed.
- There were a number of statutory fees and charges associated with DAs. Fees, however, are not clearly identified on DA forms and due to the absence of receipt numbers recorded, it could not be demonstrated that all payable fees and charges had been collected.
- The quality and availability of guidelines vary across the Authority's DAA activities. For example:
 - certain procedural guidelines exist for staff such as those covering the public notification process. The Authority's compliance with these legislative requirements is of a high standard; and

REPORT SUMMARY AND AUDIT OPINION

- adequate guidance material is not currently available to staff in a number of key areas of the DAA assessment process, such as the consideration of objections, agency comments and the principles of ESD. For example, no guidance is yet available on how to weigh the various aspects of ESD.
- The Authority provides staff with informal, on-the-job training to educate staff about legislative requirements. This should be supplemented by formal training to improve staff knowledge and expertise.
- Although the Authority does a lot of consultation on a wide range of issues, stakeholders report that much of this consultation is of reduced value because the Authority fails to provide feedback on comments and input, and often consultation occurs too late in the process to make any real difference to the outcome of a project or issue.
- The compliance section did not maintain adequate levels of compliance activity during the period under review. Audit understands that the section was not fully staffed at the time.
- Compliance against conditions of development approval is not systematically checked.
- Not all complaints in relation to alleged breaches of development conditions were investigated.
- Compliance checks and inspections were not always well documented and therefore, the status of a development's compliance was not clear.
- The Authority does not clearly identify a telephone number to the public for the purposes of making complaints about activities that may not be complying with legislative requirements.

Application of ESD principles

- The Authority has been and is doing a lot of work to improve sustainability in the building and development industry in the ACT, and it has contributed to the education of a range of stakeholders on the importance of sustainability in the DAA process. For example, new homes are required to meet minimum energy efficiency ratings.
- The Authority has developed policies with the assistance of expert authorities. It has also sought expert advice on a number of DAs, through the referrals process and use of the Planning and Land Council, which has expert members.
- Although the Authority does seek expert advice and comments on many DAs to help inform decisions, the consideration and use of this expert advice and comment was not well documented.
- The Authority has not yet developed ESD guidance material for staff to use at the individual DA level. Audit recognises that this is a challenging task, which is faced with hurdles such as getting agreement on the definition of what is 'sustainable'. Audit also recognises that the Authority experiences similar problems to bodies in other jurisdictions, and where new and better

REPORT SUMMARY AND AUDIT OPINION

tools are being developed and introduced in other jurisdictions, the Authority is investigating the adoption of these.

- On-the-job training, which is the dominant form of training used by the Authority, does not ensure that all staff, especially those without formal and relevant qualifications and expertise, understand the principles of ESD. On-the-job training should be supplemented by more formalised training, which could utilise in-house and external expertise, to improve the understanding of staff throughout the Authority, and therefore help to ensure consistency.

Summary

1.17 Audit found that the DAA process is very complex to administer and use. The Authority has implemented a number of changes to the process in an attempt to improve efficiency, timeliness and fairness. However, Audit found that current procedures are not yet achieving significant improvements in performance. The Authority has advised that part of a current review of legislation and processes relates directly to the development application and approval process.

1.18 The Authority also has a number of procedures in place to encourage consistency with legislation and guidelines, which were not always effective. Although many of these procedures work well, legislative requirements such as statutory timeframes are not met in a number of cases.

1.19 In examining case studies, Audit also found it difficult to determine consistency with guidelines and legislation because the assessing officer does not specifically address such issues through checklists and assessment reports. This is more often the case where approval is granted very quickly, or for less complex DAs.

1.20 Finally, the Authority has developed, and continues to develop, various measures to improve sustainability in the ACT, in keeping with the principles of ESD. Although much of this work is yet to be supported by comprehensive guidance material for staff to apply, Audit notes that the Authority is one of the lead agencies in the ACT, in building awareness of ESD, and in its implementation. Audit also notes that the Authority is currently considering adopting the Building Sustainability Index from NSW, which is a tool used at the individual DA level to further improve the assessment of housing sustainability.

RECOMMENDATIONS AND RESPONSES TO THE REPORT

1.21 The Audit made 22 recommendations to address the audit findings detailed in this report.

1.22 In accordance with section 18 of the *Auditor-General Act 1996*, a final draft of this report was provided to the Chief Planning Executive of the ACT Planning and Land Authority and the Chief Executive of the Chief Minister's Department for comments. The Chief Planning Executive's comments on the key findings have been incorporated as appropriate within the report.

REPORT SUMMARY AND AUDIT OPINION

1.23 In addition, the Chief Planning Executive provided responses to each recommendation as shown below.

Recommendation 1

The Authority should improve records management procedures by means such as:

- ensuring that all documents entered into the Objective program are dated and, where appropriate, there is evidence that the document has been signed;
- where there is no information to be entered into a file on the Objective program, entering 'NIL' (or similar) to indicate that there has not been an omission; and
- ensuring that if hard copy files are to be maintained, they are indexed, documents are filed chronologically, and no loose documents are contained in files.

The Authority's Response:

Agreed.

Recommendation 2

The Authority should monitor and record the time and effort taken to move through the pre-application process, where practicable, with a view to identifying where problems are occurring, the reasons for any delays, and how improvements can be made.

The Authority's Response:

Agreed in part. *This will be further reviewed but is a difficult exercise given that pre-application processes are not mandatory and the amount of time and effort involved is largely at the discretion of the applicant.*

Recommendation 3

The Authority should ensure that for fees payable on lodgement of a DA, the individual and total fees due and receipt numbers are clearly recorded for all DAs. Where this information is not recorded on the DA Form, a notation on the form should identify that the information is filed in the Objective program.

The Authority's Response

Agreed in part. *The Authority will ensure the fees receipts are filed correctly on Objective.*

Recommendation 4

The Authority should:

- (i) for fast approvals, require a greater level of assurance from applicants that they understand legislative requirements, for example, the requirements of the *Tree Protection (Interim Scheme) Act 2001* and their responsibilities under the Act, or a declaration that no other known issues on the site would prevent an approval being granted; and
- (ii) work to ensure that action is taken against applicants who provide false or misleading information.

The Authority's Response:

(i) **Agreed in part.** *[This] will be further reviewed but such statements by applicants cannot always be relied upon.*

(ii) **Agreed.**

Recommendation 5

The Authority should review the practice of a single officer assessing and approving a DA, based on an appropriate risk assessment. This would improve the consistency and objectivity of assessments.

The Authority's Response:

This is already the practice for more complex proposals and whilst the Authority will review the merit of a similar approach for simple DA's, the merits of this will have to be balanced against its practicality, cost-effectiveness and benefit when having regard to resources and impacts on timeliness of such approvals.

Recommendation 6

The Authority should review the current policy for disclosing the details of an objector after they have submitted an objection to a DA. Maintaining the confidentiality of objectors, if requested, removes a potential impediment to legitimate objections.

The Authority's Response:

Agreed in part. *However, the Land Act (section 238) requires the Planning and Land Authority to make a copy of each objection available for inspection by members of the public during office hours until the end of the appeal period. Section 239 nevertheless allows the Authority, on request of the objector, to exclude the identity of the objector from being made available subject to it not being in the public interest for that identity*

REPORT SUMMARY AND AUDIT OPINION

to be published. In practice, the Authority would agree if the objector says they have plausible concerns about reprisals if their identity becomes known.

Recommendation 7

The Authority should formalise and document the consideration of objections to ensure that each objection is considered on its merits.

The Authority's Response:

Agreed in part. However, it is already the case that the documentation attached to the Authority's statement of reasons, where required, includes consideration of objections. Nevertheless, the process for considering objections will be reviewed and improved where necessary.

Recommendation 8

The Authority should ensure that comprehensive checklists are developed and used by all staff for development assessments in each development category.

The Authority's Response:

Agreed. [This will be implemented] for those categories of development application where such practices are not already common place.

Recommendation 9

The Authority should document the reasons for decisions for all DAs, in order to improve the transparency, fairness and reliability of the DAA process.

The Authority's Response:

Agreed in part. Assessment documentation will be reviewed but it will not be practicable to provide a detailed statement of reasons for simple approvals and this is not required under the Land Act.

Recommendation 10

The Authority should review the practice of approaching applicants about applying for extensions of time, particularly when the time allowed for completing the assessment is almost over, to ensure the intent of statutory timeframes is not circumvented. The Authority should consider processes such as those used in NSW for this purpose.

The Authority's Response:

Agreed. *This issue will be considered in the Authority's planning system reform program.*

Recommendation 11

The Authority should report its performance against statutory timeframes for the determination of DAs in a more prominent section of its Annual Report and on its website.

The Authority's Response:

This will be considered, however, it should be noted that statutory timeframes are not the only performance indicator.

Recommendation 12

The Authority should maintain a central database that has more capabilities than the DARTS system currently used, with a view to making it easier to analyse and report on data. In addition to recording standard DA information, the database should record relevant information to identify the reasons for delays in the process so that improvement can be made where required.

The Authority's Response:

Agreed. *DARTS should be replaced as soon as possible; however, this has not been possible to date due to limited funding available for IT systems upgrading.*

Recommendation 13

The Authority should work with key stakeholders to review and improve the referrals process by:

- formalising and standardising methods of referral and provision of comments on referrals; and
- simplifying and integrating the referrals process.

The Authority's Response:

Agreed. *This is a priority issue for the planning system reform program.*

Recommendation 14

The Authority should reply to agency comments, giving an indication of whether the Authority has adopted the comments, and if not, give reasons. Where the Authority proposes changes to the agency comments (to allow for them to be incorporated into Authority documents), it should ensure that they do not change the original intent of the comments.

The Authority's Response:

Agreed. [This will be implemented] where such comments are specific and directly related to the development proposal; some agency comments are generalised and non-specific to what can be regarded as valid planning considerations.

Recommendation 15

Environment ACT (CMD) and relevant agencies should contribute to improvements in the referrals process by means such as:

- providing formal advice to the Authority on the implementation of the referrals process, particularly when difficulties are experienced;
- refining the internal procedure for dealing with referrals, with a view to identifying who is involved and who will provide the response to the Authority in each case, within an agreed timeframe;
- including those comments that are relevant to a particular DA, rather than general comments; and
- monitoring and reporting performance in relation to timeliness of providing a written response to the Authority or applicants.

The Authority's Response:

Agreed. [This is] being covered under the planning system reform program.

Recommendation 16

The Authority should improve documentation of processes and outcomes when seeking expert advice and comments.

The Authority's Response:

Agreed where this is not occurring.

Recommendation 17

The Authority should systematically and holistically review all DA guidance material in order to simplify it, reduce discrepancies or overlap, and clarify the status of each piece of guidance material.

The Authority's Response:

Agreed. This is an intended outcome and action for the implementation stage of the planning system reform program.

Recommendation 18

The Authority should develop a more formalised training program to improve staff's understanding of legislative requirements and the principles of ESD, as they apply to individual DAs.

The Authority's Response:

Agreed within available financial resources.

Recommendation 19

The documentation of compliance activities should be improved to ensure that:

- all complaints and compliance activities are clearly allocated to either individual staff members or sections of the Authority. Where these are passed from one staff member or section to another for follow up, the file should contain evidence that the person or section to whom/which it was referred has taken the responsibility to take action on the issue; and
- where references are made to the work or decisions of other sections of the Authority, this is either linked in the Objective program, or full details of the work or decisions are provided.

The Authority's Response:

Agreed.

Recommendation 20

The Authority should:

- address all complaints and where no action (or no further action) is to be taken, the decision and the reasons supporting it should be documented;
- conduct a risk assessment of non-compliance with development approval conditions, which looks at both the likelihood of non-compliance occurring and the potential impact of non-compliance. Where risks are identified as being too high, the Authority should work to improve compliance; and
- develop a formal procedure for checking and documenting compliance against the conditions of development approvals. The compliance record should also be clearly linked to the development approval in the Objective program.

The Authority's Response:

Agreed. *[This will be implemented] to the extent that investigating all complaints is possible within the resources available and therefore prioritising is necessary based on potential public health and amenity impacts.*

Recommendation 21

The Authority should revise consultation practices in order to better deal with the contributions made, and issues raised, by stakeholders, such as:

- the timeframe allowed for consultation;
- feedback to contributors; and
- documentation of comments received and considered.

The Authority's Response:

Agreed. *This will be considered in the planning system reform program.*

Recommendation 22

The Authority should make better use of environmental assessments to assist in their consideration of ESD, by means such as:

- reviewing the requirements for Preliminary Assessments (Division 4.2 of the Land Act) and other Assessments (Division 4.3 of the Land Act) so that adequate information is obtained on social, economic and environmental issues relevant to a proposal;
- ensuring that Development Assessments clearly document their consideration of information contained in Preliminary Assessments and other Assessments; and
- documenting details of the justification for any decision to waive the requirement to prepare an environmental assessment.

The Authority's Response:

Agreed. This is one of the significant matters being reviewed in the planning systems reform program.

2. DEVELOPMENT APPLICATION AND APPROVAL PROCESS

INTRODUCTION

2.1 This Chapter describes the various stages of the DAA process, from pre-application through validation to consideration of the DA, including expedited handling of simple DAs, referral of DA issues to other agencies, and appeals. The Chapter also considers the issues of records management, which influence all elements of the DAA process, and provides an assessment on whether the DAA process is efficient, timely and fair.

SIGNIFICANT FINDINGS

Efficiency and timeliness

- The DAA process is not well integrated across the various agencies involved, and referrals to other agencies do not occur in a consistent manner. This can lead to delays, as not all referral agencies have statutory timeframes in which to respond to referrals. The referrals process, in particular, requires a major review, as the ramifications of mistakes, omissions and delays are significant.
- Much of the assessment process is not well documented, including the consideration of objections, agency comments and the principles of Ecologically Sustainable Development.
- The quality control for document filing was poor, especially with hard copy files.
- Although electronic files also had some quality control problems, they were generally found to have a better records management system than hard copy. The audit log tool currently available in the Authority's IT system, named 'Objective', together with controls over access to electronic files, should improve quality control and accountability.
- The status of various sources of information, such as guidelines, interim guidelines, advisory notes, and codes for best practice, was not always clear.
- Many DA decisions did not meet statutory timeframes. Where these timeframes were not met, DAs took significantly longer to be determined. When examining DA data provided by the Authority (which covered all DAs assessed during 2003-04), Audit found the time taken for a large number of Single Residential DAs, for which the statutory timeframe is 30 working days, exceeded 60 working days. Many exceeded 100 working days.
- Performance against statutory timeframes in some cases may be inappropriately enhanced by procedures such as asking the applicant, close to the statutory due date, to apply for an extension of time.

- Pre-application processes, which occur before a DA is lodged, can be very time consuming, but information about the time taken by applicants prior to consulting the Authority is not collected by the Authority, so measures for improvement are difficult to identify.

Fairness

- The small number of appeals, out of the total DAs that are assessed, suggests that the vast majority do not have major objections to the fairness of decisions.
- The majority of AAT decisions generally find in favour of the Authority, which suggests that the Authority's decisions are generally fair, as they can withstand independent scrutiny.
- Lack of documentation and the consequent lack of transparency fails to demonstrate that decisions are objective and fair in all cases.
- In less complex cases where a single officers both assessed and approved DAs, this was not checked or reviewed before the development approval was issued. If a review had taken place, it had not been documented. This lack of review may reduce the ability of the Authority to demonstrate objectivity, consistency, and fairness.

BACKGROUND

2.2 The application for, and the receipt of, a development approval from the Authority is a key activity for the development industry in the ACT, as this must be completed before most developments occur. The process is complex and time consuming, and involves a large number of stakeholders, including professionals and the general public.

2.3 Information provided by the Authority shows that developments approved over the last few years account for a significant amount of expenditure. On average, \$774 million worth of development has been approved annually since July 1999 (see Figure 1.1 in Chapter 1). In 2003-04, the Authority approved nearly \$1 billion worth of developments.

2.4 The DAA processes have been reviewed on a number of occasions, and were most recently changed on 30 June 2004, when the High Quality Sustainable Design process was abolished.

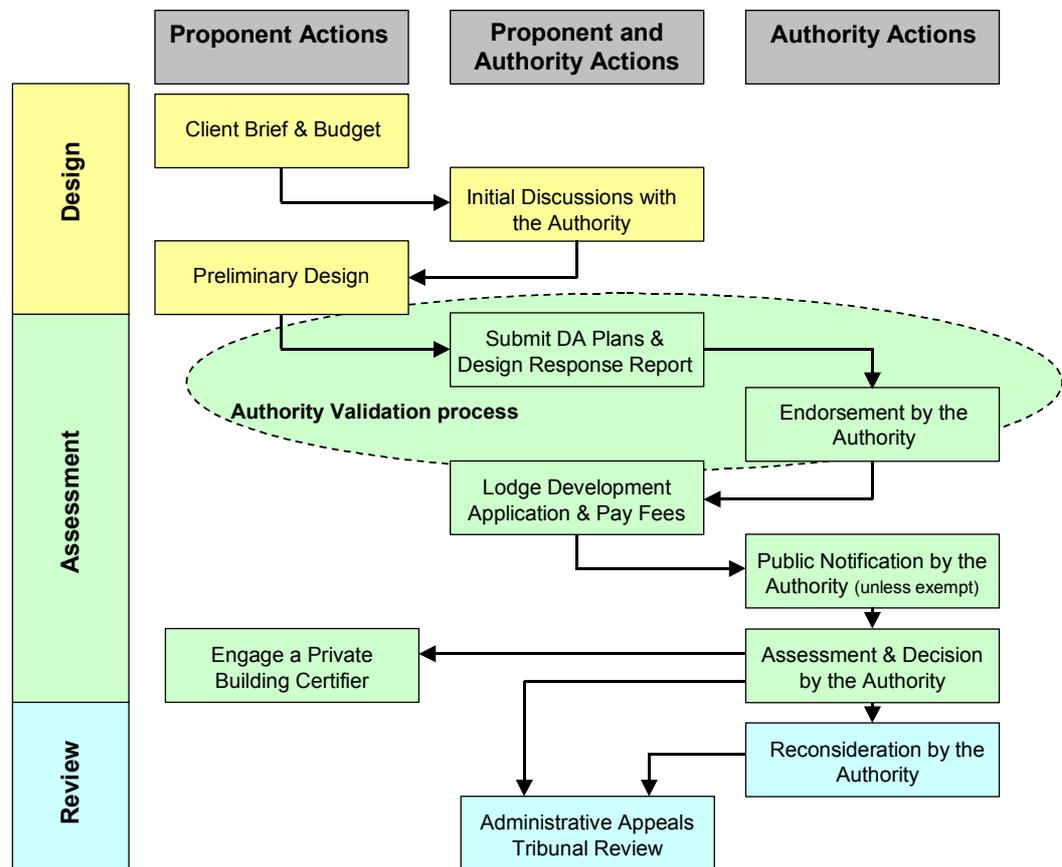
2.5 The development application process varies according to the nature and complexity of the proposal. The Authority's Development and Application Design Guidelines, commonly referred to as the Blue Books, have been developed to guide stakeholders through the DA process. Three Blue Books were produced, to provide a guide to the three different categories of development. These categories are:

DEVELOPMENT APPLICATION AND APPROVAL PROCESS

- single residences in new estates, small scale alterations & additions, and outbuildings & swimming pools;
- single residences in established areas, and dual occupancy developments; and
- multi-residential developments, commercial & industrial developments, and institutional developments.

2.6 The following flow diagram, Figure 2.1, shows the DA process for single residential developments in established areas and dual occupancy developments. It illustrates the three major phases that stakeholders undertake leading to a decision. It should be noted that the Validation process being used by the Authority occurs between the Design and Assessment phases (i.e. after the Preliminary Design step and before the Lodge Development Application and Pay Fees step).

Figure 2.1: Development application process



Source: ACTPLA - Blue Book: Development Applications - Single residences in established areas, Dual occupancy developments, p. 6.

2.7 Although it is not represented in the above flow chart, the referral of some development applications to other agencies is an integral part of the DAA process,

which is required by section 229 of the Land Act. Referral to other agencies may occur at various stages of the DA process.

ISSUES

Records management

2.8 The *Territory Records Act 2002* requires Territory agencies to have policies and procedures to ensure that proper records of all business activities are kept and that an agency's record keeping is reliable, systematic and well managed.

2.9 In November 2003, the Authority began using an Integrated Document Management System (IDMS). The IDMS uses a program called Objective (together with other supporting programs) and it provides electronic records management (including electronic management of hard copy files); and electronic document management; as well as having the capability to improve workflow and case management.

2.10 The IDMS relies on the creation of 'users' to give staff access to the system. Each 'user' is assigned different privileges by a system administrator, which determines what the user can access, view, and change etc. This records management system was introduced with a view to improving on, and replacing, the use of hard-copy filing. The process of moving from a paper based filing system to an electronic system has not always been smooth, and creates some duplication. Audit notes the significant potential of IDMS, but also recognises the initial costs placed on the Authority during the implementation period, and continuing costs due to dual systems being needed for communication with non-IDMS agencies.

2.11 Audit found that filing was inconsistent and incomplete, and many discrepancies were found between the Objective program and hard copy files. Examples of these are:

- whole folders in the Objective program were empty. In some cases, information for certain folders may never have been submitted, and in others, information had simply not been entered into the Objective program (e.g. the Approved Plans folder was empty even though the DA had been approved);
- hard copy files were not indexed or chronological, and many contained loose documents; and
- hard copy files were generally in a disorganised state, and Audit found them difficult to follow.

2.12 Although Audit identified problems such as the presence of undated and unsigned documents in the Objective program, files in Objective were significantly simpler to follow than hard copy files. In the Objective program, DA file contents are separated into various steps in the DAA process and filing was more consistent than that in hard copy files.

2.13 There were a number of statutory fees and charges associated with DA processes. Fees, however, were not clearly identified on DA forms and due to the absence of receipt numbers recorded, it was not demonstrated that all payable fees and charges were collected.

Recommendation 1

The Authority should improve records management procedures by means such as:

- ensuring that all documents entered into the Objective program are dated and, where appropriate, there is evidence that the document has been signed;
- where there is no information to be entered into a file on the Objective program, entering 'NIL' (or similar) to indicate that there has not been an omission; and
- ensuring that if hard copy files are to be maintained, they are indexed, documents are filed chronologically, and no loose documents are contained in files.

Pre-application process

2.14 The pre-application process identifies the requirements the applicant should meet to ensure the Authority is provided with appropriate information to enable them to assess a DA. These requirements are identified in the Authority's Blue Books and the Authority has introduced a 10-day Validation process to check that DAs are 'assessment ready'. During this Validation process, the Authority does not carry out any assessment of the DA information, but merely checks for the presence of the necessary types of information to enable an assessment to be made. Applications must pass the Validation process before they can be formally lodged with the Authority – at which time, fees are payable and the statutory timeframe begins.

2.15 Before 1 July 2004, the High Quality Sustainable Design process involved a number of steps that had to be rigorously followed by applicants in order to prepare a development application for lodgement. During this time, the pre-application process was closely managed by the Authority. However, since the introduction of the current process on 1 July 2004, the High Quality Sustainable Design process has been abolished and many applicants do not meet with the Authority during the pre-applications stage.

2.16 Since the introduction of the current DAA process, other agencies report that they are often not brought into the process in the early stages. Under the current system, it is possible that, for example, the design of a proposal is completed and paid for before the Heritage Council sees it. Without Heritage Council input into a proposal on a Heritage-listed property, the design may have a fatal flaw (i.e. something that precludes the proposal from going ahead in that form). For this reason, Environment ACT considers that pre-application meetings should be encouraged by the Authority.

2.17 Audit notes that the Blue Books advise applicants to contact other agencies and to ascertain their requirements early. However, consultation with, and referral to, other agencies is sometimes delayed until a later stage of the DA process. Many DAs are referred to Environment ACT for the first time after lodgement, and even then, they can come via different avenues, such as the Applications Secretariat, individual assessment officers and via the Agency Referral Meetings (ARMs).

2.18 Applicants contact the Authority at different stages of the pre-application process, or not at all. They may instead contact the Authority for the first time when the DA is lodged. Stakeholders reported that even under the new DAA process, the pre-application process can still be very time consuming. However, it is now very difficult for the Authority to monitor and record how well this pre-application process is working and how long it takes. Without this kind of information, Audit believes that there is a risk of greater delays and problems occurring - and with little or no information on why problems exist, where they lie and how the process can be improved.

2.19 Accountability for actions in the process should be improved through the use of the Audit Log tool in the Objective program, which tracks the movement of documents as well as who creates and changes them, and when. However, this will only occur once an applicant initiates contact with the Authority, or upon lodgement of a DA. Therefore, Audit considers that the time and effort taken by applicants to move through the pre-application phase of the DA process should be monitored and recorded, as much as practicable, in order to identify the cause of delays and opportunities for improvement.

2.20 The Authority advised that:

Pre-application processes are administered by the Authority on a non-mandatory basis and are difficult by their nature to monitor consistently. New measures introduced in the latter part of last year have to a large extent placed the extent of pre-lodgement processes in the hands of proponents.

Recommendation 2

The Authority should monitor and record the time and effort taken to move through the pre-application process, where practicable, with a view to identifying where problems are occurring, the reasons for any delays, and how improvements can be made.

Fees on lodgement of DAs

2.21 When lodging a DA, the applicant must complete a Development Application Form (Form 1 under the Land Act) and pay an accompanying DA fee. There are a number of fees and charges that make up the total DA fee payable. On any one DA, fees may be charged for the Application for Development (which is based on the cost of building work) and for other things such as lease variations and public notification of the DA.

2.22 The DAs examined by Audit often had multiple fees written on the fee section of the Development Application Form (DA Form). Audit found it difficult to determine whether fees were appropriately calculated and collected because:

- fees were not clearly identified on DA Forms. No details were provided to identify what the fees related to and the final fee payable was not clearly identified. Therefore, it was not clear whether all appropriate fees had been included; and
- it was not clear whether fees had been paid for some DAs. Of the DAs examined, 64% did not have a receipt number recorded on the DA Form.

2.23 The Authority advised that for operational purposes, some DAs Forms may be scanned into the Objective program before fees are paid (e.g. when the application needs to go through the Validation process). Where this occurs, the applicant is invoiced, and the invoice and receipt are entered into Objective. However, some of the DAs examined by Audit did not have a receipt number on the DA Form, or a separate receipt in Objective. In addition, invoices and the receipts generated upon payment are not consistently named or linked to one another in Objective. The Authority advised that standard naming conventions have recently been developed for these documents and as a result, when certain information is entered into the Objective program, it is automatically located in a consistent location in Objective.

2.24 Although a DA is not valid until fees are paid, it is difficult to demonstrate that all fees due to the Territory are being collected if fee calculation and collection is not clearly and consistently recorded.

2.25 Accordingly, the process of fee calculation and collection should be made clearer and more consistent. Each fee payable should be clearly identified on the DA Form and receipt numbers should always be recorded. Where this information is not entered on the DA Form, a notation on the form should indicate that the information is in Objective.

Recommendation 3

The Authority should ensure that for fees payable on lodgement of a DA, the individual and total fees due and receipt numbers are clearly recorded for all DAs. Where this information is not recorded on the DA Form, a notation on the form should identify that the information is filed in the Objective program.

Fast approval of DAs

2.26 For some very simple DAs, the Authority may be able to issue approval either on-the-spot or within 24 hours. This process provides better efficiency and timely services, but relies on applicants understanding the requirements of the legislation and filling in the DA form correctly (specifically Part 6, which refers to other legislation). There is a risk that other requirements, such as the need for approval to conduct tree-damaging activities, can be missed or not properly

considered. This risk can be increased when there is also a lack of compliance activities to ensure that applicants actually provide accurate information.

2.27 Environment ACT reported that it has suggested to the Authority that a checklist be used to ensure applicants have addressed heritage and environment issues. Such a checklist would further assist in providing a greater level of assurance that all relevant issues on a site have been considered.

Recommendation 4

The Authority should:

- (i) for fast approvals, require a greater level of assurance from applicants that they understand legislative requirements, for example, the requirements of the *Tree Protection (Interim Scheme) Act 2001* and their responsibilities under the Act, or a declaration that no other known issues on the site would prevent an approval being granted; and
- (ii) work to ensure that action is taken against applicants who provide false or misleading information.

The DA approval process

2.28 The complexity of the overall process was raised as a major concern at all stakeholder meetings with Audit. The multiple layers of information that are relevant to DAs were largely thought to be a contributing factor. For example, when discrepancies arise between the various information and guidance, it is difficult to determine which is the overriding information.

2.29 Stakeholders consistently indicated that they did not have confidence in the transparency, reliability, and fairness of the DAA process. They reported that they experienced inconsistencies in the process and that decisions were sometimes very subjective and unreliable.

2.30 Some applications are approved without the application and assessment being reviewed by another person (either peer or supervisor). Audit understands that processes such as these may be risk managed by the Authority. However, Audit considers that stakeholder confidence and accountability in the process could be improved by ensuring that all DAAs undergo some review before approval so that they are not assessed and approved by the same person. To minimise the reduction in efficiency, this review could be structured to reflect the significance and risk levels of applications and could range from a simple process review of what the assessment officer has done, to a review of the application and assessment. Some form of quality assurance, such as random checks, would be desirable.

2.31 The Authority advised that:

It is not practicable within the resources available, cost-effective or necessary for all such decisions to be checked and reviewed before the development

approval is issued. ... Procedures exist for checking and review of assessments for more complex applications.

Recommendation 5

The Authority should review the practice of a single officer assessing and approving a DA, based on an appropriate risk assessment. This would improve the consistency and objectivity of assessments.

Notification and objections

2.32 DAs are required by section 229 of the Land Act to be publicly notified in the local paper. However, a number of DAs are listed as exempt from notification, in Schedule 4 and 5 of the *Land (Planning and Environment) Regulations 1992*. Section 237 of the Land Act, states that any person who is affected by an application may object to the approval of that application. The objection must be made to the Authority in writing, within the period identified in the public notification notice.

2.33 Audit noted that the Authority's public notification processes are of a high standard.

2.34 After objections are received in relation to a development, copies are made available for public inspection and a copy is given to the applicant, unless the objector makes a successful application to the Authority not to have their identity revealed.

2.35 In order for an application for anonymity to be successful, the Authority must form the opinion that 'based on reasonable grounds, it would not be in the public interest for the objector's identity to be published', in accordance with section 239 of the Land Act. The Authority forms this opinion in relatively few cases – therefore, the majority of objectors' identities are revealed.

2.36 Audit is concerned that the disclosure of objectors' details may deter many people from making objections, and that this may undermine the intention of the notification process to give people a chance to provide input on developments that affect them. Therefore, Audit considers that this should be reviewed, especially in cases where the non-disclosure of the identity of the objector does not hinder the process, nor have any bearing on the Authority's decision.

Recommendation 6

The Authority should review the current policy for disclosing the details of an objector after they have submitted an objection to a DA. Maintaining the confidentiality of objectors, if requested, removes a potential impediment to legitimate objections.

2.37 The process followed by staff when they consider objections was not clear to Audit, and there was insufficient documentation to demonstrate that each objection was considered on its merits or in a formalised way.

Recommendation 7

The Authority should formalise and document the consideration of objections to ensure that each objection is considered on its merits.

Assessment processes

2.38 The Authority has a large number of forms and checklists in circulation but it was not clear to Audit which forms and checklists apply to which developments, as they are used inconsistently during various assessments and they are often incomplete.

2.39 The development and use of standard forms and checklists for all DAs would improve transparency, reliability and fairness. Such checklists should be tailored to suit the type of development and they should be used and completed, no matter how small or large the DA. There may be advantages in involving selected external stakeholders when revising checklists.

2.40 The Notice of Decision for each of the more complex DAs examined in detail by Audit included an attachment titled 'Findings on Material Questions of Fact'. This document identified a range of information, such as timeframes for the decision; the assessment of the DA against the Territory Plan and planning guidelines (such as the ACT Parking and Vehicular Access Guidelines); public notification and submissions; and government agency comments. This information greatly assists in identifying the procedures that have been undertaken in reaching a decision on the application, and subsequently improves the transparency, fairness, and reliability of the DAA process.

2.41 Detail similar to the information contained in Findings on Material Questions of Fact was not found for the smaller and simpler DAs examined during the audit. The Authority advised that there was no legislative requirement for this. Although Audit understands that simple DAs may not require as much detailed information, documentation of the assessment process for all DAs would be very beneficial. Such documentation could vary according to DA type and complexity, and may range from a simple checklist to the more detailed Findings on Material Questions of Fact.

Recommendation 8

The Authority should ensure that comprehensive checklists are developed and used by all staff for development assessments in each development category.

Recommendation 9

The Authority should document the reasons for decisions for all DAs, in order to improve the transparency, fairness and reliability of the DAA process.

2.42 Stakeholders raised concerns that although the planning system is supposed to be performance-based, shortages of qualified planning staff may mean that staff rely on the precedent of existing designs. Hence, good innovative designs may be rejected.

2.43 Audit recognises that other jurisdictions are also experiencing shortages of qualified planners. This shortage further supports the need for the development of more formal training for development planning and assessment staff, to supplement the existing program of mainly on-the-job training. The Authority stated that it already conducts in-house seminars and workshops, which use in house expertise and this type of expertise could be utilised to develop formal training.

Timeliness of the DA assessment process

2.44 Audit found that for the 26 DAs examined, the Authority performed well in processing single residential DAs. However, there were significant problems with timeliness for the ‘other’ DAs. This finding is consistent with complaints made by stakeholders about significant delays they experienced, both in relation to the Authority and Environment ACT.

2.45 Table 2.1 provides a summary of the timeliness of the 26 DAs examined in detail by Audit.

Table 2.1: DAs examined by Audit

	Timely (determined within statutory timeframes)	Not timely (not determined within statutory timeframes)	Timeliness unknown due to lack of information
Single residential DAs	100%		
Non-single residential DAs	20%	70%	10%

Source: ACT Audit Office – analysis of the sample of DAs examined during the audit.

2.46 The Authority failed to meet statutory requirements for DA assessment timeframes in a number of cases. Of the DAs examined by Audit, 70% of non-single residential DAs failed to meet their statutory timeframes.

2.47 Table 2.2 provides a summary of the timeliness of DAs determined for the period July 2002 to March 2005, based on data provided by the Authority.

Table 2.2: DAs that were not determined within statutory timeframes (with and without objections)

	2002-03	2003-04	March 2004- March 2005
Single residential DAs	13%	12%	18%
Non-single residential DAs	23%	30%	31%

Source: ACT Audit Office – analysis of data provided by the Authority.

2.48 The number of applications that were not processed within statutory timeframes is lower than that found for the sample of DAs examined by Audit. However, it is still a concern when as many as 31% of non-single residential DAs are not processed in compliance with legislative timeframes.

2.49 Based on this data, the timeliness for DAs has actually deteriorated since 2002-03.

2.50 Although Audit notes that the Authority attributes this reduction in timeliness, in part, to the introduction of the IDMS system, Audit considers that the changes to the DAA process implemented by the Authority have not adequately simplified the process, as stakeholders continued to report delay problems during Audit consultation. Audit considers that, in addition to process reviews, the complex legislative requirements of the Land Act and associated Regulations may need to be reviewed in order to improve further on the current system.

2.51 Audit is particularly concerned by the apparent trend that if DAs are not determined within statutory timeframes they often experience significant delays. When examining DA data provided by the Authority (which covered all DAs assessed during 2003-04), Audit found the time taken for a large number of single residential DAs, for which the statutory timeframe is 30 working days, exceeded 60 working days. Many exceeded 100 working days.

2.52 Audit found that some applicants applied for an extension of time for their DA to be determined, at the Authority’s suggestion. The following process gives a typical example of where the extension of time process occurred in the DAs examined by Audit:

- an extension of time was applied for by the applicant only after the Authority made a written request for a significant amount of additional information;
- the Authority explained in its letter to the applicant that in order to ensure that the statutory timeframes was met for the application, the applicant should supply the information within a specified time (e.g. within seven days of the date of the letter) ‘otherwise the application may run out of time and be deemed refused’; and
- the Authority then advised that if the applicant was likely to take more than the specified time to respond, ‘it is recommended that you advise us

immediately and seek an extension of the time for determining the application’.

2.53 The practice of asking applicants to apply for extensions of time may therefore improve apparent performance against statutory timeframes. Further, in the cases examined by Audit, the extension of time was granted a few days before the statutory deadline would have run out, or after the deadline has passed.

2.54 The Authority should ensure that, where additional information is requested, this is done as early as possible rather than asking applicants to apply for extensions of time within a few days of the statutory deadline. One example of an alternative process is that used in NSW where, in relation to Integrated Development Assessments (IDAs), which are typically very large or complex developments, the consent authority (usually a Local Council or the Minister for Planning) has 40 working days to determine an application. Where the consent authority requires additional information, the request must be made within 25 working days and it stops the statutory clock until the additional information is provided by the applicant.

2.55 The Authority advised:

It is agreed that extensions of time related to requests by the Authority for more information should occur as early as possible in the process. This is not, of course, always possible. The planning system reform program is also looking at aspects of this issue.

Recommendation 10

The Authority should review the practice of approaching applicants about applying for extensions of time, particularly when the time allowed for completing the assessment is almost over, to ensure the intent of statutory timeframes is not circumvented. The Authority should consider processes such as those used in NSW for this purpose.

Data analysis and reporting

2.56 The Authority reports on DA assessment timeliness against specified performance measures on a quarterly basis to the Department of Treasury, but these are not publicly reported. In the 2003-04 Annual Report, under the sections titled ‘Key Achievements’ and ‘Agency Performance’, it was reported that 5,339 DAs were assessed, but nothing was reported about the timeliness of these assessments. Instead, information on the percentage of Development Applications assessed within statutory timeframes was contained in Appendix A - Financial Results and Analysis.

Recommendation 11

The Authority should report its performance against statutory timeframes for the determination of DAs in a more prominent section of its Annual Report and on its website.

Data management

2.57 DA data collected by the Authority is entered into a system called DARTS. Data from DARTS were provided to Audit, but was difficult to use and analyse because of the limited capabilities of the system. In order to be analysed and used, the Authority had to transfer the data to an excel spreadsheet. The Authority informed Audit that the DARTS system is planned for replacement.

Recommendation 12

The Authority should maintain a central database that has more capabilities than the DARTS system currently used, with a view to making it easier to analyse and report on data. In addition to recording standard DA information, the database should record relevant information to identify the reasons for delays in the process so that improvement can be made where required.

DA assessment - consultation with other agencies

2.58 Section 229 of the Land Act identifies a number of triggers that require the Authority to give DAs to certain agencies for comments. This section identifies that the Authority must give certain applications to the Heritage Council, the Conservator and the Environment Protection Authority. That is, they are ‘mandatory referrals’. Section 229 (4)(d) of the Land Act also states that the Authority ‘may give a copy of an application to any other person or body for comments’. If this occurs, it is typically referred to as a ‘non-mandatory referral’.

Management of agency consultation by the Authority

2.59 Agency Referral Meetings (ARMs) were held weekly between Authority staff and other agencies to discuss all current DAs and determine which applications need to be referred to agencies. The Authority has expressed its desire to discontinue these meetings. Environment ACT disagrees, as it found alternatives tried by the Authority, such as referring all applications to agencies electronically, to be unsuccessful. Electronic referrals were very time-consuming and Environment ACT did not have the appropriate IT resources available to all necessary staff. Further, Environment ACT believes that the ARMs provide a valuable opportunity to deal with issues in a coordinated way, that is often very resource efficient and reduces the likelihood of referrals being ‘missed’.

2.60 Although Environment ACT staff stated that they do advise the Authority of problems, and they stated the reasons they wished to retain the ARMs, they tend to do this informally, and this may not receive the attention of appropriate management levels. To ensure appropriate actions, Audit considers that Environment ACT should formally advise the Authority when problems with the DA process (particularly the referrals process) occur. The Authority, in turn, should consider the issues raised by Environment ACT when reviewing processes or evaluating change.

2.61 Agencies report that they are not receiving all relevant applications through the referrals process. One example where this may occur is if an agency provides a 'no comments' response on an application, which is subsequently amended. Even though the amendment may involve a change on which the agency would like to comment, they may not be sent the application again.

2.62 Some problems in the referrals process are caused by the lack of formal and standard communication between the parties, and the lack of record keeping. For example:

- when referrals are sent to Environment ACT from the Authority, these can come from the Agency Referral Meetings (ARMs), individual assessment staff, or the Authority's Applications Secretariat;
- Environment ACT staff advised Audit that although the ARMs used to be attended by Authority staff and minuted by the Applications Secretariat, this has recently changed. They are now usually only attended by Environment ACT and DUS staff who meet to discuss new DAs and then provide their minutes to the Authority. This reduces the opportunity for communication to occur between agencies;
- agencies are not advised whether their comments on DAs have been adopted; and
- agencies are not advised when DAs they commented on are determined.

2.63 Current processes and their lack of integration have meant that agencies have, in some cases, been required to give retrospective approvals where decisions are made without appropriate referrals, or where DAs have been approved with a condition of approval requiring that approval from another agency be obtained.

2.64 In one case study examined, (see paragraph 3.31) the Conservator indicated that, in relation to the case study site, she understood that Lease and Development conditions protected a stand of trees on the site. The Tree Retention clause of the lease specifically states that:

the mature Casurina (sic) grove within and adjacent to the land shall be retained and maintained to ensure its ongoing health and vigour and that the Lessee shall not, without the previous consent in writing of the Territory remove or cause to be removed any tree forming part of the said Casurina (sic) grove.

Further details of tree retention requirements are contained in the development conditions for the site. Although the DA for the site proposed to remove a number of trees, the application was not referred to the Conservator.

2.65 Although the exact cause of the problem in this example is not known, Audit considers that the situation should not arise when such an application, that is so clearly relevant to the Conservator, is not referred to the Conservator. Instead, the Conservator received an application to undertake a tree damaging activity (TDA) from the applicant five days prior to the DA being approved. This DA approval was

given before the Conservator was given an opportunity to comment on the DA or make a decision on the TDA application, despite the specific clause in the lease.

Management of agency consultation by Environment ACT

2.66 Different processes occur in Environment ACT for different referrals. For example, when only one section is involved, the Authority would deal directly with that section. When multiple sections are involved, Environment ACT provides a co-ordinated response to the Authority, via the Conservator Liaison officer.

2.67 When Environment ACT provides the co-ordinated response, it comes from a range of sources (i.e. different sections within Environment ACT such as the Tree Protection Unit and the Environment Protection Authority). These comments are sometimes very general rather than being specific to the DA being referred. Where the comments provided are general, it requires the Authority's staff to interpret and apply the advice of the expert staff at Environment ACT.

2.68 When the Authority consults agencies via the referrals process, some of the referral recipients (for example, the Tree Protection Unit (TPU)) do not have statutory requirements to meet specific timeframes for application assessment. This creates some problems as, without statutory timeframes, referred applications are prioritised according to the recipient's workload at the time. As a result, comments and advice given on the referral may not be timely compared to the expectations and timeframes of the Authority. It should be noted that with the commencement of the *Heritage Act 2004* on 9 March 2005, the Heritage Council does have a statutory timeframe associated with the provision of written advice on DAs to the Authority.

2.69 TPU staff undertake some monitoring of timeframes, but this is used only as an internal management tool. Audit was provided with details of the informal monitoring system used by TPU to record the status of all applications for TPU advice on, or approval for, tree damaging activities. Although Audit was advised that there are some deficiencies in the recording system, it showed delays greater than six months were experienced for some applications. The TPU advised that these delays were primarily caused by waiting for supporting information. The TPU also advised that this database has been earmarked for improvement after the proposed introduction of new tree protection legislation, which is due to be debated in the Legislative Assembly in 2005.

2.70 The TPU reported that for the period 29 March 2001 to 14 April 2005, the median time taken to process all applications to undertake tree-damaging activities (TDA) is 26 working days. The median time taken to process applications for TDA, which are related to DAs, is 28 days.

2.71 For 2003-04, DA-related applications made up only 14.5% of total applications received by the TPU. Other areas of Environment ACT also report that DA-related work is only part of their responsibilities and for this reason, they have limited resources allocated to the task. For example, when the Conservator Liaison Officer is away, the position may not always be backfilled and therefore, DA-related

applications may not be progressed during this time. This may further limit the ability of Environment ACT to provide advice on DAs in a timely manner.

2.72 Environment ACT does not report its timeliness of provision of advice, either to the Authority or to applicants.

Management of agency consultation - conclusions

2.73 Stakeholders reported that due to the complex nature of the DAA process; constant changes to the process; and the fact that the requirements of a number of different agencies are involved, the process needs to be much better integrated between agencies. The current lack of integration causes significant time delays and this results in significant additional costs to applicants.

2.74 The lack of integration is particularly evident in the referral process, where DAs are referred to other agencies for comments. The referral process is inconsistent; referrals occur both pre and post DA lodgement and they are undertaken by applicants in some cases and by a variety of Authority staff (e.g. individual assessment staff and the Applications Secretariat) in other cases. Further, the flow of information between agencies is often informal and does not always occur at significant steps in the process (e.g. agencies are not always informed when a DA they commented on is determined).

2.75 Audit considers that the lack of integration in the referrals process combined with the fact that some referral agencies do not have statutory timeframes associated with responding to the Authority or applicants on DAs or DA related issues, are some of the most significant contributing factors to problems with the DAA process.

2.76 Audit believes that the referrals process, in particular, requires a major review, as the ramifications of mistakes, omissions, and delays are significant. Any changes from the review should be followed up with a post-implementation review.

2.77 The Authority advised that:

[it] tries to ensure that all relevant government agencies are advised about development applications and given appropriate opportunities to comment. Concerns about current processes from both the agencies and applicants (often in terms of timeliness of agency responses), however, are acknowledged. The Authority recognises improving the performance of agency referrals as a priority issue in its planning system reform program.

Recommendation 13

The Authority should work with key stakeholders to review and improve the referrals process by:

- formalising and standardising methods of referral and the provision of comments on referrals; and
- simplifying and integrating the referrals process.

Recommendation 14

The Authority should reply to agency comments, giving an indication of whether the Authority has adopted the comments, and if not, give reasons. Where the Authority proposes changes to the agency comments (to allow for them to be incorporated into Authority documents), it should ensure that they do not change the original intent of the comments.

Recommendation 15

Environment ACT (CMD) and relevant agencies should contribute to improvements in the referrals process by means such as:

- providing formal advice to the Authority on the implementation of the referrals process, particularly when difficulties are experienced;
- refining the internal procedure for dealing with referrals, with a view to identifying who is involved and who will provide the response to the Authority in each case, within an agreed timeframe;
- including those comments that are relevant to a particular DA, rather than general comments; and
- monitoring and reporting performance in relation to timeliness of providing a written response to the Authority or applicants.

Use of expert advice

2.78 In addition to obtaining expert advice and comments through the referrals process, the Authority also reports that it obtains expert advice on a number of DAs through such organisations as the Planning and Land Council (PLC). In the DAs examined by Audit, seeking advice from the PLC was alluded to, but there was no documentation about this process or its outcomes.

2.79 The Authority advised that documentation of advice and comment will be reviewed and improvements made as necessary.

Recommendation 16

The Authority should improve documentation of processes and outcomes when seeking expert advice and comments.

Appeals against decisions

2.80 There are a number of different types of decisions that may be handed down by the Administrative Appeals Tribunal (AAT). As these decisions can be complex and detailed, they may require some examination and interpretation to determine

whether or not they generally agree with the Authority's decision. For example, if there is a negotiated outcome that results in a consent decision, the extent to which the AAT agreed or disagreed with the Authority is not immediately obvious. However, Audit found that even when allowances were made for alternative interpretations of some decisions, the majority of decisions found in favour (i.e. generally agreed with) the Authority's decision.

2.81 Based on information provided by the Authority, Audit found that:

- in 2003-04, between 3% and 12.5% of the decisions made by the AAT did not generally agree with the Authority's decision; and
- in 2004-05, between 15% and 30% of the decisions made by the AAT did not generally agree with the Authority's decision. It should be noted that up to half of the 2004-05 figures collected by the Authority include appeals not related to the DAA process (such as appeals relating to orders, change of use charges, building certifiers, building surveyors, land rent, builder's licences, exemptions from the public register and rectification orders). Further, these figures will continue to change as the year progresses.

2.82 In 2003-04, 71 DAs were appealed out of 5,339 DAs assessed. This small number of appeals suggests that the vast majority of participants do not have major objections to the fairness of decisions. Audit did not examine whether the appeal process is complex or costly and may discourage applicants to appeal.

2.83 The majority of AAT decisions find in favour of the Authority. This suggests that the Authority's decisions are generally fair, as they can withstand independent scrutiny.

CONCLUSION

2.84 Audit recognises the Authority's ongoing efforts to streamline the complex DAA process. However, Audit observed that further work is required to improve efficiency and timeliness. In order to make the necessary efficiency and timeliness gains, Audit recommends that the Authority focus on such actions as improving documentation and records management; improving monitoring and reporting and particularly, improving and integrating the referrals process.

2.85 Although Audit considers that the DAA process is fair in most cases, as shown by the small number of appeals and the number of appeal decisions that find in favour of the Authority, many of the measures recommended to improve efficiency and timeliness will also improve the transparency and fairness of the DAA process.

3. LEGISLATION AND GUIDELINES

INTRODUCTION

3.1 This Chapter describes legislation and guidelines relevant to the DAA process and looks at whether the DAA processes have been applied in a manner consistent with these, including compliance of developments with conditional approvals. The Chapter also considers overall communication and consultation, as much of this is related to new or proposed legislation and guidelines on the DA process.

SIGNIFICANT FINDINGS

Legislation

- The legislation governing the DAA process is very complex and there are many layers of information which impact on the process – such as Regulations, planning guidelines, lease requirements, land use policies, the requirements of other agencies, objections, and the principles of Ecologically Sustainable Development.
- There exists some risk that fast approvals fail to meet legislative requirements unless a greater degree of assurance is required to be provided by the applicant, followed by appropriate compliance activities. For example, applicants should be required to sign a statement that clearly states acknowledges that the applicant has read and understood what constitutes a tree damaging activity, and knows that it is an offence to carry out this activity without the appropriate approval.
- The Authority failed to meet statutory requirements for DA assessment timeframes in a number of cases. Audit noted that the data provided by the Authority shows an average of 14% of single residential DAs and 28% of non-single residential DAs failed to meet statutory timeframes during the period July 2002 to March 2005. Of the small sample of DAs examined by Audit, 70% of non-single residential DAs failed to meet their statutory timeframes.

Guidelines and checklists

- Guidance material is available to staff and applicants to assist compliance with legislative processes. However, it is so extensive that it can be difficult to understand, and difficult to determine what guidance to follow where a discrepancy exists.
- Checklists are used to help ensure consistency with legislation and guidelines (such as planning guidelines) but they are not used consistently and not always completed.

- There were a number of statutory fees and charges associated with DAs. Fees, however, are not clearly identified on DA forms and due to the absence of receipt numbers recorded, it could not be demonstrated that all payable fees and charges had been collected.
- The quality and availability of guidelines vary across the Authority's DAA activities. For example:
 - certain procedural guidelines exist for staff such as those covering the public notification process and the Authority's compliance with these legislative requirements are of a high standard; and.
 - adequate guidance material is not currently available to staff in a number of key areas of the DAA assessment process, such as the consideration of objections, agency comments and the principles of ESD. For example, no guidance is yet available on how to weight the various aspects of ESD.

Training

- The Authority provides staff with informal, on-the-job, training to educate staff about legislative requirements. This should be supplemented by formal training to improve staff knowledge and expertise.

Communication

- Although the Authority does a lot of consultation on a wide range of issues, stakeholders report that much of this consultation is of reduced value because the Authority fails to provide feedback on comments and input, and often consultation occurs too late in the process to make any real difference to the outcome of a project or issue.

Compliance

- The compliance section did not maintain adequate levels of compliance activity during the period under review. Audit understands that the section was not fully staffed at the time.
- Compliance against conditions of development approval is not systematically checked.
- Not all complaints in relation to alleged breaches of development conditions were investigated.
- Compliance checks and inspections were not always well documented and therefore, the status of a development's compliance was not clear.
- The Authority does not clearly identify a telephone number to the public for the purposes of making complaints about activities that may not be complying with legislative requirements.

BACKGROUND

3.2 The DAA process involves complex legislation and a wide range of issues and stakeholders. As a result, comprehensive, up-to-date and accurate guidelines will help to ensure that legislative requirements are met and issues are duly considered.

3.3 The legislative requirements of the DAA process are identified in the Land Act; the *Land (Planning and Environment) Regulations 1992*; and associated statutory instruments such as the Territory Plan and its variations (pursuant to Division 2.3 of the Land Act), and leases of Territory land.

3.4 The *Environment Protection Act 1997*, Section 3 (2) states that:

[Ecologically Sustainable Development] is to be taken to require the effective integration of economic and environmental considerations in decision-making processes and to be achievable through implementation of the following principles:

- (a) the precautionary principle, namely, that if there is a threat of serious or irreversible environmental damage, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (b) the inter-generational principle, namely, that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (c) conservation of biological diversity and ecological integrity;
- (d) improved valuation and pricing of environmental resources.

3.5 The range of guidelines currently available to staff and the public takes a number of forms and includes:

- Development and Application Design Guidelines (the Blue Books), which aim to provide a step-by-step guide to the DA process for each of the three different categories of development and identify what information and preparatory work is required;
- the Guide to Good Design, which aims to assist applicants in achieving building designs that are sustainable and meet their needs. This is another of the 'Blue Book' series;
- Planning Guidelines, which are a range of documents formally adopted by the Authority to guide planning decisions. On the Authority's website 29 general guidelines are listed, plus more than 40 others that relate only to specific suburbs or localities around the ACT;
- the ACT House Energy Rating Scheme (ACTHERS) Guidelines, which provide details of the requirements for all homes to have an Energy Efficiency Rating before being sold, and for new homes to meet a minimum four star rating;
- guidance on the requirements for such issues as Design Response Reports, which are required to be prepared for a range of identified developments; and
- a template to assist in the preparation of a Residential Sustainability Report, which enables applicants to obtain a Residential Sustainability Rating for their proposal.

- 3.6 Other information which may be relevant to DA preparation includes:
- the Heritage Places Register;
 - legislation administered by other agencies, such as the *Tree Protection (Interim Scheme) Act 2001* and the *Environment Protection Act 1997*; and
 - special policies, such as those relating to Bush Fire Recovery in fire affected areas of the ACT.

ISSUES

Legislation

3.7 The Authority is currently undertaking an extensive review of the legislation and processes administered by the Authority. A large part of this review relates directly to the development application and approval that are the subject of the Audit. This review looks at four main areas. These are:

- leasehold administration;
- the Territory Plan and the status of the various planning documents used by the Authority;
- the streamlining of both the Development Application (DA) and the Building Approval (BA) processes; and
- the Environmental Impact Assessment system in the ACT.

3.8 The proposed streamlining of DA processes is likely to include measures to reduce the volume of DAs submitted to the Authority. Initiatives by the Authority to remove the need for DAs for very minor works could assist the Authority's resources to be better and more efficiently targeted to more significant works.

Guidelines on processes and procedures

3.9 The Authority has developed a range of guidelines and guidance material to assist stakeholders in the DAA process, including the Blue Books for applicants, which detail how to develop a good building design as well as the various steps in the DA process. Guidelines also exist for Authority staff for various aspects of the DAA process, such as Public Notification procedures.

3.10 Audit considers that procedural guidelines such as those for Public Notification do assist in ensuring compliance with legislative requirements, and the Authority's compliance with this particular process was of a high standard.

3.11 Audit also found that although referral and notification processes meet basic legislative requirements in most cases simply because they occur, it is difficult to determine whether they are carried out effectively (that is, whether consultation is of an appropriate quality and referrals are timely and add value to decisions in all relevant cases).

3.12 Guidelines such as the Blue Book series are a very good source of advice and assistance for applicants and are generally easy to understand. However, due to the volume of information available across the DAA process, it becomes apparent that clear and concise guidance is important to assist DAA stakeholders. The large volume of information that may apply to a particular type of development can complicate the process rather than providing a guide through the legislative requirements. For example, in the Development Application Information Package section of the Authority's website, 13 different items are listed under 'Policies and Guidelines' for single residential developments (and there are more listed for dual occupancy and multi-residential developments) and this is just one of many layers of information which can apply to developments.

3.13 Audit therefore considers that guidance material should be systematically reviewed in order to reduce the volume of information and further simplify the material to reduce discrepancies or overlap. The status of all guidance material should also be clarified.

Recommendation 17

The Authority should systematically and holistically review all DA guidance material in order to simplify it, reduce discrepancies or overlap, and clarify the status of each piece of guidance material.

Checklists, assessments, and approvals

3.14 Audit found that some guidance exists to assist Authority staff in DA assessment and that these guidelines appear to be consistent with legislation. However, Audit also found that in the case of some DAAs, it could not be demonstrated that guidance and legislation had been followed – given the lack of documented records. For example, checklists were not used consistently and many were incomplete. It is thus difficult to ensure that all proposals are assessed in accordance with legislative requirements.

3.15 Although some consistency and quality assurance checks should occur before a Notice of Decision is approved and signed, this does not appear to occur in some cases. That is, some DAs appear to undergo no review, as they are assessed and approved by the same person (for example, the 'fast' approvals).

3.16 In the case of these 'fast' approvals (i.e. those given on-the-spot, or within 24 hours), there is a risk that assessments may not be consistent with legislative requirements, as documentation does not demonstrate whether issues have been considered, or requirements have been met. The chance of these approvals leading to inconsistencies with legislative requirements is, in the opinion of Audit, increased because:

- these approvals are assessed and approved by the same person;
- controls such as random checks are not used to check on these approvals;

LEGISLATION AND GUIDELINES

- all relevant information about a development may not be identified or provided on the DA form; and
- compliance activities to check conditions of approvals are not adequate.

3.17 For example, in the case of a simple development (such as a pergola or garage), a significant tree may be impacted by the development. In this case, the *Tree Protection (Interim Scheme) Act 2001* (the Tree Protection Act) requires that an approval be obtained to carry out tree damaging activities. However, Part 6 of the DA form may not be adequate to ensure that applicants understand the requirements of the Tree Protection Act and their responsibilities under the Act. Further, the level of assessment given to such an application does not ensure that the required approval for a tree damaging activity has been obtained. Therefore, Audit considers that the Authority should take steps to ensure that applicants understand legislative requirements and their obligations under legislation, as well as their obligation to provide all relevant information to the Authority.

3.18 As a general procedure, to improve quality of decisions, DA approval processes should be reviewed and checked to ensure the quality of DAs that are assessed and approved by the same person. If the current practice is to continue on grounds of efficiency, then a risk assessment should be undertaken to identify measures to minimise the risks, such as fines for providing misleading information and improved compliance measures.

3.19 Audit noted that checklists against Part A (General Principles and Policies) and B (Land Use Policies) of the Territory Plan were present and completed for the DAs examined by Audit in detail. However, even when these checklists are used, they provide quantitative, not qualitative guidance. There is no guidance material that provides qualitative information to staff and identifies what to consider during their assessments. For example, staff are alerted to the need to consider the principles of ESD in their assessments, but they are not told how they might go about weighing the different social, economic and environmental aspects of a development. Instead, the Authority relies on on-the-job training to develop staff's ability to undertake development assessments.

3.20 Audit considers that the Authority should ensure that comprehensive checklists are developed and used by all staff for development assessments in each development category, as previously identified in Recommendation 8.

3.21 Audit also considers that the Authority should introduce more formal training programs to ensure that staff understand legislative requirements and such matters as the principles of ESD. Formal training is also likely to improve consistency between staff when dealing with complex issues.

3.22 The Authority advised that:

... further guidance material [will be] made available to staff. New documentation in the form of the Good Design series of publications contains some guidance on ESD principles.

3.23 The Authority has further advised that staff have been instructed to be more diligent in their use of checklists and senior officers will conduct random checks to ensure compliance.

Recommendation 18

The Authority should develop a more formalised training program to improve staff's understanding of legislative requirements and the principles of ESD, as they apply to individual DAs.

Notification, objections, and comments

3.24 Section 231 of the Land Act lists a range of matters that must be considered before the Authority approves or refuses an application. This list includes 'any comments of a person or body to which the application has been referred for comment' and 'each objection or other submission ...'. The process followed by staff when they consider objections was not clear to Audit, and there was insufficient documentation to demonstrate that each objection was considered on its merits or in a formalised way. In addition, agencies are not advised of the results of consideration of their comments and so they are often unaware of whether their comments have been adopted until the Notice of Decision is made available. Where the Authority does not take up agency comments, the agency is not informed of the reasons.

3.25 Audit considers that the current procedures for consideration of public submissions and agency comments may not result in full and objective assessment of their merits, and the Authority's documentation does not demonstrate that this process is adequate.

3.26 There does not appear to be a standard method and format by which agencies provide comments to the Authority and these comments are sometimes general rather than specific to the development.

3.27 Unless agency advice is clear and specific, it may make it more difficult for Authority staff to complete their assessment. Agencies also reported that sometimes the Authority 'interprets' advice, which presents a risk that the meaning of the comments may be changed. Audit considers that these problems could be avoided if agency comments were provided in a standard format, which could readily be included in Authority advice.

3.28 Audit considers that the shortcomings of agency comments and their subsequent consideration by the Authority may be due to a number of factors. These include:

- the lack of guidance given to assessment staff;
- the lack of specific advice given by agencies;
- poor documentation of the consideration process; and/or

- the ability to provide conditional approvals (under the Land Act, the Authority may include a condition of approval that requires the applicant to obtain approvals from other agencies). The availability of this option may result in the consideration of agency comments being deferred.

3.29 In order to address these issues, Audit has made Recommendations 13, 14 and 15 to the Authority and Environment ACT.

Development conditions

3.30 The Authority (or relevant approval body) has the ability to include, as a condition of development approval, a requirement that the applicant obtain a further approval. Without obtaining the further approval, the development, as conditionally approved by the Authority (or relevant approval body), could not proceed.

3.31 Although consistent with the Land Act, the practice of including a condition of consent, which requires further approvals to be obtained, usually from other agencies, can be problematic. An example of this process was examined by Audit, as discussed in the following case study.

Case Study 3.1: Conditional approval

A DA was approved by the relevant authority under section 230 of the Land Act (in this case, the Minister). A condition of the development approval required the applicant to obtain the Conservator's approval to undertake a tree damaging activity, pursuant to the Tree Protection Act.

The development required several trees on the site to be removed. Without the approval to undertake the tree damaging activity, the development could not proceed. The Conservator was faced with a decision to either grant the approval, or void the original development approval.

The Conservator may approve an application to carry out a tree damaging activity 'if satisfied on reasonable grounds' that the activity meets certain criteria, one of which is 'that all reasonable development options and design solutions have been considered to avoid or minimise the requirement for tree damaging activity'.

In this case, the Authority had advised the Conservator, after the DA was approved, that 'all reasonable development options and design solutions have been considered to avoid or minimise the requirement for tree damaging activity', but it is not clear what analysis was undertaken by the Authority in forming this view.

The Conservator approved the application to undertake a tree damaging activity based on the advice received from the Authority.

Effectively, it was the decision of the Conservator (which was based on the advice of the Authority), rather than the relevant authority under section 230 of the Land Act, that finally determined that the development could proceed. As a result, this decision process appears to be circular and not robust.

Further, in this case the Conservator was involved at a late stage of the DAA process. Such late involvement exposes the process to the risk of delays, and the ineffective use of the Authority's time and effort, should the Conservator determine not to approve the tree damaging activity.

3.32 It may be appropriate for the Authority to consider the issues raised in this case study in the context of the review of legislation and processes currently being undertaken.

Compliance

Current Practice

3.33 The Authority undertakes a range of compliance activities designed to increase the likelihood that developments occur in a manner consistent with approved development applications. Compliance activities are usually carried out in response to complaints from members of the public or as part of campaigns in areas where a lot of development is occurring.

3.34 The compliance section deals with a range of compliance matters that arise due to unauthorised development, breaches of Crown Leases and unsatisfactorily maintained land. It also carries out compliance monitoring of targeted developments for early detection of land and planning breaches and to ensure adequate site management including tree, built infrastructure and environment preservation. The activities of the compliance section include:

- carrying out 900 inspections in 2003-04; and
- issuing 47 Orders, five Directions to carry out rectification work and three prohibition notices under the Land Act in the same period.

3.35 Due to the vast range of land and planning issues the Authority reports that compliance with some conditions of a development approval, may be checked by staff other than compliance staff (e.g. assessment staff).

3.36 The Authority also reports that regulatory tools provided in the Land Act have been improved recently and as a result, they are more widely used to deal with instances of non-compliance. For example, prohibition notices are an improvement on the stop-work orders previously used because prohibition notices take effect immediately, whereas stop-work orders did not take effect until after any appeal was heard, and by that time, the work which was the subject of the stop-work order may have been completed. Prohibition notices are also appealable but they take effect immediately and would only cease to take effect if an appeal was successful.

Complaints

3.37 The Authority's compliance activities rely, in part, on complaints from the public. Although a number of information brochures and other publications produced

by the Authority provide telephone numbers, there are no specifically identified 'complaints lines' or similar, and nothing of this nature appears on the Authority's Internet homepage. The Authority should provide a telephone number for the purpose of making a complaint about possible breaches of legislation in the local phone book, and complaints telephone numbers should be more clearly identified on the website.

3.38 The Authority advised that a telephone number for complaint purposes will be further investigated with Canberra Connect.

3.39 Audit noted several compliance issues during its examination of a number of compliance folders in the Objective program. These issues are discussed in the following case studies.

Case Study 3.2: Lack of action on complaints.

In this case, not all complaints, which allege that certain developments are not complying with conditions of their approval, were investigated by the Authority. Further, there was no documentation found to indicate that a decision had been made to take no action.

Case Study 3.3: Insufficient justification for lack of action.

On this file, a record of inspection refers to the unapproved construction of a fence and covered walkway. This record of inspection, dated 25 May 2004, identified the 'Next action' is to 'Write to the lessee requesting that the fence and the structure be removed'. A letter dated 7 October 2004 tells advises the lessee that the 'structure in its present location must comply with requirement for design and siting' and that 'Any structure forward of the building line requires design and siting approval'. However, the letter then states that 'The purpose of this letter is to inform you that the Authority will not be taking any further action at this stage' even though the structure is 'unapproved' and 'requires Development Approval'. This letter was not 'published' in the Objective program, so it is not clear whether the letter was actually sent to the lessee. Regardless of whether the letter was sent or not, Audit did not find sufficient justification for the Authority's lack of action in relation to the unapproved structure.

Case Study 3.4: Lack of follow up and lack of information about related issues.

This case relates to the roof colour of a development and the developer's failure to construct a retaining wall, as per the development approval. The complaint was made on 29 January 2004 and although the compliance section did investigate the complaint, their action resulted in a referral to the Development Assessment section of the Authority on 5 August 2004. In this referral, the officer from the Compliance section states that:

... there is nothing more that we could do in regards to either issue brought to our attention as:

- soil had been pushed to the site cut where the retaining wall on the boundary didn't go to, and that more soil was going to be placed to this area and compacted; and
- the colour of the roof has now been approved.

It is unclear to Audit whether this non-compliance was satisfactorily checked or resolved as:

- there was no clear record that the Development Assessment section agreed to take responsibility for dealing with the complaint;
- the compliance officer alludes to a retrospective approval being given for the roof colour, but no details are given; and
- in relation to the retaining wall issue, the compliance officer seems to be relying on an undertaking given by the lessee of the premises, which is the subject of the complaint. There is no evidence to suggest that this was followed up by Compliance section to ensure that action was taken to resolve the issue.

3.40 Audit considers that the Authority should work to ensure that adequate levels of compliance activities are maintained and that the documentation and tracking of compliance activities is improved.

Recommendation 19

The documentation of compliance activities should be improved to ensure that:

- all complaints and compliance activities are clearly allocated to either individual staff members or sections of the Authority. Where these are passed from one staff member or section to another for follow up, the file should contain evidence that the person or section to which it was referred has taken the responsibility to take action on the issue; and
- where references are made to the work or decisions of other sections of the Authority, this is either linked in the Objective program, or full details of the work or decisions are provided.

Extent of compliance coverage

3.41 The compliance section did not maintain adequate levels of compliance activity during the period under review, leading to a risk of inadequate level of assurance that developments are occurring in accordance with approvals. Audit understands that the section was not fully staffed at the time. Audit was also concerned that action on complaints was not concluded.

3.42 Audit accepts that it is not practical to physically check every condition of development imposed. It may not even be practicable to follow up every complaint. Nevertheless, Audit found no evidence of any analysis of the risks imposed by low compliance coverage, such as poor developments and low incentives for developers to comply in the future. Such a risk analysis would help to direct compliance resources in the most effective way and to provide a basis for determining the appropriate resourcing of the compliance function. Further, the absence of any documentation to indicate consideration of a complaint suggests that the complaints process may be largely ineffectual.

Compliance with development approvals

3.43 Compliance checks are not carried out for all conditions of approval. Where compliance is checked, there is not a formal process for updating records related to the approval, to show a developer's compliance progress against the conditions. As a result, it is very difficult to determine what, if any, conditions have been checked at any one time, as the development progresses.

3.44 All compliance activities in relation to DAs should be clearly documented and these should be linked to the development approval, to allow for improved tracking of compliance with the conditions of the approval. The records to be maintained could take the form of a checklist against a list of conditions of the approval, which identifies who checked compliance, the date, and remaining conditions that require action. When linking items in the Objective program, Authority staff should ensure that a cross-reference link is used to ensure that it is visible at both the DA and the Compliance folder.

3.45 The Authority advised that a more systematic approach to checking compliance against conditions of development approval will be developed and implemented.

Recommendation 20

The Authority should:

- address all complaints and where no action (or no further action) is to be taken, the decision and the reasons supporting it should be documented;
- conduct a risk assessment of non-compliance with development approval conditions, which looks at both the likelihood of non-compliance occurring and the potential impact of non-compliance. Where risks are identified as being too high, the Authority should work to improve compliance; and
- develop a formal procedure for checking and documenting compliance against the conditions of development approvals. The compliance record should also be clearly linked to the development approval in the Objective program.

Communication and consultation

3.46 There is disparity between the Authority's view of its consultation processes and the view held by stakeholders. The Authority considers itself to be performing well and although the Authority does a lot of consultation on a wide range of issues, stakeholders report that much of this consultation is of reduced value because the Authority fails to provide feedback on comments and input, and often consultation happens too late in the process to make any real difference to the outcome of a project or issue. For example, Environment ACT reported that they were only given a few days prior to publication to provide comments on the Blue Books.

3.47 A report prepared by the National Institute for Governance in April 2004, titled 'Review of Stakeholder Engagement in ACT Planning' stated that:

[stakeholders] ... tended to highlight consultation processes that seemed perfunctory, heavily controlled, and/or exercises in telling people what had already been decided, rather than genuinely engaging in genuine dialogue working collaboratively to achieve better planning outcomes. ... Developers and planning professionals considered the consultation process, particularly on development applications that fall under the High Quality Sustainable Design (HQSD) guidelines, to be inefficient and costly.

3.48 The report went on to say that:

These comments suggest that the governance framework around consultation needs to be strengthened so that participants can be confident that ... their input will be valued and that they will receive feedback on how it has been used.

3.49 Communication and consultation is particularly important, as there has been a large amount of change occurring in the DAA process over an extended period.

However, stakeholders reported that changes are not always well communicated to them and that the Authority did not consult stakeholders on the most recent changes to the DA process. Instead, the changes were introduced and stakeholders were informed at that time.

3.50 Audit recognises that at times it is appropriate for the Authority to make a range of decisions or changes without consultation. However, Audit found that in the view of the community and stakeholders, consultation (when being undertaken) was not always of an appropriate quality. Therefore, Audit considers that early consultation on issues and the provision of feedback to stakeholders would assist in assuring stakeholders that their participation is valued. Feedback could be in the form of a summary of issues raised during consultation, and the Authority's response to each issue. This could then be posted on the Authority's website and made available at the Authority's shopfront, rather than sent to individuals.

Recommendation 21

The Authority should revise consultation practices in order to better deal with the contributions made, and issues raised, by stakeholders, such as:

- the timeframe allowed for consultation;
- feedback to contributors; and
- documentation of comments received and considered.

CONCLUSION

3.51 Legislative requirements for development applications are complex, which leads to the need for a complex set of guidelines. Nevertheless, processes have generally been consistent with these guidelines and legislation. Audit considers that better guidance material could further assist stakeholders to navigate their way through the complex legislative requirements. In addition, there should be better checklists, used consistently for all DAs, supported by better staff training.

3.52 The Authority has endeavoured to consult key stakeholders and to test compliance with DAA conditions. Improved consultation and improved compliance activities as recommended by Audit will help to ensure that the DAA process is applied in a manner consistent with guidelines and legislation.

4. ECOLOGICALLY SUSTAINABLE DEVELOPMENT

INTRODUCTION

4.1 This Chapter describes whether development approval processes have regard to the principles of Ecologically Sustainable Development (ESD).

SIGNIFICANT FINDINGS

- The Authority has been and is doing a lot of work to improve sustainability in the building and development industry in the ACT, and it has contributed to the education of a range of stakeholders on the importance of sustainability in the DAA process. For example, new homes are required to meet minimum energy efficiency ratings.
- The Authority has developed policies with the assistance of expert authorities. It has also sought expert advice on a number of DAs, through the referrals process and use of the Planning and Land Council, which has expert members.
- Although the Authority does seek expert advice and comments on many DAs to help inform decisions, the consideration and use of this expert advice and comment was not well documented.
- The Authority has not yet developed ESD guidance material for staff to use at the individual DA level. Audit recognises that this is a challenging task, which is faced with hurdles such as getting agreement on the definition of what is ‘sustainable’. Audit also recognises that the Authority experiences similar problems to bodies in other jurisdictions, and where new and better tools are being developed and introduced in other jurisdictions, the Authority is investigating the adoption of these.
- On-the-job training, which is the dominant form of training used by the Authority, does not ensure that all staff, especially those without formal and relevant qualifications and expertise, understand the principles of ESD. On-the-job training should be supplemented by more formalised training, which could utilise in-house and external expertise, to improve the understanding of staff throughout the Authority, and therefore help to ensure consistency.

BACKGROUND

4.2 The aim of the Territory Plan is to ensure that the planning and development of the ACT provides the people of the ACT with an ecologically sustainable, healthy, attractive, safe and efficient environment in which to live, work and have their recreation. It follows then, that the Authority needs to consider the principles of ESD when carrying out its functions. The Authority is also required to report on its performance against the principles on ESD annually, pursuant to section 158A of the *Environment Protection Act 1997* and the Chief Minister’s Annual Report Directions.

The Authority is one of the key agencies within the ACT government with a role in improving awareness of ESD, and its implementation.

ISSUES

Expert advice and consultation

4.3 The Authority reports that its Guide to Good Design Book was developed in consultation with the Australian Greenhouse Office (AGO), and the scoring system associated with the Residential Sustainability Report was developed from the High Quality Sustainable Design Blue Book, which was developed using mainly in-house expertise.

4.4 The Authority has recently examined the adoption of a Sustainability Rating System from NSW called the Building Sustainability Index (BASIX) and consultations with the developers of BASIX are underway to investigate whether the system can be adapted to consider ACT specific issues. BASIX was developed by the NSW Department of Infrastructure, Planning and Natural Resources and has undergone extensive consultation with experts and stakeholders throughout its 2½-year development. BASIX was implemented in some local government areas (LGAs) of NSW on 1 July 2004 and it will be introduced in all NSW LGAs during 2005. The BASIX tool currently aims to reduce greenhouse gas emissions and potable water use for new houses, including multi-unit dwellings.

ESD guidelines for development assessment staff

4.5 Specific policies and guidelines ensuring that staff and applicants have regard for the principles of ESD have not yet been developed by the Authority or Environment ACT. Significant work has been done to improve sustainability in the ACT and steps have been taken to improve the sustainability of housing and development in the ACT (e.g. minimum requirements for energy ratings of houses, the Sustainable Transport Plan). However, without specific guidance material on ESD, particularly at the individual DA level, sustainable development is harder to achieve.

4.6 The DA process currently has limited scope to specifically take ESD into account, as there is little qualitative information on how this should be done at the individual DA level. The Authority does seek comments on many DAs from experts – such as ActewAGL, City Management, ACT No Waste, the Tree Protection Unit, Heritage Council and the Environment Protection Authority (except ActewAGL, all were previously part of the Department of Urban Services). However, there is not yet sufficient guidance to enable staff to weight competing aspects of a proposal to determine its overall merit, with respect to ESD. For example, there is not a clear means for assessing a proposal that may require the removal of a number of significant trees (environmental), but which will employ a large number of staff (economic) and is located on the site of a park and children's playground (social). Audit, however, recognises that it is difficult for the Authority (and similar bodies in

other jurisdictions) to give specific instruction on how to rate the positive and negative impacts of such a proposal.

4.7 Audit believes that the Authority is one of the leading ACT government agencies tackling the issues of sustainability, and development assessment does have regard for some crucial aspects of ESD (such as energy rating and energy efficiency, water efficiency, solar aspect and shading, and social impacts). Also, the referrals process provides the opportunity to get expert advice on social and environmental issues. However, ESD is not yet being considered in a comprehensive and consistent way due to a lack of clear guidance for staff. Audit notes that, in this regard, other jurisdictions do not yet have such comprehensive guidance tools available at the development assessment level, and where these tools are being developed, the Authority is investigating their use in the ACT.

Use of environmental assessments

4.8 Preliminary Assessments (PAs) and other Assessments (which can take the form of a Public Environment Report or an Environmental Impact Statement) are required to be carried out for certain types of development proposals under Part 4 of the Land Act. These assessments are required to include information on the potential impact of the project on the environment by Schedule 3, section 3 (3) of the Land Act. This includes not just the physical environment but also the human and biological environment. Further, information must be provided on the potentially beneficial impacts of the proposal, which provides an opportunity for the applicant to discuss such things as the economic and social aspects of the development.

4.9 Audit observed that the DAs examined did not routinely refer to environmental assessments, even though these are a potentially useful tool and source of information during assessment of a proposal. Audit considers that in their consideration of the principles of ESD, assessment officers would benefit from using the information contained in PAs and other assessments if they were more closely linked to the development assessment process.

4.10 Audit also noted that in one of the cases examined, the applicant was exempted from doing a PA because one had been done for the site in 1997. Audit considers that insufficient reasons were given for withdrawing this requirement, particularly given the age of the previous PA.

Recommendation 22

The Authority should make better use of environmental assessments to assist in their consideration of ESD, by means such as:

- reviewing the requirements for Preliminary Assessments (Division 4.2 of the Land Act) and other Assessments (Division 4.3 of the Land Act) so that adequate information is obtained on social, economic and environmental issues relevant to a proposal;
- ensuring that Development Assessments clearly document their consideration of information contained in Preliminary Assessments and other Assessments; and
- documenting details of the justification for any decision to waive the requirement to prepare an environmental assessment.

Guidelines and training for ESD

4.11 While the Authority has done a lot of work to improve the sustainability of the ACT, much of this is still at the conceptual and policy level – there are no comprehensive ESD related guidelines and processes for the individual DA level. The Authority points out that it has set significant sustainability targets in such policies as the Transport Plan and it intends on monitoring and reporting against a range of sustainability indicators every two years under the Canberra Spatial Plan. These indicators have only been in place since March 2004, so even baseline data was not available until March 2005.

4.12 The Authority further pointed out that it is very difficult to translate ESD into specific guidance material as most agencies (both in the ACT and other jurisdictions) are still grappling with the concept. As a result, the Authority uses a range of tools to achieve sustainability gains. Some are mandatory (such as Energy Efficiency Ratings – where new homes are required to meet at least a 4 star rating) and others are not. An example of other tools used to assist with ESD principles is the referral process whereby some DAs go to expert agencies and the Planning and Land Council (PLC) for advice. The Authority states that there are at least two members of the PLC who have expertise in ESD.

4.13 Audit notes that where PLC advice was sought in relation to the case studies examined, this process and its outcomes were not well documented. For example, in one case, references were found to seeking PLC advice, but no subsequent advice had been entered into the Objective program. Audit recommends that when seeking expert advice (from PLC and through agency referral), documentation of the process and its outcomes should be improved, as outlined in Recommendation 16.

4.14 In summary, the Authority is working on a range of ESD related policies, but it is difficult to determine how this work is being applied and used at the individual assessment level. Therefore, at this stage, Audit is unable to assess the real impact of ESD on the decision-making process, as most of the tools that will be used by the

Authority are still in development. Tools to achieve sustainability are still being developed across Australia, and Audit notes that the Authority works to keep abreast of developments.

4.15 Audit recommends that the consideration of ESD principles should, as far as possible, be included in the standardised development assessment checklists that were recommended by Recommendation 8. The checklists should be developed at the same time the ESD policies are developed.

4.16 Finally, Audit recommends that ESD should be included as part of a more formal training program for all Authority staff, as previously recommended by Recommendation 18.

CONCLUSION

4.17 Audit recognises that the Authority is a leading ACT government agency in relation to sustainability and ESD, particularly in relation to building awareness of these concepts and principles. However, Audit considers that further improvements, such as better training and guidelines, would help to ensure that the DAA process has regard to the principles of ESD. ESD may also be advanced by better use of environmental assessments in the DAA process.

Appendix A

CRITERIA FOR THE AUDIT

The following are the criteria used to guide the conduct of the audit and to enable the objectives of the audit to be achieved.

Objective 1: Development approval processes are efficient, timely and fair.

- Criterion 1.1 Development approval decisions are based on relevant evidence that is well documented.
- Criterion 1.2 All pre-applications requirements are clearly identified and consistent with ACTPLA procedures.
- Criterion 1.3 Development applications are processed within the statutory timeframes.
- Criterion 1.4 Procedures for Development Approvals are fair and reliable.
- Criterion 1.5 The proportion of cases referred to the AAT or other appeal mechanism and overturned on appeal is small.
- Criterion 1.6 Fee collection systems are reliable.

Objective 2: Development approval processes have been applied in a manner consistent with relevant guidelines and legislation.

- Criterion 2.1 Legislative requirements have been translated into guidelines that assist staff to assess proposals.
- Criterion 2.2 All development approvals conform to legislative requirements such as the Regulation, the Territory Plan, lease conditions, planning codes, or any special development conditions.
- Criterion 2.3 There is an effective compliance process to ensure consistency with relevant legislation, guidelines, and conditions of approval.

Objective 3 Development approval processes have regard to the principles of Ecologically Sustainable Development.

Criterion 3.1 ESD-related processes have been reviewed and approved by expert authorities, or developed in consultation with them.

Criterion 3.2 Processes and guidelines for approval of development applications specifically take ESD into account.

Criterion 3.3 Each development application assessment has appropriately taken into account ESD-related guidelines and processes.

PREVIOUS AUDIT REPORTS

Reports Published in 2004-2005

- Report No. 4 / 2004: Data Reliability for Reporting on the ACT 'No Waste by 2010' Strategy
- Report No. 5 / 2004: Leave Management
- Report No. 6 / 2004: Workers' Compensation Supplementation Fund
- Report No. 7 / 2004: Annual Report 2003-2004
- Report No. 8 / 2004: Waiting Lists for Elective Surgery and Medical Treatment
- Report No. 9 / 2004: Administration and Monitoring of Youth Service Contracts
- Report No. 10 / 2004: 2003-04 Financial Audits
- Report No. 1 / 2005: Management of Government Grants to the ACT Multicultural Council Inc.

Reports Published in 2003-2004

- Report No. 9 / 2003: Annual Management Report for the Year Ended 30 June 2003
- Report No. 10 / 2003: Financial Audits with Years Ending to 30 June 2003
- Report No. 1 / 2004: Administration of Policing Services
- Report No. 2 / 2004: Travel Arrangements and Expenses
- Report No. 3 / 2004: Revenue Estimates in Budget Papers 2002-03

Reports Published in 2002-2003

- Report No. 5 / 2002: V8 Car Races in Canberra – Costs and Benefits
- Report No. 6 / 2002: Annual Management Report for the Year Ended 30 June 2002
- Report No. 7 / 2002: Financial Audits with Years Ending to 30 June 2002
- Report No. 1 / 2003: Effectiveness of Annual Reporting
- Report No. 2 / 2003: Belconnen Indoor Aquatic Leisure Centre
- Report No. 3 / 2003: Emergency Services
- Report No. 4 / 2003: Management of Fraud and Corruption Prevention in the ACT Public Sector
- Report No. 5 / 2003: Lease of FAI House
- Report No. 6 / 2003: Allegations of Financial Mismanagement University of Canberra Union
- Report No. 7 / 2003: Compliance Performance Audit – Recruitment Processes
- Report No. 8 / 2003: Financial Incentive Package for Fujitsu Australia Ltd (FAL)

Reports Published in 2001-2002

- Report No. 5 / 2001: The Administration of Payroll Tax
- Report No. 6 / 2001: Annual Management Report for the Year Ended 30 June 2001
- Report No. 7 / 2001: Managing Canberra Urban Parks and Open Spaces
- Report No. 8 / 2001: Canberra Tourism and Events Corporation – Relocation to Brindabella Business Park
- Report No. 9 / 2001: Agents Board – Financial Administration of Training Grant Program
- Report No. 10 / 2001: Corrective Services – Review of Certain Allegations
- Report No. 11 / 2001: Financial Audits with Years Ending to 30 June 2001
- Report No. 12 / 2001: The Freedom of Information Act
- Report No. 1 / 2002: Special Purpose Review of Part of the Commission of Audit Report on the State of the Territory's Finances at 31 October 2001
- Report No. 2 / 2002: Operation of the Public Access to Government Contracts Act
- Report No. 3 / 2002: Government Arrangements of Selected Statutory Authorities
- Report No. 4 / 2002: Frameworks for Internal Auditing in Territory Agencies

The Auditor-General issued 102 Reports prior to 2001-2002. Details of reports published prior to 2001-2002 can be obtained from the ACT Auditor-General's Office or the ACT Auditor-General's homepage: <http://www.audit.act.gov.au>.

AVAILABILITY OF REPORTS

Copies of Reports issued by the ACT Auditor-General's Office are available from:

ACT Auditor-General's Office
Scala House
11 Torrens Street
BRADDON ACT 2612

or

PO Box 275
CIVIC SQUARE ACT 2608

Phone (02) 62070833 / Fax (02) 62070826

Copies of Reports are also available from the
ACT Auditor-General's Homepage: <http://www.audit.act.gov.au>