

ACT Auditor-General's Office
Performance Audit Report

Regulation of ACT Liquor Licences

Department of Justice and Community Safety

June 2007



ACT AUDITOR-GENERAL'S OFFICE



PA 07/06

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 '**Regulation of ACT Liquor Licences**', conducted under the authority contained in the *Auditor-General Act 1996*.

I would appreciate it if you could arrange for the distribution of the Report to each member of the Legislative Assembly, and its subsequent tabling in the Legislative Assembly, pursuant to Section 17(5) of the *Auditor-General Act 1996*.

Yours sincerely

Tu Pham
Auditor-General
28 June 2007

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LIST OF ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACT	Australian Capital Territory
ACTPLA	ACT Planning and Land Authority
AIHW	Australian Institute of Health and Welfare
ASIC	Australian Securities and Investment Commission
BCA	Building Code of Australia
GSO	The ACT Government Solicitor's Office
IBS	Integrated Business Systems
JACS	Department of Justice and Community Safety
Liquor Act	<i>Liquor Act 1975</i> , as amended
NDLERF	National Drug Law Enforcement Research Fund
OFT	The ACT Office of Fair Trading
ORS	The ACT Office of Regulatory Services
RMP	Risk Management Plan
RSA	Responsible Service of Alcohol
WHO	World Health Organisation

1. REPORT SUMMARY AND AUDIT OPINION

INTRODUCTION

1.1 This report presents the results of a performance audit that reviewed the efficiency and effectiveness of certain regulatory activities relating to liquor licensing in the Australian Capital Territory (ACT) as described in the *Liquor Act 1975* (the Liquor Act).

BACKGROUND

1.2 Alcohol is a regular feature of Australian social, cultural and interpersonal interactions. Alcohol is widely used in Australia, consumed by approximately 12 million Australians aged 14 years and above, which accounts for 81% of the population.¹

1.3 The mis-use of alcohol can have adverse effects on mental and physical functioning. In its report titled *National Alcohol Strategy 2006-09* issued in May 2006, the Ministerial Council on Drug Strategy stated:

In addition to the heavy burden of health and social problems associated with alcohol and licensed premises there is also a substantial economic cost borne by society. The financial costs of alcohol-related problems to the Australian community have been estimated at \$7.6 billion dollars per annum (1998-1999), compared with ... \$6.1 billion from illicit drugs and \$21.1 billion from tobacco.

1.4 While costs were not identified for individual State and Territory, based on population share, the costs to ACT can be broadly estimated to be \$126 million.

1.5 To prevent and minimise alcohol-related harm to individuals, families and communities, Australian governments (including the ACT government), in collaboration with non-government and industry partners and the community, have recently developed the *National Strategy Plan 2006-09* (the Strategy) for coordinated action to develop drinking cultures that support a reduction in alcohol-related harm in Australia.

1.6 The Strategy has identified the following four priority areas focusing on:

- reducing the incidence of intoxication among drinkers;
- enhancing public safety and amenity at times and in places where alcohol is consumed;
- improving health impacts among all individuals and communities affected by alcohol consumption; and

¹ National Drug Law Enforcement Research Fund, *Alcohol and Licensed Premises: Best Practice in Policing – A Monograph for Police and Policy Makers*, April 2003, Chapter 1.

- facilitating safer and healthier drinking cultures by developing community understanding about the special properties of alcohol and through regulation of its availability.

1.7 In the ACT, the Department of Justice and Community Safety (JACS) is responsible for administering the *Liquor Act 1975*, which has the object of promoting and encouraging responsibility in the sale and consumption of liquor through the establishment of a scheme of liquor licences and permits. The Liquor Act also provides legislative power to JACS to regulate management and behaviour in licensed premises.

1.8 Although there is no published data relating specifically to the ACT, the national trends in alcohol mis-use could reflect similar alcohol-related issues in the ACT.

1.9 Recent media reports on the incidences of intoxication and anti-social behaviours associated with under-age drinking and alcohol consumption, and inadequate control over sale to minors (e.g. at events such as Skyfire) has raised concerns in the community and debates in the Legislative Assembly.

1.10 Audit has also received a representation from a member of the general public that several licensed premises might have been allowed to operate without an approved occupancy loading (which is the maximum number of persons allowed in the indoor and outdoor public areas of a licensed premises), hence creating public safety risks.

AUDIT SCOPE AND OBJECTIVES

1.11 The objective of this performance audit was to provide an independent opinion to the Legislative Assembly on whether the Department of Justice and Community Safety has an effective and efficient regulatory program to encourage and promote responsibility in the sale and consumption of liquor.

1.12 The audit focused on regulatory and administrative practices in relation to the assessment of the application for, and issuing of, liquor licences and permits, with an emphasis on the determination and approval of occupancy loadings for indoor and outdoor public areas of the licensed premises.

1.13 The audit also focused on the regulatory activities implemented by the Department in monitoring compliance by licensees and addressing non-compliance. In this aspect, the audit primarily assessed whether the Department has a systematic, risk-based program of compliance activities to monitor effectively operations of licensed premises. The audit did not cover the regulatory activities conducted by ACT Police under the Liquor Act.

1.14 **Appendix A** provides further details regarding audit criteria, approach and methodology.

AUDIT OPINION

1.15 The audit opinions drawn against the audit objectives are set out below.

Liquor Licensing

The licensing procedures adopted by JACS were not sufficiently robust to ensure the integrity and effectiveness of the liquor licensing regime.

There was significant scope to improve the effectiveness of assessment process of application for licences and permits, including:

- consistent documentation;
- better document management;
- documentation of major decisions and activities to enhance transparency in the decision-making process;
- development of procedural manuals for staff; and
- provision of guidance material to potential and existing licensees and the general public.

Approval of Occupancy Loadings

The approval processes for occupancy loading were neither timely nor consistent. Many licensed premises have not been assessed for occupancy loadings within a reasonable time as required by legislation.

Monitoring Compliance of liquor licensees

There was no formalised risk-based strategy to assess the regulatory risks, the types of activities and resource requirements, necessary to monitor compliance with the Liquor Act by licensees. Due to high staff turnover and departure of experienced staff, the number of compliance inspections has significantly declined in the recent years. As a result, it is doubtful that the current limited compliance activities were effective in promoting responsible consumption and sale of liquor.

Addressing non-compliance

The Liquor Act provides an appropriate enforcement framework for the Liquor Licensing Board and the Registrar with a set of graduated responses to address non-compliances. The decisions made by the Board and the Registrar to address identified non-compliance were documented and made in a timely manner. There was only a small number of appeals to the Administrative Appeals Tribunal (AAT) and the majority of the AAT decisions generally found in favour of the Board and the Registrar. This suggested that the decisions made by the Board and the Registrar to address identified non-compliance were mostly made in accordance with the Liquor Act.

KEY FINDINGS

1.16 The audit opinion is supported by the following findings:

Managing Regulatory Function and Liquor Licensing

- The application process for a liquor licence and permit is well defined in legislation.
- Work practices in the Office of Fair Trading (OFT) were poor and had not been applied consistently in the assessment of some applications for liquor licences. The OFT did not always follow the requirements to obtain all documents specified in the application forms, for example, leases, building plans, or character references of applicants.
- Documentation of some applications was incomplete and not kept on file.
- There was little evidence to indicate appropriate action was taken to follow up any missing documents after issuance of the licence. In addition, the OFT did not perform appropriate checks to confirm the accuracy and validity of the information submitted in the applications.
- In most cases, the assessment process was not well documented, and was not consistent with the Territory's record management requirements. The OFT did not document key decisions, such as the inspection of the premises to assess the suitability for a licence, or decisions not to request certain statutory documents. The lack of documentation to support the decisions made by assessors may compromise the integrity of the licensing regime, and increase risks of corruption or misconduct.
- Documented policies and operating procedures were not available to assist staff compliance with legislative processes, and to ensure consistency for processing applications.
- Applicants can seek assistance and obtain the application pack from the OFT directly. However, relevant forms and guidance material were not available on the OFT's website to assist the applicants.
- The OFT's information management arrangements were deficient, and did not provide ready access to relevant and basic information on liquor licences to facilitate its regulatory activities, or for data analysis necessary to improve the OFT's performance on liquor licensing.

Approval of Occupancy Loadings

- The Liquor Act requires the Registrar (or his Deputy) to determine for all licensed premises, except for OFF licences, the occupancy loadings for the indoor and outdoor public areas.
- The Liquor Act does not prohibit the operation of licensed premises prior to the determination of occupancy loading. However, the legislation requires the Registrar to undertake an assessment 'as soon as possible'.

- The OFT has currently applied priorities to the assessment of 'higher risk' premises, such as night clubs or pubs in the major entertainment precincts. Notwithstanding this approach, Audit found that a number of popular licensed premises are currently operating without an occupancy loading. In addition, a large number of 'lower risk' licensed premises have not yet been assessed for occupancy loading.
- The assessment process for occupancy loading was not conducted in a timely manner. Audit found that:
 - the occupancy loading of only one licensed premise had been assessed out of a total of 50 new liquor licences approved since January 2005. The Chief Officer (ACT Fire Brigade) has provided recommendations for another seventeen licensed premises during the period, and only five are in the final stage of assessment pending the decision-maker's final determination; and
 - many licensed premises with licences granted during the period August 1994 to December 2004 were not assessed for occupancy loading.
- Due to failure to manage the approval process for occupancy loadings within a reasonable time, the intent of the legislation and the community expectation of a safe drinking environment were not met.
- Without determination of legally enforceable occupancy loadings, the regulation of overcrowding and protection of the safety and health of the patrons and the public may be more difficult and less effective. This view is supported by a legal opinion provided by the ACT Government Solicitor's Office (GSO) that suggested there might not be a convenient way to enforce overcrowding controls under the provisions of the Liquor Act and the *Building Act 2004* in the absence of a determined loading.
- There may be also a legal risk of potential claim against the Territory as a result of delay in determining an occupancy loading under the Liquor Act, particularly in cases of accidents such as fire.

Managing Compliance

- The OFT has undertaken a range of compliance activities to regulate licensed premises and patrons' behaviour in accordance with the Liquor Act.
- The level of regulatory activities, in particular the number of inspections, has been significantly reduced in recent years, partly reflecting inadequate resources. It is unlikely that the current regulatory strategies and activities are sufficient to provide assurance that compliance activities are effective.
- The OFT did not achieve its targeted numbers of inspections in recent years notwithstanding a significant reduction in inspection targets since 2004-05. The OFT conducted:
 - 41% of the annual target of 1000 inspections in 2004-05;
 - 78% of the annual target of 500 inspections in 2005-06; and
 - 60% of the annual target of 400 in 2006-07.

- The OFT did not have documented risk management policies and procedures for the regulatory administration of the Liquor Act. The OFT did not apply a systematic risk management approach to address key regulatory and operational risks (including resourcing issues) or develop strategies to mitigate those risks.
- After-hour inspections conducted by the OFT's Compliance Unit are an effective means to monitor the management and operations of the licensees, including the behaviour of patrons. These inspections, however, were infrequent and limited in coverage, and could not assure adequate results being achieved from compliance activities.
- The OFT had primarily targeted higher risk licensed premises in its after-hour compliance inspections. Only 28%, 34% and 17% of total licences issued in 2004-05, 2005-06 and 2006-07 respectively were selected for compliance inspections. Some of these licensed premises were inspected more often because of higher risks identified by the Compliance Unit. Most licensed premises, however, have never been subject to inspection.
- From 2004-05 to April 2007, nearly 350 breaches were reported by the OFT comprising:
 - non-compliance with licensing conditions (35%);
 - non-compliance with the standards of the Liquor Licensing Standards Manual (30%); and
 - breaches of under-age drinking provisions (15%).
- Such high levels of non-compliance would appear to indicate that an extension of regulatory activities would be necessary to ensure better industry compliance with legislation and licensing conditions.

Addressing Non-Compliance

- The Liquor Act provides an appropriate legislative framework to address non-compliance, which includes a set of graduated responses.
- Out of a total of 29 cases referred to the Liquor Licensing Board during the period 2004-05 to April 2007, only one case was dismissed due to insufficient evidence. This suggested that information presented by the Registrar to the Liquor Licensing Board and to the affected licensees was, in most cases, sufficient to substantiate the matters referred to the Board for determinations.
- In the period under review from July 2004 to April 2007, there were only two appeals on the Board's decisions to the Administrative Appeals Tribunal (ATT), representing about 6% of the total determinations made by the Board.
- Of all appeals during the period January 2000 to April 2007, most AAT decisions generally found in favour of the Board and the Registrar, which suggested their decisions were mostly made in accordance with the Liquor Act.

- The responses to non-compliance of a more serious nature by the Registrar and the Board were conducted in a timely manner. The decisions made by the Board and the Registrar were documented and made available to the licensees within a reasonable timeframe.

RECOMMENDATIONS AND RESPONSE TO THE REPORT

1.17 The audit made seven recommendations to address the audit findings detailed in this report.

1.18 In accordance with section 18 of the *Auditor-General Act 1996*, a final draft of this report was provided to the Chief Executive of JACS for formal response. The Chief Executive provided the overall response below:

I largely accept the investigatory work that led to the recommendations outlined in the report. The creation of the Office of Regulatory Services (ORS) provides the opportunity to streamline licensing processes and combine compliance activities.

As highlighted in my response to the draft report, ORS is currently undergoing a review of its core services, which will assist in establishing the strategic direction for the Office. I anticipate that this review will consider the many regulatory activities carried out by the ORS, including liquor licensing. The review will examine the way in which the ORS undertakes its business and how the Office can further improve its business systems. This review is due to be completed by mid August 2007.

Your report, together with the review of core services, will greatly assist in shaping the direction of the Office in all its licensing and compliance activities in the future.

1.19 The Chief Executive of JACS did not provide specific responses to the recommendations.

Recommendation 1 (Chapter 2)

The OFT should:

- ensure that documentation for licensing applications is complete and properly maintained on file;
- take timely action to follow up any outstanding documentation;
- implement appropriate checks to verify the accuracy and validity of application details, including information provided by applicants;
- provide adequate supporting documentation to identify the assessment actions taken - for example, an inspection report on the assessment of the premises for suitability for a licence; and

- document full details of the decision to facilitate accountability and transparency in licensing assessment.

Recommendation 2 (Chapter 2)

The OFT should:

- review the effectiveness and efficiency of the current liquor licensing procedures;
- develop and publish the new or revised procedures to improve:
 - operational efficiency;
 - consistency in the assessment of application for a licence;
 - compliance with legislative requirements and in accordance with better practices; and
- train staff to ensure they have the appropriate knowledge and skills to assess liquor applications.

Recommendation 3 (Chapter 2)

The OFT should:

- provide clear and comprehensive guidance to assist applicants in preparing and submitting quality applications and understanding their obligations under the Liquor Act; and
- make the liquor licence application pack and the guidance material to applicants readily available, for example, on the website for the OFT or Canberra Connect.

Recommendation 4 (Chapter 2)

The OFT should improve its existing management information system to facilitate the regulatory function of liquor licensing, and enhance its accountability.

Recommendation 5 (Chapter 3)

The OFT should put in place sound management practices to ensure assessments of occupancy loadings are completed in a timely manner.

Recommendation 6 (Chapter 3)

JACS should consider reviewing and amending the legislation to prescribe a timeframe for assessment of occupancy loadings, in order to enhance the integrity and accountability of the process.

Recommendation 7 (Chapter 4)

The OFT should develop and implement an explicit, systematic and documented overall strategic framework for liquor licensing that:

- addresses key priorities and strategies for delivering regulatory outcomes;
- incorporates a comprehensive risk assessment and strategies to address and monitor identified risks; and
- targets compliance activities in accordance with assessed licensee risks, preferably covering all regulated entities within a set period of time, with higher risk entities visited more often and /or subjected to more intensive inspections.

2. REGULATORY FUNCTION AND LIQUOR LICENSING

INTRODUCTION

2.1 This chapter describes the regulatory function administered by the ACT Office of Fair Trading (OFT) of the Department of Justice and Community Safety (JACS) relating to liquor licensing and examine the processes for assessing applications for liquor licences in accordance with the Liquor Act.

KEY FINDINGS

- The application process for a liquor licence and permit is well defined in legislation.
- Work practices in the Office of Fair Trading (OFT) were poor and had not been applied consistently in the assessment of some applications for liquor licences. The OFT did not always follow the requirements to obtain all documents specified in the application forms, for example, leases, building plans, or character references of applicants.
- Documentation of some applications was incomplete and not kept on file.
- There was little evidence to indicate appropriate action was taken to follow up any missing documents after issuance of the licence. In addition, the OFT did not perform appropriate checks to confirm the accuracy and validity of the information submitted in the applications.
- In most cases, the assessment process was not well documented, and was not consistent with the Territory's record management requirements. The OFT did not document key decisions, such as the inspection of the premises to assess the suitability for a licence, or decisions not to request certain statutory documents. The lack of documentation to support the decisions made by assessors may compromise the integrity of the licensing regime, and increase risks of corruption or misconduct.
- Documented policies and operating procedures were not available to assist staff compliance with legislative processes, and to ensure consistency for processing applications.
- Applicants can seek assistance and obtain the application pack from the OFT directly. However, relevant forms and guidance material were not available on the OFT's website to assist the applicants.
- The OFT's information management arrangements were deficient, and did not provide ready access to relevant and basic information on liquor licences to facilitate its regulatory activities, or for data analysis necessary to improve the OFT's performance on liquor licensing.

IMPLEMENTATION OF THE REGULATORY FUNCTION

Role and functions of the Office of Fair Trading

2.2 In July 2000, the regulatory branches of the Department's Policy and Regulatory Division, namely the Consumer Affairs Bureau and the Liquor and Adult Services Regulation Branch, were amalgamated as a new OFT. The OFT is responsible for administering 25 pieces of legislation and codes of practice and the regulatory functions covering the licensing/registration and compliance activities of agents, credit providers, finance brokers, liquor, motor vehicles repairers, security industry, trade measurement and others.

2.3 The OFT consists of the following business units:

- Advice and Complaints;
- Registration and Client Services;
- Compliance;
- Trade Measurement;
- Business and Community Relations; and
- Secretariat and Support.

Office of Regulatory Services

2.4 As part of the 2006-07 Budget initiatives, JACS has established the ACT Office of Regulatory Services (ORS) that brought together a range of government regulatory activities.² The ORS is now responsible for regulatory aspects of the Liquor Act, as well as a wide range of other matters such as registration services by the Registrar-General, maintenance of the Office of Rental Bonds, parking inspection, and regulation and enforcement of legislation covering occupational health and safety, workers' compensation, dangerous substances and labour regulation. Additional functions, for example the regulation of charitable collections, outdoor cafes and tobaccos have recently been transferred to the ORS. JACS has advised that some of the other industries regulated by the OFT are of similar size to the liquor industry, demanding a similar scale of regulatory activity.

2.5 The ORS has an annual budget of \$19.4 million for 2007-08 compared to an estimated outcome of \$21.6 million for 2006-07. The ORS advised that its staff level is 160. Audit understands that the ORS is still in the early stage of re-organisation. As a result, the OFT's existing work practices relating to its regulatory activities remain unchanged until a new regulatory scheme has been developed and implemented.

² 2007-08 ACT Budget Paper No 4.

LEGISLATIVE FRAMEWORK

Liquor Licensing Board

2.6 The Liquor Act created the Liquor Licensing Board (the Board), which, among other things, is responsible for promoting and encouraging responsibility in the sale and consumption of liquor.

2.7 The functions of the Board are to:

- consider and decide applications or other matters referred to it under the Act;
- conduct inquiries, including hearings, in relation to applications or other matters referred to it under the Act;
- advise the Minister, as required, on matters of policy and administration; and
- exercise the other functions given to it under the Act or any Territory law.³

Licensing requirements

2.8 In accordance with the Liquor Act, any person who is selling liquor to another person is required to have a permit or license, except for:⁴

- the duty-free sale of liquor;
- the administration, dispensing or sale of liquor for medicinal purposes by a doctor or a pharmacist;
- the sale of liquor in the premises by the permission and under the control of the Defence Force authorities;
- the sale of liquor in Parliament House;
- the sale by auction by an licensed auctioneer in good faith and in the course of the auctioneer's business;
- the sale by, or on behalf of, the Commonwealth or the Territory, of liquor seized under a law in force in the ACT; and
- the sale of liquor in an exempt university building of the Australian National University and the University of Canberra.

Types of licences

2.9 Table 2.1 outlines the types and conditions of the liquor licences in accordance with Part 4 of the Liquor Act.

³ *Liquor Act 1975*, Section 11.

⁴ *Liquor Act 1975*, Section 9.

Table 2.1: Classes of licences

Class	General conditions of the licence
General	To sell liquor for consumption on the premises or away from the premises at any times or, if times are prescribed, at those times.
On	To sell liquor on the licensed premises at any times or, if times are prescribed, at those times to persons for consumption on those premises.
Off	To sell liquor on the licensed premises at any times or, if times are prescribed, at those times in sealed containers to people for consumption away from those premises.
Club	To sell liquor on the licensed premises of the club to members of the club and member's invited guests and away from the club at any times or, if times are prescribed, at those times.
Special	To sell liquor on the premises and in the places at the specified times and subject to the conditions specified in the licence.

Source: Division 4.1 of the Liquor Act

2.10 As at April 2007, there was a total of 604 active liquor licences, as shown in Table 2.2 below.

Table 2.2: Total number of active liquor licences by class as at 10 April 2007

Type of licence	Number of licences issued
General	14
On	310
Off	175
Club	66
Special	39
TOTAL	604

Source: The OFT's data (Registration and Client Services)

2.11 The total number of active licences has increased from 568 in 2004-05 to the current level of 604. An average of 65 new licences was granted each year since 2004-05. The number of new licences granted each year, however, was offset by a number of licences that were not renewed as the licensee chose to close the business. Also, some new licences were issued in lieu of other types, and some re-applied for a licence after a period without a licence.

Types of permits

2.12 Part 9 of the Liquor Act also allows the Registrar to issue a permit for specific purposes. Table 2.3 outlines the types, conditions for each type and the number of permits that have been issued up to May 2007.

Table 2.3: Total number of permits by type

Type of Permit	Conditions of the Permit	Number Issued
Liquor permit	To sell the amount of liquor (in dollar terms), at the event, at the times and places stated in the permit.	25
Non-profit organisation wine permit	To sell, in closed containers, the amount of wine (in dollar terms), at the event, at the times and places stated in the permit.	1
Tourism wine permit	To sell, in closed containers, the amount of wine (in dollar terms), at the (tourism or promotional) event, at the times and places stated in the permit.	0
TOTAL		26

Source: The OFT's data (Registration and Client Services)

Fees

2.13 The Liquor Act provides that the Minister may determine fees for each type of new licence, transfer of a licence, or renewal of a licence and application for a permit. Licensees are required to renew their licences on or before 30 November each year because all licences expire on that date. Details of the fees charged under the Liquor Act are published on the OFT's website. As at 30 June 2006, total licence and permit fees collected by the OFT amounted to \$1.1 million.

ASSESSMENT OF LICENCE APPLICATIONS

2.14 The OFT's Registration and Client Services Unit has a primary responsibility for administering, registering and licensing persons, businesses and organisations of various industries under a plethora of legislation, regulation and code of practices. Liquor licensing is one of its primary functions. Currently, the Unit has seven staff, including the Unit Manager, who is also delegated as the Deputy Registrar of Liquor Licences.

2.15 Upon receipt of an application for a licence, the decision-maker (the Registrar or in his absence, the Deputy Registrar) must consider the application, 'as soon as reasonably practicable' and, based on the material provided in the application, determine whether the application should be accepted or refused.

2.16 Under section 52 of the Liquor Act, the following matters should be considered by the decision-maker when making a decision in relation to an application for a licence:

- whether the applicant is a fit and proper person to hold a licence;
- whether the premises in relation to which the licence sought are fit and proper for the purpose of the licence;
- whether the conditions of the crown lease over the premises are appropriate for selling liquor;

- the applicant's age;
- the applicant's understanding of the obligations of a licensee under the Liquor Act;
- whether the applicant has been convicted of a defined offence;
- whether the applicant has contravened a provision of the Liquor Act or a direction;
- whether the applicant is an undischarged bankrupt;
- if the applicant is a corporation, whether the applicant is in liquidation; and
- whether the proposed licensed premises and any alterations to the premises have satisfied the conditions stated in the Licensing Standards Manual (the Manual). The Board is required under section 33 of the Liquor Act to issue the Licensing Standards Manual, which sets the standards of the licensed premises to meet the Building code of Australia and the licence facilities standards, including toilet facilities, signage, dancing areas and etc.

2.17 In reviewing an application for a licence, an appropriate OFT officer has to assess the documents submitted by the applicant. These documents could include the following:

- a copy of the current lease;
- the approved plan of the premises and certificate of occupancy;
- two statutory declarations concerning the character of the applicant, industry knowledge and suitability;
- two character references;
- the certificate of incorporation and a company extract from the Australian Securities and Investment Commission (ASIC) if the applicant is a company (for identifying details of shareholders, directors, and company secretary);
- the business name registration certificate (if the applicant is trading under different business name);
- lease advice clearance from the ACT Planning and Land Authority (ACTPLA);
- a letter from the landlord to allow sale of alcohol in the proposed premises;
- a copy of the menu if the licence is for ON, SPECIAL and/or GENERAL premises consumption; and
- if a club, a copy of the constitution and compliance check against the Liquor Act (for example, the club must have more than 200 financial members who were over at least 18 years old and other conditions as per section 54 of the Liquor Act).

2.18 Before approval of the issue of a licence, the proposed premises must be inspected by the appropriate OFT officer (usually the Deputy Registrar) to ensure the

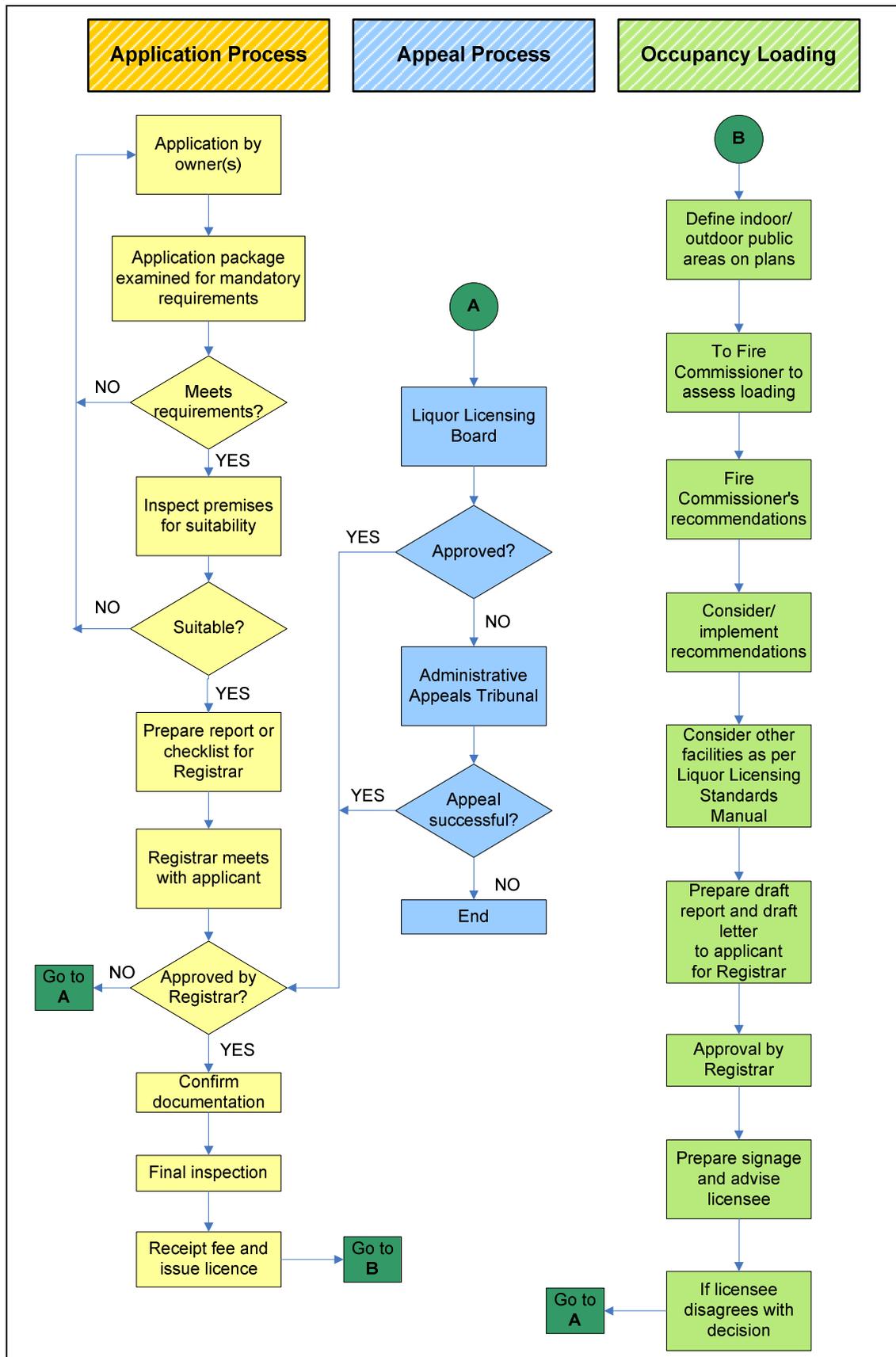
premises meet the Building Code of Australia (BCA) and the licence facilities standards specified in the Manual.

2.19 If the decision-maker has refused to issue a licence, an applicant can appeal the decision to the Liquor Licensing Board and the Administrative Appeals Tribunal (AAT).⁵

2.20 Diagram 2.1 illustrates an overview of the licensing process. The Diagram outlines the standard work practices (in respect of liquor licensing and registration) that were documented by JACS Internal Audit in June 2004 (Internal Audit Report) and have been adopted by the OFT for many years.

⁵ The application for a licence can be referred to the Board under Part 12 of the Liquor Act and a review of the decision by the AAT under Part 13 of the Liquor Act.

Diagram 2.1: Overview of Liquor Licensing Process



Source: ACT Audit Office

EVALUATION OF LICENSING PROCESS

2.21 The decision to grant a licence depends on the assessment of the licence application and the decision-maker's judgement as to whether the applicant complies with the statutory criteria. The main licence assessment record is held on an application file, which contains all required documentation.

Consistency of assessment process

2.22 Audit examined a sample of application files covering all types of licences, selected from 2004-05 to 2006-07 (up to April 2007). Audit found that the OFT had not consistently adopted the standard work practices outlined in Diagram 2.1 (above) in the assessment of the applications examined by Audit. Not all application files contained a complete set of mandatory documents. Also, in some cases, the assessment process had not been thoroughly followed, as illustrated in Case Study 2.1 below.

Case Study 2.1 – Assessment of the Application for a Licence by a Pub

A newly established pub (Pub A) in the City was granted a GENERAL licence on 13 December 2006. Audit noted that the application file did not include a number of documents:

- no character references of the directors (influential persons). The OFT officer advised that it was their standard practice not to seek character reference if the applicants were existing licensees;
- no certificate of incorporation and a company extract from the ASIC to confirm the details of shareholders and directors. There was no evidence to indicate that the OFT staff had undertaken any company search with the ASIC database to confirm the accuracy and validity of the applicant's details;
- no executed memorandum of sublease; and
- no letter from the landlord stating no objection to the sale of liquor. The decision-maker marked on the application form that the landlord (another incorporated company) was also a shareholder and thus a letter from the landlord was not required. Audit was advised that the landlord also owned other properties that have been rented to the directors of Pub A to operate other licensed premises. The OFT officer advised that a letter from the landlord was not a statutory requirement.

Audit Comments

Audit noted that the standard application form stated that all these documents were required to be provided by an applicant. This clearly indicated that these documents would be part of the statutory requirements, or are otherwise considered necessary to enable the decision-maker to consider the application with adequate facts and information. If the decision-maker has reasonable grounds to believe that a particular document should be exempted or not required, it would be good management practice to clearly document the reason(s) for such exemption. Audit considers that the decision to not request character references, because the applicant is an existing licensee, did not take into account the possibility that the information submitted in past applications may no longer be relevant, or accurate.

Further, Audit searched the ASIC company records of both the applicant and the landlord and found that the directors of the 'landlord' company were not shareholders or directors of the 'applicant' company, as understood by the OFT. It was evident that the OFT did not undertake appropriate procedures to confirm the accuracy and validity of the information that could be used in consideration of the application. This illustrated a casual and inconsistent approach in the assessment process of applications for liquor licences.

Completeness of documentation

2.23 Audit's examination of application files also found that:

- the OFT had been using an 'application for liquor licence check sheets' (application checklist) in recent years to replace a requirement to prepare a report for the Registrar. The checklist indicated that certain documents would be required from the applicants before approval of the application;
- some application files did not contain all relevant mandatory documents, for example, a copy of the lease or sublease, or approved plan. The licences had been issued regardless;
- there was little evidence of follow-up actions where mandatory documents were not submitted or were not found on files; and
- in most cases, there was no documentary evidence of inspection of the premises for suitability to ensure compliance with the BCA and the licence facilities standards. Without a documented inspection report, Audit was not sure whether the decision-maker would have had sufficient information and facts to consider whether the proposed licensed premises were 'fit and proper' for the purposes of the licence in accordance with subsection 52(1)(b) of the Liquor Act.

2.24 In responding to Audit's query about the absence of a documented inspection of the premises, the OFT advised that the officer who performed the inspections had sometimes marked on the letter to the applicant with a tick and date/signature to indicate that the premises were suitable for a licence.

2.25 The *Territory Records Act 2002* requires that an agency 'must make and keep full and accurate records of its activities'. Audit considers that such casual practice (a simple tick and date/signature on the letter to applicant) failed to adequately demonstrate that the premises were suitable, and hence such applications failed to satisfy a licensing requirement. The OFT should consider the preparation and use of a pro-forma inspection report to ensure all relevant matters are examined and for sound record keeping practices.

2.26 Audit was advised that the deficiencies found were primarily caused by a shortage of experienced staff and high turnover of staff in the Registration and Client Services Unit. Given the significant implications on the safety and wellbeing of patrons if a licence was issued to unsuitable premises or licensees, Audit believes the OFT should resolve the resource issues and put in place sound practices and procedures to improve the effectiveness of the application process.

Recommendation 1

The OFT should:

- ensure that documentation for licensing applications is complete and properly maintained on file;
- take timely action to follow up any outstanding documentation;
- implement appropriate checks to verify the accuracy and validity of application details, including information provided by applicants;
- provide adequate supporting documentation to identify the required assessment actions taken - for example, an inspection report on the assessment of the premises for suitability for a licence; and
- document full details of the decision to facilitate accountability and transparency in licensing assessment.

2.27 Audit noted that the application processes, while inadequate, were generally conducted in a timely manner, usually within about four weeks.

2.28 The OFT advised Audit that no applications have been refused in recent years. There have been no recent appeals regarding application decisions.

Policies and guidelines

2.29 The OFT does not have any documented policies and operating procedures addressing receipt, assessment, licensing and registration process. Audit noted that an Internal Audit Report in June 2004 had made a recommendation to the OFT to develop formal procedures in respect of the liquor licensing and registration processes in the form of an Operational Manual. This recommendation has not been implemented.

2.30 Audit understands that the current licensing procedures had been operating for many years, but considers that licence assessments have been made without the support of robust, documented procedures. This has reduced assurance that assessments of applications were made consistently and appropriately. The high turnover of experienced staff in recent years reinforces the need for well documented procedures, including the use of pro-forma checklists and reports to support the decision making process, rather than relying on 'corporate knowledge' or the skills of individual staff.

2.31 JACS is currently undertaking a review of its regulatory scheme following the establishment of the ORS; the review will include the OFT's existing compliance activities. Audit considers it is important that the effectiveness and efficiency of the current work practices relating to liquor licensing be examined in this review. New or revised operating procedures developed subsequent to the review (including decision-making guidance; and training staff in its use) should be documented to enhance:

- operational efficiency;
- consistency in the execution of regulatory activities relating to liquor licensing; and
- assurance that regulatory activities are conducted in accordance with legislative requirements and reflects better regulatory practices.⁶

Recommendation 2

The OFT should:

- review the effectiveness and efficiency of the current liquor licensing procedures;
- develop and publish the new or revised procedures to improve:
 - operational efficiency;
 - consistency in the assessment of application for a licence;
 - compliance with legislative requirements and in accordance with better practices; and
- train staff to ensure they have the appropriate knowledge and skills to assess liquor applications.

Guidance to applicants

2.32 An applicant for a liquor licence must obtain an application pack and seek advice from the OFT directly; there is little relevant information on the OFT's website apart from an electronic version of an application form for a liquor permit. In contrast, electronic lodgement of licensing or registration for most of the OFT's other regulatory activities, such as agents, are available on the ACT Government's Canberra Connect website (refer www.canberraconnect.act.gov.au).

2.33 The OFT has advised that the current practice of having face-to-face discussions with an applicant assists the applicant to have a better understanding of the type of licence that would best serve their business need. In addition, the OFT officer can use this opportunity to assess the applicant's industry knowledge and understanding of their legislative obligations under the provisions of the Liquor Act.

2.34 Audit reviewed the application packs and noted that the forms are reasonably clear and guide the applicants to supply the required information. Audit considers that it may be useful to review and improve the application forms to reduce any ambiguity in the application requirements, in particular to distinguish between statutory requirements and other information that may be helpful to support the application. For example, it is currently not clear in the forms whether there is a statutory requirement for the landlord to provide a letter allowing the sale of liquor in the premises (discussed in Case Study 2.1 before).

⁶ ANAO Better Practice Guide (BPG) titled *Administering Regulation* March 2007, Chapter 2.

2.35 Currently, the Liquor Act is available on the OFT's website. However, applicants cannot easily access detailed guidance material to assist their understanding of the application and assessment processes, such as a plain English guide to the various statutory obligations under the Liquor Act. Audit considers that quality of applications can be enhanced if detailed guidance material is readily available, for example on the OFT's website. Guidance material should describe the application process, outline the responsibilities of the applicant and the OFT as a regulator and the obligations of the licensee, and provide clear instructions and practical examples of the type of information and documents required.

2.36 In addition, the OFT should consider making the application pack available on the Canberra Connect website to encourage use of an electronic application facility. Further face-to-face meetings between the applicants and the OFT can be arranged as necessary and appropriate. This can increase the efficiency of the process.

Recommendation 3

The OFT should:

- provide clear and comprehensive guidance to assist applicants in preparing and submitting quality applications and understanding their obligations under the Liquor Act; and
- make the liquor licence application pack and the guidance material to applicants readily available, for example, on the website for the OFT or Canberra Connect.

MANAGEMENT OF INFORMATION

2.37 Information management is an important contributor to effective regulation. It enables monitoring and assessment of the regulatory functions including licensing and compliance activities, so that regulators and stakeholders are provided with necessary insights into any performance issues - such as licensing assessment delays and timeliness of approval of occupancy loading.

2.38 The OFT has been using a database system called Integrated Business System (IBS) since 2004 to record details of licensing, complaints and inspections. However, not all data has been recorded in the IBS (for example, the system does not record the status of approved occupancy loadings of licensed premises approved prior to the implementation of the IBS). A search of the hard-copy records is also required when certain information is needed.

2.39 Audit also noted that the Compliance Unit had to search for details of non-compliance records from a licensee's hard-copy file. This occurred when the Board asked for the licensee's performance or compliance records prior to making a decision on the level of response to the licensee's recent alleged breach of the Liquor Act.

Audit understands that such simple requests require extensive resources to track the licensee's performance.

2.40 It is evident that the current management information system is inadequate, as it was not possible to access basic information without a time-consuming search of individual files. For example, data are not readily available to inform management of non-compliance by licensees, or of the occupancy loadings of the licensed premises for inspections. Audit found that the poor information management system has made tracking and monitoring of liquor licensing difficult.

2.41 Audit considers that better collection and maintenance of liquor licensing details, licensees' compliance information, and inspections records would facilitate the regulatory function. A simple system can be developed to maintain electronically all relevant data of licensees, which allows easy access, updating and retrieval of data for analysis and reporting.

2.42 It is a fundamental feature of good administration to maintain relevant data in a way that supports an efficient operation and accountability of the area performing the function. The OFT's current arrangements do not always provide readily available information and extensive resources are required at times to collect basic data. This adversely affects an efficient regulatory function and further impedes the development of the OFT's performance indicators, review and improvement of its operations.

Recommendation 4

The OFT should improve its existing management information system to facilitate the regulatory function of liquor licensing, and enhance its accountability.

CONCLUSION

2.43 The National Alcohol Strategy states that the availability of alcohol has proliferated, especially through the increased number of licensed outlets providing liquor products. It is therefore important for the relevant regulatory bodies to effectively regulate the supply of alcohol by enforcement of liquor licensing laws.

2.44 Audit considers that the OFT's licensing procedures lacked robustness and transparency in the assessment and decision making process. This raised significant risks that licences may be issued to unsuitable premises and/or to persons who may not be 'fit and proper'.

2.45 There is significant scope to improve effectiveness and efficiency in liquor licensing, including:

- consistent assessments of applications and better documentation;
- documentation of major decisions and activities to enhance transparency in decision-making processes;

- development of a procedural manual for staff; and
- provision of guidance material to applicants and the general public.

2.46 The current information management arrangements do not provide readily available information to facilitate the regulatory function of liquor licensing. Further it would not support accountability, nor provide transparency for the OFT's performance. Audit considers that the existing management information system relating to the Liquor regulation function needs to be significantly enhanced.

3. APPROVAL OF OCCUPANCY LOADINGS

INTRODUCTION

3.1 This chapter examines the effectiveness and efficiency of the assessment process to determine occupancy loadings. Occupancy loadings assessments are not part of the application process for a liquor licence and are usually conducted by the ACT Office of Fair Trading's Registration and Client Services Unit, as an additional step in the liquor licensing process.

KEY FINDINGS

- The Liquor Act requires the Registrar (or his Deputy) to determine for all licensed premises, except for OFF licences, the occupancy loadings for the indoor and outdoor public areas.
- The Liquor Act does not prohibit the operation of licensed premises prior to the determination of occupancy loading. However, the legislation requires the Registrar to undertake an assessment 'as soon as possible'.
- The OFT has currently applied priorities to the assessment of 'higher risk' premises, such as night clubs or pubs in the major entertainment precincts. Notwithstanding this approach, Audit found that a number of popular licensed premises are currently operating without an occupancy loading. In addition, a large number of 'lower risk' licensed premises have not yet been assessed for occupancy loading.
- The assessment process for occupancy loading was not conducted in a timely manner. Audit found that:
 - the occupancy loading of only one licensed premise had been assessed out of a total of 50 new liquor licences approved since January 2005. The Chief Officer (ACT Fire Brigade) has provided recommendations for another seventeen licensed premises during the period, and only five are in the final stage of assessment pending the decision-maker's final determination; and
 - many licensed premises with licences granted during the period August 1994 to December 2004 were not assessed for occupancy loading.
- Due to failure to manage the approval process for occupancy loadings within a reasonable time, the intent of the legislation and the community expectation of a safe drinking environment were not met.
- Without determination of legally enforceable occupancy loadings, the regulation of overcrowding and protection of the safety and health of the patrons and the public may be more difficult and less effective. This view is supported by a legal opinion provided by the ACT Government Solicitor's Office (GSO) that suggested there might not be a convenient way to enforce overcrowding controls under the provisions of the Liquor Act and the *Building Act 2004* in the absence of a determined loading.

- There may be also a legal risk of potential claim against the Territory as a result of delay in determining an occupancy loading under the Liquor Act, particularly in cases of accidents such as fire.

LEGISLATIVE REQUIREMENTS

Define public areas and occupancy loadings

3.2 Part 3 of the Liquor Act requires the Registrar to determine the occupancy loadings for all licensed premises, except for those OFF licences which sell liquor for consumption away from the premises (for example, liquor retail shops). The requirement to determine occupancy loading has been legislated since 1993.

3.3 The primary purpose for determination of the maximum loadings for the public areas of the premises, in particular the indoor public areas, is to ensure the health and safety of the patrons and of members of the public.

3.4 In determining the occupancy loadings for the premises, the Registrar has to determine which parts of the premises are indoor public areas, taking into consideration various matters, such as the Building Code of Australia (BCA), the bar facilities, dance floor, and toilet facilities. The Registrar must, in writing, determine which areas of the premises are bar-rooms and which are not in accordance with section 40A of the Liquor Act. The determination is marked on the approved plan for compliance purposes.

3.5 For indoor public areas of the premises, the occupancy loading is defined in section 41 of the Liquor Act as the maximum number of persons the determined public area of the premises can accommodate, without involving a contravention of the BOA (Part D1.6 in respect of fire exit widths).

3.6 In respect of outdoor public areas of the premises, the occupancy loading is the maximum number of persons that the outdoor area can accommodate, having regard to the standard and availability of furnishings and toilet facilities for patrons, the appropriateness and adequacy of the barrier that is to delineate the boundaries of the outdoor area, and any impact that would affect the amenity and the health or safety of the patrons or members of the public (section 42 of the Liquor Act).

Assessment policy and procedures

3.7 The OFT has not published any policy or guidelines in relation to the process of determining occupancy loadings. However, the criteria and procedures are defined in Part 3 of the Liquor Act. Further, there has been a series of AAT decisions that have shaped the policies and procedures by which the Registrar can determine

occupancy loadings. The notable cases are the *Private Bin Pty Ltd vs the Registrar and Caftor Pty Ltd vs the Registrar*.⁷

3.8 Diagram 2.1 (Chapter 2) outlined the approval process for occupancy loading. The procedures are summarised below:

- the Registrar has to seek advice from the Chief Officer (ACT Fire Brigade) of his/her decision regarding the determination of the indoor/outdoor public areas of the premises (advice from the Chief Officer is not usually required to determine the outdoor public areas); and
- on receipt of the recommendation of the Chief Officer (ACT Fire Brigade), the Registrar has to make a determination of an occupancy loading regarding other issues in addition to fire safety consideration, such as:
 - the number of persons that can be accommodated on the premises having regard to the area and the facilities (toilets, furnishings);
 - the ability of the licensee to control the premises to ensure that patrons' conduct does not fall below an acceptable standard, and if it does, disorderly patrons can be dealt with effectively without undue disturbances to other patrons on the premises;
 - the ability of the licensee to meet obligations under the Act in relation to issues such as serving or supplying liquor to intoxicated persons and underage drinkers; and
 - the ability of the OFT to carry out its regulatory functions under the Act.

3.9 In determining occupancy loadings for outdoor areas, the main considerations include toilet facilities and the number of chairs the licensee is permitted to use in an outside area under the *Roads and Public Places Act 1937*.

3.10 Audit noted that the criteria used to determine the occupancy loadings are generally in line with the strategies to reduce alcohol-related harms associated with the physical environment of licensed premises outlined in the research commissioned by the National Drug Law Enforcement Research Fund (NDLERF).⁸

EFFECTIVENESS AND EFFICIENCY OF APPROVAL PROCESS

Timeliness of approval process

3.11 The OFT had approved and issued a total of 50 liquor licences (excluding OFF licences) since January 2005. These licensed premises are required to have their occupancy loadings approved in accordance with the Liquor Act. Table 3.1 summarises the status of the approval process.

⁷ *Private Bin Pty Ltd and Registrar of Liquor Licences ACTAAT 94* (21 October 1994), and *Caftor Pty Ltd and Registrar of Liquor Licences ACTAAT 34* (15 December 2006).

⁸ S J Doherty and A M Roche (2003) *Alcohol and Licensed Premises: Best Practices in Policing - A Monograph for Police and Policy Makers*, Chapter 4.

Table 3.1: Occupancy loading assessment since January 2005

Type of Licence	New Licences Granted since January 2005	Occupancy Loading Approved	Determination Pending	Other Advice from the Fire Chief Officer Received but no action by OFT
Club	2	-	1	-
General	1	-	1	-
Special	4	-	-	-
On	43	1	3	12
TOTAL	50	1	5	12

Source: ACT Audit Office analysis of the OFT's data

3.12 Audit examined the assessment records since January 2005 and noted that:

- occupancy loading of one ON licensed premises was approved within five months after issue of the licence;
- five licensed premises were in the final stage of approval process - the recommendations of the Chief Officer (ACT Fire Brigade) had been received and the determinations of occupancy loadings were pending on the decision-maker's final assessment; and
- the Chief Officer (ACT Fire Brigade) had made recommendations of another twelve licensed premises, and some of the recommendations were made in early 2006. However, the OFT had not yet taken any further action, including inspection of the premises and final assessment of an occupancy loading.

3.13 In addition, Audit selected a sample of another nine licensed premises with their licences issued during the period August 1994 to December 2004, and noted that occupancy loadings of only three premises were approved. In some cases, a request for recommendation from the Chief Officer (ACT Fire Brigade) had not been issued. Case Study 3.1 illustrates one of the long standing assessment records.

Case Study 3.1 – A Community Club (Tuggeranong)

A major community club located in Tuggeranong was issued a licence in December 1997. No occupancy loading process has been undertaken since then.

Audit was advised that the club management had been planning extensions and undertaking renovations to the premises in recent years, for example, inclusion of an 'outdoor smoking area'. Consequently, those renovations would involve alteration to internal parts of the club premises. To assess occupancy loadings of a club, the 'outdoor smoking areas' while being 'outdoor' under the provisions of the *Smoking (Prohibition in Enclosed Public Places) Act 2003*, will be considered as 'indoor public areas' for the purposes of determination of occupancy loadings under the Liquor Act. This is because the areas will be accessed from inside the club premises and may not have a means of external entry or emergency exit. The Chief Officer (ACT Fire Brigade) will be required to consider these issues in making a recommendation.

The OFT considered that the Club has a relatively low risk of overcrowding within its premises, and therefore it would not be cost-effective to use the limited resources of the Unit and the Fire Brigade to undertake work in preparing occupancy loadings for premises that would likely to be altered, therefore requiring the process to be completed again.

Audit comments

Audit understands that the Club made extensions or renovations since 1997. However; the current approach by the OFT effectively means that the Club, or any licensed premises undergoing some form of renovation or extension, could be allowed to operate for years without any determined occupancy loading.

Notwithstanding the OFT’s view regarding the lower risk of the club premises, and their current practice to use of the resources by focusing on higher risk premises, it was unacceptable that assessment of a major club’s occupancy loadings was not processed at all over a period of ten years, contrary to the legislative requirement.

3.14 Audit was concerned that occupancy loadings of a significant number of licensed premises have not been processed within a reasonable time after granting the licences, to provide the protection and safety for patrons as intended in the legislation.

3.15 Table 3.2 provides examples of some licensed premises that are operating without an approved occupancy loading.

Table 3.2: Example of some licensed premises without occupancy loading

Licensed Premises	Location	Date Licence Issued	Occupancy Loading Approved	Advice from the Fire Chief Officer Received
Bar No. 1	Civic	05/04/06	No	04/09/06
Nightclub No. 2	Braddon	29/06/04	No	27/03/07
Bar No. 3	Civic	01/06/06	No	12/07/06
Nightclub No. 4	Wanniassa	22/12/06	No	(a)
Bar No. 5	Tuggeranong	22/02/06	No	19/05/07
Nightclub No. 6	Civic	09/06/06	No	30/08/06
Bar No. 7	Dickson	21/08/02	No	(b)

(a) The OFT advised that the licensed premises were recently renovated and no request for advice from the Chief Officer (ACT Fire Brigade) was sent.

(b) The OFT advised that the occupancy loadings of the licensed premises were initially approved on 22 December 2003. Due to renovation of the premises and increase in space, new determination of occupancy loadings has to be made.

Source: ACT Audit Office analysis of the OFT’s data

Resource issue

3.16 Audit understands that additional regulatory functions have been allocated to the OFT that have put pressure on its available resources. Consequently, the OFT has

to allocate its resources to managing the highest priority regulatory risks. The OFT's current strategies to determine occupancy loadings are to target those high risk licensed premises, such as the night clubs in the major entertainment precincts, so that this can be processed and approved within a short period of time. Notwithstanding this approach, there remained a number of higher risk nightclubs and bars without approved occupancy loading for many years.

3.17 Maximising regulatory effectiveness with available resources is an ongoing challenge for a regulator. Audit believes that the timeliness of administration of occupancy loading needs to be significantly improved to protect the safety of the patrons and members of the community and to meet the intention of the legislation.

Recommendation 5

The OFT should put in place sound management practices to ensure assessment of occupancy loadings are completed in a timely manner.

LEGAL OPINION

3.18 Audit noted that the Liquor Act does not prohibit any licensed premises to operate prior to the determination of an occupancy loading under sections 41 or 42 of the Act. The Act requires an assessment to be carried out 'as soon as possible' but sets no time limit for doing so.

3.19 In the absence of any determined occupancy loading, the OFT advised that it believed that the Board had a very broad power to issue a direction under Division 5.4 of the Liquor Act, if the licensee was found to 'have, in the licensed premises, created a fire hazard to life or property or permitted such a fire hazard to develop'.⁹

3.20 The directions that the Board could issue include a decision to suspend the licence for a certain period. Further, the OFT indicated that, in view of limited resources, the current arrangements provide flexibility in dealing with the administration of occupancy loadings. If any licensed premises operating without an approved occupancy loading were found to have a problem, the OFT would direct resources to manage the determination process as a matter of priority.

3.21 In view of the significant number of licensed premises that did not have approved occupancy loadings, Audit considered that it was necessary to seek legal advice from the GSO in respect of several matters regarding the administration of the Liquor Act, in particular:

- whether there would be a breach of the Liquor Act or any other Territory law for licensed premises to operate without occupancy loading; and

⁹ *Liquor Act 1975*, Sub-section 82(1)(f).

- in the absence of approved occupancy loading, how the Territory and the OFT exercise their function to regulate the number of people in the premises to protect community safety.

3.22 The GSO advised that:

- There is no breach of the Liquor Act where a licensed premises operates without an approved occupancy loading when such a loading has not been determined.
- There does not appear to be a convenient method of enforcement of overcrowding controls in the absence of a determined occupancy loading, [Neither] ... the issue of directions under the Liquor Act nor ... the relevant provisions of the Building Act [are] particularly useful for the purposes of controlling overcrowding in licensed premises ...
- Because no time limit is set within which an occupancy loading can be determined after a grant of a licence, the law provides that the relevant decision maker should issue his or her notice 'as soon as possible' and the Chief Fire Officer (Fire Brigade) and the Registrar should each carry out their part of the process of determining an occupancy loading also 'as soon as possible'. However, it is not clear what 'as soon as possible' really means.

3.23 Further, in respect of any potential liability to the Territory as a result of a delay in determining an occupancy loading under section 41 of the Liquor Act, the GSO advised there would be a risk but it was difficult to quantify. In summary, the GSO stated that it is possible that a person injured as a result of overcrowding in premises would be able to establish liability on the part of the Territory in negligence, on the basis that the Territory had failed to exercise its statutory power to fix an occupancy level. Examples of some overseas events involving overcrowding suggest that the potential for injury or loss of life in case of fire or a panic in overcrowded premises is substantial and an accident may result in substantive claims for serious injury from many people.

3.24 The AAT, in its decision of the *Private Bin Pty Ltd vs the Registrar* (1994), commented that:

What the evidence shows is that occupancy loadings have not been determined for all relevant licensed premises in the Territory ... If strict adherence to occupancy loadings were as necessary to the protection of public safety ... one would have expected urgent action to be taken where breaches occurred and that it would have been regarded as very important for occupancy loading to be determined for all premises. I am left with the impression that priority in determining occupancy loadings has been given to premises where difficulties in overcrowding have been experienced. The imposition of a predetermined number makes regulation of overcrowding simpler.¹⁰

3.25 Audit considers that failure to determine the occupancy loadings in a timely manner does not meet the intent of the legislation, and the expectation of the licensees to have their occupancy loadings determined so they can know the maximum number

¹⁰ ACTAAT *Private Bin Pty Ltd, The and Registrar of Liquor Licence* (1994) ACTAAT 94 (21 October 1994), paragraph 37.

of patrons that can be accommodated. To protect the community safety and effectively manage overcrowding in licensed premises, it is essential that the OFT take prompt action to ensure better assessment of occupancy loading, including setting performance indicators, timeframe targets and review of outcomes.

3.26 Audit believes that it may also be desirable for JACS to consider possible amendments of the legislation to provide for statutory timeframes within which occupancy loading for different classes of licences must be made. Similar statutory timeframe requirements are legislated for the development application process administered by the ACTPLA pursuant to the *Land (Planning and Environment) Act 1991* and the *Land (Planning and Environment) Regulations 1992*.

3.27 Audit understands that the ACT Government is planning to undertake a review of the Liquor Act in the near future. Audit considers that there is merit in prescribing a statutory period for assessment of occupancy loadings to provide certainty to the industry and to promote accountability and a more effective regulatory function.

Recommendation 6

JACS should consider reviewing and amending the legislation to prescribe a timeframe for assessment of occupancy loadings, in order to enhance the integrity and accountability of the process.

CONCLUSION

3.28 Rarely will a regulator have available to it all the resources it would like for meeting the expectations from the Assembly, the Territory, the industry and the community. Balancing available resources with regulatory priorities and stakeholder expectations is a key management challenge for regulators.

3.29 The Territory has the duty to ensure adequate resources and capacity are available for regulatory functions, especially when these relate to the protection of community safety and harm minimisation, as in the case of supply and consumption of alcohol. Audit considers that the OFT did not manage effectively the regulatory risk associated with the legislative requirements for determination of an occupancy loading, since occupancy loadings have not been determined for many licensed premises in the Territory. Such regulatory risks have to be addressed by improving management, practices and procedures and possibly amending the legislation to provide for prescribed timeframe for the process. To not do so could expose the Territory to potential legal liabilities.

4. MANAGING COMPLIANCE

INTRODUCTION

4.1 This chapter examines the activities of the ACT Office of Fair Trading to manage regulatory risks and monitor compliance by liquor licensees.

KEY FINDINGS

- The OFT has undertaken a range of compliance activities to regulate licensed premises and patrons' behaviour in accordance with the Liquor Act.
- The level of regulatory activities, in particular the number of inspections, has been significantly reduced in recent years, partly reflecting inadequate resources. It is unlikely that the current regulatory strategies and activities are sufficient to provide assurance that compliance activities are effective.
- The OFT did not achieve its targeted numbers of inspections in recent years notwithstanding a significant reduction in inspection targets since 2004-05. The OFT conducted:
 - 41% of the annual target of 1000 inspections in 2004-05;
 - 78% of the annual target of 500 inspections in 2005-06; and
 - 60% of the annual target of 400 in 2006-07.
- The OFT did not have documented risk management policies and procedures for the regulatory administration of the Liquor Act. The OFT did not apply a systematic risk management approach to address key regulatory and operational risks (including resourcing issues) or develop strategies to mitigate those risks.
- After-hour inspections conducted by the OFT's Compliance Unit are an effective means to monitor the management and operations of the licensees, including the behaviour of patrons. These inspections, however, were infrequent and limited in coverage, and could not assure adequate results being achieved from compliance activities.
- The OFT had primarily targeted higher risk licensed premises in its after-hour compliance inspections. Only 28%, 34% and 18% of total licences issued in 2004-05, 2005-06 and 2006-07 respectively were selected for compliance inspections. Some of these licensed premises were inspected more often because of higher risks identified by the Compliance Unit. Most licensed premises, however, have never been subject to inspection.
- From 2004-05 to April 2007, nearly 350 breaches were reported by the OFT comprising:
 - non-compliance with licensing conditions (35%);

- non-compliance with the standards of the Liquor Licensing Standards Manual (30%); and
- breaches of under-age drinking provisions (15%).
- Such high levels of non-compliance would appear to indicate that an extension of regulatory activities would be necessary to ensure better industry compliance with legislation and licensing conditions.

REGULATORY COMPLIANCE FRAMEWORK

Regulatory Function

4.2 Division 2.2 of the Liquor Act allows the Chief Executive of JACS to appoint a public employee as:

- the Registrar;
- the Deputy Registrar; and
- an inspector of licensed premises.

4.3 Delegated officers are authorised to inspect licensed premises or any premises being suspected of selling liquor on the premises and to exercise their regulatory functions in accordance with the Liquor Act, including:

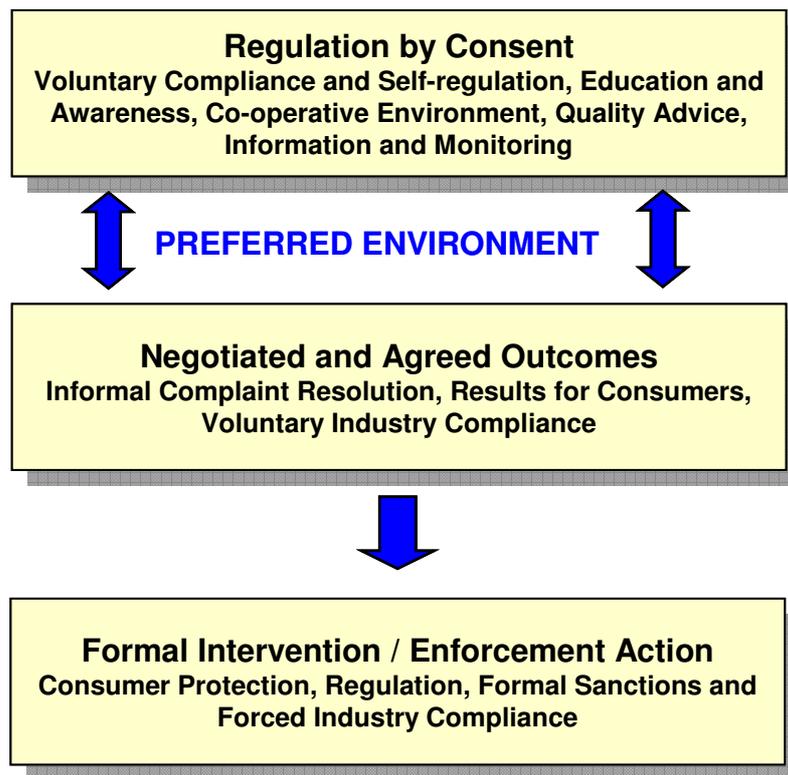
- performance of an occupancy loading check;
- enforcement and prosecution of under-age persons (under 18 years old) who buy, possess or consume liquor on the premises;
- inspection of the licensed premises for compliance with the Licensing Standards Manual, such as cleanliness of premises and facilities; and
- regulation of conduct of licensees, such as security staff, signs/notices, provision of food and responsible practices in the service, supply and promotion of alcohol (for example, no supply of liquor to intoxicated patrons).

Policy and Procedures

4.4 The OFT issued a general 'Compliance Investigations Policy and Procedures' (the Compliance Policy) in March 2004, to apply to all regulatory activities of the OFT. This policy outlines the operating framework for the OFT and the procedures in undertaking its regulatory activities - including investigation process, consideration of administrative law and natural justice, record keeping requirements, evidence collection, and project management of compliance and regulatory investigations.

4.5 The Compliance Policy states that the OFT's preferred operating environment is not solely to focus on taking 'formal intervention and/or enforcement'. The preferred option is to regulate industry through 'regulation by consent' and 'negotiated/agreed outcomes' as shown in Diagram 4.1 below.

Diagram 4.1: The OFT Operating Environment Model



Source: The OFT’s Compliance Investigations Policy and Procedures March 2004

4.6 Audit noted the compliance strategies, as outlined in the OFT’s Compliance and Enforcement Policy (which is available on the OFT’s website), focus on:

- education;
- monitoring and inspections;
- self-regulation;
- information sharing; and
- enforcement.

4.7 There was no specific compliance policy or procedure for liquor regulations. Audit was advised that the OFT Compliance and Enforcement Policy, which seems to refer mostly to fair trading laws, such as the *Fair Trading Act 1992*, also applies to the compliance policy for liquor licensing.

Risk Assessment

4.8 JACS promulgated its Risk Management Plan for 2007-09 in early 2007. The RMP has identified that the key risks of the newly established Office of Regulatory Services (ORS) are:

- an inability to balance reactive service delivery requirements and strategic development work;

- a lack of ongoing capacity and capability to meet service delivery requirements;
- the establishment of ORS and transition to the new service leads to uncertainty relating to budgets and delegations; and
- a tight budget limits the ability to secure and retain required capabilities.

4.9 Audit noted that the OFT's Compliance Policy required staff to prioritise compliance investigations based on assessment of risks (such as matters requiring prosecution action), and to adopt a systematic approach in investigations management. Audit found, however, that the OFT did not have any documented risk management policies and procedures in the regulatory administration of the Liquor Act. Also, the OFT did not undertake a systematic risk management approach to address, in an explicit and structured way, key regulatory and operational risks to achieving regulatory outcomes, and strategies to mitigate those risks, including necessary resource allocations.

4.10 Regulatory risk is an actual or potential event or circumstance that interferes with the achievement of a regulatory policy objective or administrative outcome.¹¹ In the context of liquor licensing compliance activities, it can be categorised into the following broad groups:

- risk that affects the OFT's ability to effectively administer the legislation - for example, availability of resources to deal with an unexpected event; and
- risk that decreases the licensees' ability or willingness to comply with legislative requirements - for example, lack of understanding by licensees of their obligations, or a lack of control of patron entry to abide by a determined occupancy loading.

4.11 The JACS 2007-09 Risk Management Plan has outlined the Department's Risk Accountability Framework, which requires all managers and staff to be responsible for integration of risk management principles in business and project planning and implementation of effective risk treatment strategies.

4.12 Audit considers that to achieve the expected regulatory outcomes, it is necessary to implement a structured and systematic risk management approach to identify relevant regulatory risks associated with liquor licensing, and to develop and implement strategies to mitigate those risks. An integrated risk management planning approach would minimise exposure to significant risks through identification, assessment and management of risk, as well as enhancing the ability to improve overall performance. Importantly, management and staff should be fully aware of, and implement the risk plan in their operational activities.

¹¹ ANAO Better Practice Guide (BPG) titled *Administering Regulation* March 2007, Chapter 2.

MANAGEMENT OF COMPLIANCE ACTIVITIES

4.13 The OFT's Compliance Unit is responsible for undertaking regulatory functions under various acts, including ACT fair trading laws,¹² *Security Industry Act 2003*, *Sale of Motor Vehicles Act 1977*, *Trade Measurement Act 1991*, and the Liquor Act. In 2004, the Compliance Unit had eight staff members, including the Unit Manager and one full time trade measurement officer. There were two compliance teams and one of these was responsible for undertaking compliance work in relation to liquor licensing, security industry, and adult films. Currently, the Unit has a total staff of six including one temporary liquor inspector who is planning to leave the OFT shortly. Due to the departure of several officers since 2004, the ORS is currently recruiting additional staff.

4.14 In respect of the liquor licensing monitoring program, the OFT has primarily performed a mix of reactive and proactive compliance activities. Table 4.1 outlines the type of activities conducted by the Compliance Unit in recent years.

Table 4.1: The OFT liquor licensing compliance activities

Program	Major Activities
Routine	Primarily reactive inspections in response to complaints, follow-up on cancelled/suspended licences, St Patrick Day, underage functions, major events permits (such as Summernats and Canberra Shows), and other general inspections of licensed premises.
After Hours	Primarily proactive enforcement, focusing on checks of security staff licences, cleanliness of toilets and premises, provision of food, intoxicated patrons, underage persons in the premises, occupancy loadings and other matters (e.g. patrons drinking in public places outside the licensed premises).

Source: ACT Audit Office

4.15 The Compliance Unit advised that, in planning the after-hours inspections, compliance activities would target higher risk licensed premises based on:

- the inspectors' industry experience and knowledge;
- the track record of licensees; and
- any lessons learnt from previous visits.

4.16 The licensed premises selected for inspection usually included those popular night clubs, pubs, bars and clubs in the major entertainment areas, with potential risk of overcrowding and underage persons on the premises. Audit found no evidence of proper planning for inspections; inspection was based on ad-hoc decisions or the knowledge of individual inspectors rather than a proper analysis of risk data and evidence.

¹² *Fair Trading (Consumer Affairs) Act 1973* and *Fair Trading (Administration) Act 1996*.

Frequency and quantity of compliance activities

4.17 The OFT was required to report its annual output performance of regulatory services in 2004-05 and 2005-06 Statements of Performance. The accountability indicators relevant to the regulatory schemes administered by the OFT were included in the following indicators:

- percentage of inspected businesses that comply with Fair Trading laws;
- ratio of disciplinary proceedings to inspections;
- percentage change in complaints; and
- average cost per inspection by OFT.

4.18 There was no performance indicator to report the quantity of disciplinary proceedings, inspections and investigations undertaken by the OFT. However, details of compliance, investigations, inspections and prosecution in respect of the regulatory schemes administered by the OFT were included in the appendices of JACS annual reports. Regulatory activities administered under the provisions of the Liquor Act were also included in one of the appendices.¹³

4.19 The Compliance Unit submits its quarterly performance reports to the JACS Executive, and the report shows the achievements against the annual target set for each type of compliance activity. The number of liquor licensing inspections conducted from 2004-05 to mid April of 2007 is shown in Table 4.2.

Table 4.2: Compliance Liquor Inspections by the OFT (July 2004 to April 2007)

Inspections	2004-05	2005-06	2006-07 (to mid April)
Number of routine	88	112	36
Number of after hours	322	282	176
Total Inspections	410	394	212
Annual Target	1000	500	350⁽¹⁾

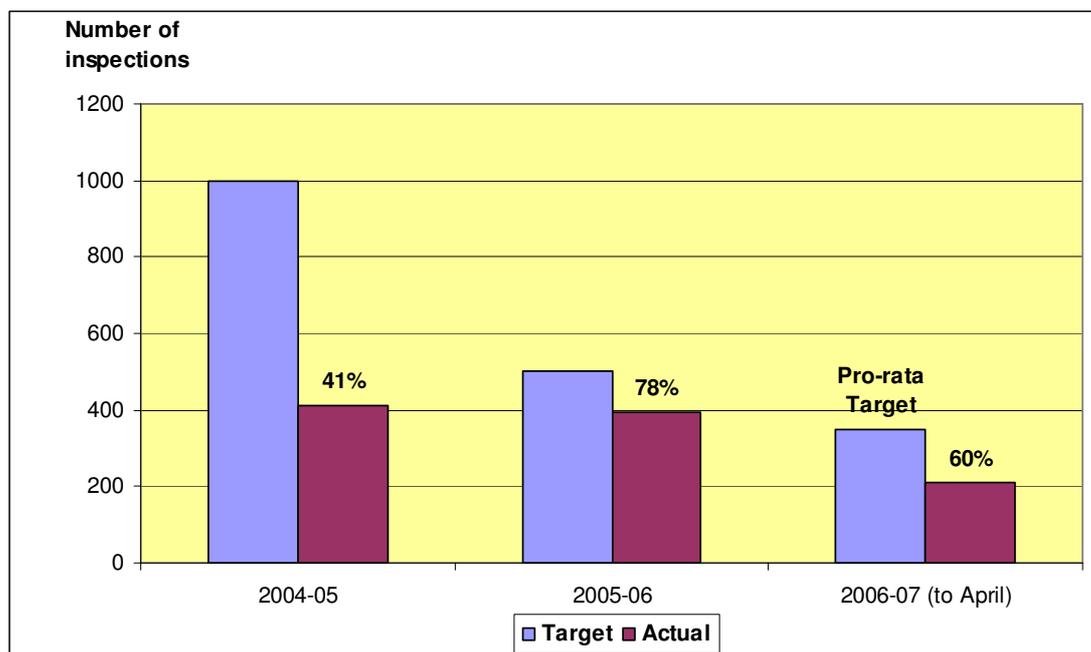
⁽¹⁾ Pro-rata target for 10.5 months based on a full year target of 400.

Source: ACT Audit Office analysis of the OFT’s data

4.20 Diagram 4.2 outlines the performance outcomes of the regulatory activities conducted by the Compliance Unit from 2004-05 to 2006-07 (up to April 2007).

¹³ JACS 2004-05 Annual Report Vol 1 Table 95 p 243 and 2005-06 Annual Report Vol 1, p 172.

Diagram 4.2: Number of Inspections Compared to Target, (July 2004 to April 2007)



Source: ACT Audit Office

4.21 The number of liquor licences continues to increase as the population of Canberra grows, but the significant reduction in inspections in recent years fails to keep pace with the need to adequately monitor compliance of licences. It was of concern that as at April 2007, the OFT had achieved only 60% of the 2006-07 inspection target, a target that is already 60% below the 2004-05 target.

4.22 Audit found that the OFT had not allocated adequate resources to manage the regulatory activities in respect of liquor licensing and had not put in place an appropriate monitoring strategy to address this regulatory risk since 2004-05.

4.23 The Compliance Unit advised that, on average, one after-hour inspection has been scheduled each month in recent years. Subject to availability of staff, the Unit would sometimes be able to schedule after-hour inspections every fortnight in some months.

4.24 Given that the highest risks of non-compliance, in particular under-age drinking and exceeding occupancy loading, would be likely to occur at night times or early hours in the morning at popular licensed premises, it is unacceptable that inspections at these times were limited to one or two per month for the whole industry.

Effectiveness of compliance strategy

4.25 Table 4.3 provides a summary of the outcomes of the OFT’s compliance activities from 2004-05 to 2006-07 (up to mid April). Audit noted that about 29% and

34% of the total number of active licences issued in 2004-05 and 2005-06 were inspected respectively, and in 2006-07 only 18% of licences have been inspected.¹⁴

Table 4.3: The OFT Compliance Outcomes (July 2004 to April 2007)

	2004-05	2005-06	2006-07 (April)
Total Inspections	410	394	212
Number of Licensed Premises Inspected ¹	164	198	109
Number of Offences Reported ²	92	145	110

¹ Any licensed premises that had been visited more than once during the year was counted as one.
² More than one offence would be found in a visit of one licensed premises.

Source: ACT Audit Office analysis of the OFT’s data

4.26 Audit has classified the reported offences based on the nature of the breaches into eight major categories, in accordance with the Liquor Act. The major categories of breaches are described in Table 4.4.

Table 4.4: Major Categories of Non-Compliances

Categories	Nature of Breaches Pursuant to the Liquor Act
Production of permit/licences	Failed to produce permit/licence at request and keep the licence on the licensed premises as required by sections 26(2) and 145.
Non-compliance with the Manual	Breaches of the standards for licensed premises specified in the Liquor Licensing Standards Manual in accordance with section 33 of the Liquor Act.
Licensing conditions	Various sections under Parts 7 to 10 of the Liquor Act, for example, notices about food and bar trading hours.
Intoxication	Section 138(1) prohibits sale of liquor to intoxicated people.
Consumption of liquor in certain public places	Section 139 prohibits consumption of liquor in prescribed public place, e.g. within 50 metres of a bus interchange or outside the licensed premises.
Exceeded occupancy loadings	Section 148 prohibits a licensee to permit a number of persons in excess of the occupancy loading determined by the Registrar under sections 41 and 42 of the Liquor Act.
Failing to display occupancy loading signs	Section 149 requires a licensee to display a sign in accordance with section 43 of the Liquor Act.
Provisions relating to underage drinking	Breaches of Division 10.2 of the Liquor Act, e.g. allowing underage people entry to bar-room on licensed premises.

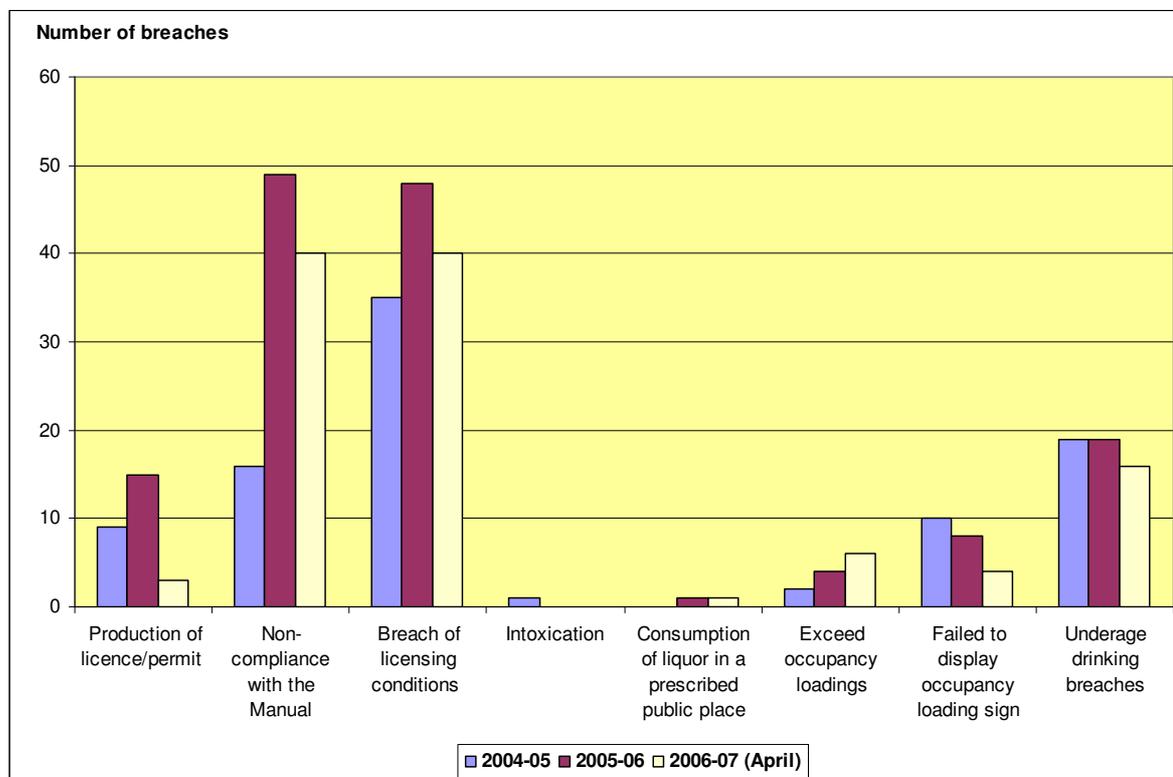
Source: ACT Audit Office

4.27 Diagram 4.3 displays the number of breaches against each category of the offences by year. Audit’s analysis of the trends and nature of the breaches reported by the OFT revealed that, based on total number of breaches from 2004-05 to 2006-07 (up to April), most of the licensees were found not complying with licensing

¹⁴ JACS 2004-05 Annual Report Vol 1 Table 95 p 243 (568 licences) and 2005-06 Annual Report Vol 1, Table 89 p 172 (576 licences). Total licences issued in 2006-07 were 604 (refer Table 2.2)

conditions (35%), the standards of the Manual (30%), and under-age drinking provisions (15%).

Diagram 4.3: Analysis of Breaches of the Liquor Act (July 2004 to April 2007)



Source: ACT Audit Office analysis of the OFT’s data

4.28 Based on Audit’s analysis of the OFT’s compliance activities, the after-hour inspections conducted by the OFT’s Compliance Unit are an effective means to police the management and operations of the licensees, (including the behaviour of patrons) to reduce alcohol-related harms and anti-social behaviour within and around a licensed drinking environment. This analysis was consistent with Audit’s observation of an after-hour inspection summarised in Case Study 4.1 below.

Case Study 4.1: Observation of an After Hour Inspection

Audit accompanied the OFT’s Compliance Team, which comprised two OFT officers in the company of three police officers, while the Team conducted after-hour inspections on the night of Friday 20 April 2007. The inspections were a joint operation with ACT Police targeting the higher risk entertainment venues in the Southside of Canberra, covering the suburbs of Philip, Mawson, Wanniasa, Tuggeranong, Manuka, and Kingston. The Compliance Team also inspected one licensed premises located in the City in the early morning of 21 April 2007 to investigate a noise complaint raised by the nearby residents. Audit had observed part of the compliance inspections until midnight on 20 April 2007.

In general, the Compliance Team inspected whether the licensees had complied with the provisions of the Liquor Act in respect of engagement of licensed security staff, standards of the licensed premises (in accordance with the Manual), sale of alcohol to intoxicated persons and minors (persons less than 18 years old).

Audit understood that, due to a comparatively quiet night, there were not many serious breaches found during inspections, except one case in relation to underage drinking found on one licensed premise in the City. Other minor issues, such as consumption of alcohol outside the licensed premises and breach of the standards of the Manual, were noted.

Audit Comment

Inspections often resulted in various breaches being identified at licensed premises. Follow-up actions to deal effectively with the breaches assist in promoting responsible supply and consumption of alcohol. It is of concern, however, that these types of inspections did not occur with the appropriate frequency and coverage.

4.29 The National Drug Law Enforcement Research Fund (NDLERF) report suggests that enforcement is a key element of best practice in policing licensed premises. It also suggests that liquor laws are the principal mechanism for reducing alcohol-related harms in and around licensed drinking environment. This can be achieved by focusing on the management and operation of a licensed drinking environment, as well as the behaviour of patrons.

4.30 Audit noted that the OFT had appropriate regulatory objectives by undertaking reactive and proactive compliance activities. However, resource issues and a high turnover of experienced inspectors, led to a reduction in the number of compliance inspections, and the OFT had not managed to achieve the expected targets in recent years. Audit considers this outcome unacceptable, given both the increasing number of breaches and the importance of adequate compliance.

4.31 Further, as indicated in Table 4.3 above, the OFT had only visited about 29% and 34% of total licensed premises in 2004-05 and 2005-06 respectively and 18% in 2006-07 (up to April). A better practice is for all regulated entities to be covered, with higher risk entities visited more often and / or subjected to more intensive visits. Although some of the licences may be considered as lower risk, Audit considers that it would be useful for the OFT to undertake more preventive and proactive inspections of all licensed premises in a period of time, at least every two or three years. More proactive enforcement assists early identification of problem practices and has a deterrent and educational effect on licensed venue practices, and patrons' behaviours.

Recommendation 7

The OFT should develop and implement an explicit, systematic and documented overall strategic framework for liquor licensing that:

- addresses key priorities and strategies for delivering regulatory outcomes;
- incorporates a comprehensive risk assessment and strategies to address and monitor identified risks; and
- targets compliance activities in accordance with assessed licensee risks, preferably covering all regulated entities within a set period of time, with higher risk entities visited more often and /or subjected to more intensive inspections.

Advice and complaints

4.32 The OFT's Advice and Complaints Unit is responsible for providing advice to the general public and handling complaints received. Information on how to make an inquiry or complaint is available on the OFT's website, including a specific web page for liquor licences and permits. The OFT website advises that 'if your complaint warrants further investigation, you will be asked to lodge an official complaint'.¹⁵

4.33 Upon receipt of any inquiry or complaint (in writing, by email or by phone), the Advice and Complaints Unit will record in the Integrated Business System (IBS) details of the inquiry or complaint and the action taken. If a matter cannot be resolved by the Unit's staff, it is referred to the appropriate business unit, for example, liquor licensing issues will be referred to the Registration and Client Service Unit. The OFT received a total of 85 inquiries from July 2005 to 5 June 2007. Only three complaints related to the liquor industry; the complaints concerned alleged breaches of fair trading laws such as misleading advertising in the sale of liquor.

4.34 The Advice and Complaints Unit refers complaints relating to the regulatory activities of liquor industry to the Compliance Unit. In addition to matters referred by the Advice and Complaints Unit, the Compliance Unit advised that it had received a few complaints (usually by phone or email) directly to the Unit in recent years regarding the conduct of the licensed premises. Audit noted that the Compliance Unit had followed up a total of 18 complaints in its routine inspections in the period from January 2005 to February 2007. However, after investigation by the Compliance Unit, many of these complaints, failed to identify sufficient evidence to take any disciplinary action against the licensees.

4.35 Audit understands that the Compliance Unit had, as a result of its investigations of complaints, successfully referred three matters to the Registrar and the Board for disciplinary actions in the period from January 2004 to April 2007.

Education and training

4.36 In the ACT, there is no statutory requirement for a licensee or its staff to have formal training, such as the 'Responsible Service of Alcohol' (RSA) course. However, any person who provides the RSA training is required to be approved by the Registrar pursuant to section 8 of the Liquor Act. There are about ten persons and institutions that have been accredited by the Registrar to provide the RSA training course in the Territory.

4.37 Although there is no legislative requirement to do so, Audit understands that some licensees and clubs prefer to employ staff who have completed the RSA training. The Registrar may also refer to the Board for a direction to require a licensee to ensure that all the licensee's restaurant/bar staff attend a RSA course, for example, if the licensee has been found in breach of the Liquor Act on several

¹⁵ http://www.fairtrading.act.gov.au/Services_Main.htm

occasions by serving alcohol to intoxicated persons or minors. Audit noted that the Board had issued such directions to several licensees in recent years.

4.38 As part of the enforcement strategies outlined in its Compliance and Enforcement Policy, the OFT uses publications, presentations, and print media to encourage compliance by licensees and inform consumers. Audit noted that the OFT had issued a total of five newsletters to all licensees, high schools and colleges in ACT since October 2004 to advise on various issues in relation to sale and consumption of alcohol. The newsletters mainly covered the following topics:

- sale and consumption of alcohol by minors and during school formals;
- regulation of minors on the licensed premises, such as acceptable forms of identification cards;
- consequences of breach of the Liquor Act by a minor; and
- matters that licensees should be aware of in conducting their business, such as sign displays, provision of food, checking identification cards, security, intoxication, industry standards, provision of RSA training to staff, education program relating to drink spiking, and smoke free requirements from 1 January 2007.

4.39 In a newsletter to the principals of high schools and colleges, the OFT offered to conduct information sessions at schools and colleges on alcohol related issues. In October 2005, the OFT had written to a number of licensed premises in the major entertainment precincts in respect of in-house training sessions for their staff on the requirements of the liquor licensing legislation. Audit understands that only four licensees in City and Manuka had accepted the offer and others declined to arrange for their staff to attend the training because of the additional staff cost. In November 2006, the Registrar and the Compliance Team conducted educational inspections at Kingston to assist licensees by performing identification checks of patrons at the door and counting against the occupancy loadings.

4.40 Given the limited OFT resources, Audit considers that the OFT efforts in following up complaints, and in offering educational services were adequate.

4.41 Audit considers that there is merit for JACS to actively work with the industry to promote and ensure an appropriate level of self-regulation by the industry. In particular, it would be useful to encourage a collaborative approach with the industry to jointly develop and promote a Code of Conduct for the liquor and licensed hospitality industries, and to implement other initiatives at the licensed premises to minimise harm arising from the misuse and abuse of alcohol. For example, a higher level of co-operation between the industry and JACS could lead to a higher level of licensees and key staff attending relevant training to ensure a sound understanding of the licensees' obligations under the Liquor Act.

4.42 Audit notes that several encouraging initiatives have been implemented in other jurisdictions:

- Consumer Affairs Victoria developed a Code of Conduct for packaged liquor licensees;¹⁶
- Western Australia's Department of Racing, Gaming and Liquor, issued a Harm Minimisation Policy;¹⁷ and
- New South Wales, Victoria, Queensland, Western Australia and Tasmania¹⁸ have a requirement for licensees and staff to complete training in responsible serving of alcohol.

CONCLUSION

4.43 The OFT has undertaken reactive and proactive compliance inspections to regulate licensed premises and patrons' behaviour under the provisions of the Liquor Act. However, given the significant reduction in the frequency of compliance activities, in particular after-hour inspections, the OFT has not achieved its performance targets in recent years. It is therefore unlikely that the OFT's regulatory strategies and activities were sufficient to provide necessary assurances that its liquor compliance activities were effective. Consequently, it is doubtful that the OFT has adequately discharged its role in regulating and promoting responsible supply and consumption of alcohol as intended by the legislation.

4.44 The OFT needs to enhance its regulatory activities by increasing the number of inspections, especially after-hour inspections, to discharge its duties adequately under the Liquor Act. Further, there is merit for JACS to actively work with the industry to promote and ensure an appropriate level of self-regulation by the industry.

¹⁶ Refer Liquor Licensing of Consumer Affairs Victoria website (www.consumer.vic.gov.au)

¹⁷ Refer www.rgl.wa.goc.au

¹⁸ Refer NSW Department of Gaming and Racing (www.dgr.nsw.gov.au), Queensland Department of Racing, Tourism and Fair Trading-Liquor Licensing Division (www.liquor.qld.gov.au) and Tasmanian Department of Treasury and Finance (www.treasury.tas.gov.au)

5. ADDRESSING IDENTIFIED NON-COMPLIANCE

INTRODUCTION

5.1 This chapter examines the response of the Office of Fair Trading to identified non-compliance with the Liquor Act.

KEY FINDINGS

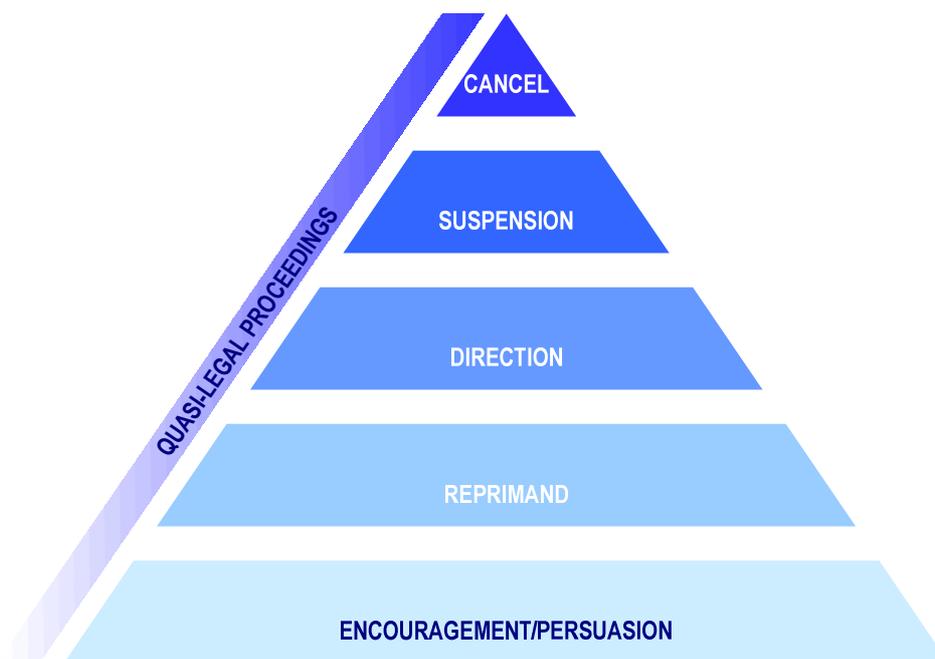
- The Liquor Act provides an appropriate legislative framework to address non-compliance, which includes a set of graduated responses.
- Out of a total of 29 cases referred to the Liquor Licensing Board during the period 2004-05 to April 2007, only one case was dismissed due to insufficient evidence. This suggested that information presented by the Registrar to the Liquor Licensing Board and to the affected licensees was, in most cases, sufficient to substantiate the matters referred to the Board for determinations.
- In the period under review from July 2004 to April 2007, there were only two appeals on the Board's decisions to the Administrative Appeals Tribunal (AAT), representing about 6% of the total determinations made by the Board.
- Of all appeals during the period January 2000 to April 2007, most AAT decisions generally found in favour of the Board and the Registrar, which suggested their decisions were mostly made in accordance with the Liquor Act.
- The responses to non-compliance of a more serious nature by the Registrar and the Board were conducted in a timely manner. The decisions made by the Board and the Registrar were documented and made available to the licensees within a reasonable timeframe.

ENFORCEMENT FRAMEWORK UNDER THE LIQUOR ACT

5.2 The Liquor Act establishes the statutory powers for the Liquor Licensing Board and the Registrar - to enforce compliance by licensees and regulate patrons' behaviour within and around a licensed drinking environment. The Act empowers the Registrar to determine, based on evidence of an alleged breach of the legislation, to refer a matter to the Board. The disciplinary action that the Board can exercise, in part, is determined by the Registrar, who has to decide and recommend to the Board the level of response to an alleged non-compliance.

5.3 The Liquor Act provides a hierarchy of responses that enables the Board and the Registrar to have flexibility in exercising its disciplinary response. Diagram 5.1 describes a set of graduated responses the Board and the Registrar may use to address non-compliance.

Diagram 5.1: Hierarchy of responses under the Liquor Act



Source: ACT Audit Office

5.4 The Board and the Registrar can address non-compliance with an appropriate response pursuant to the provisions of the Liquor Act. For example:

- if the Registrar considers there is sufficient evidence to refer a matter (an alleged breach) to the Board for directions, the Board can only, if the matter is considered proven, either issue directions to a licensee, or reprimand the licensee. The Board cannot impose any penalty higher than the basis of referral by the Registrar; and
- if the Registrar applies for the cancellation of a licence, the Board can, subject to the matter being proven, either cancel the licence, suspend the licence for a specified period, issue directions to the licensee, or reprimand the licensee. The Board can also require the licensee to perform more than one of the above actions in respect of one proven offence.

5.5 Audit understands that applications for directions and reprimands are generally used where the Registrar believes an alleged breach can be remedied by either a monetary penalty or the issuance of a direction for remedial action. For example, the Board may issue directions to a licensee to put in place corrective or preventive procedures - such as improved security arrangements to deal with overcrowding issues.

5.6 Cancellation and suspension applications are generally reserved for the more serious breaches or where the licensees are, in all circumstances, considered to be not 'fit and proper' to hold a liquor licence (for cancellation of licences only). Audit found that during the last three years there was only one case (in August 2006) where the Registrar sought cancellation of a licence by the Board; this was carried out with the Licensee's consent.

5.7 Audit considers the Liquor Act has an appropriate framework that can provide the OFT and the Board power and flexibility in responding to non-compliance. This enables the Board, based on referral from the Registrar, to use lower level responses to address most instances of non-compliance - while reserving more punitive measures for serious non-compliance, for example overcrowding, or if lower level responses fail to achieve the desired regulatory outcomes.

ADDRESSING NON-COMPLIANCE

Effectiveness of assessing non-compliance and responses

5.8 The Registrar, upon review of the inspection reports and the Compliance Unit's recommendations, determines the appropriate level of responses to the alleged breaches. Since most of the alleged breaches found during inspections were minor offences (or were a first time offence by a licensee) the OFT would usually follow up with letters to licensees advising remedial actions required. The licensees would be warned of possible disciplinary action if further breaches were found.

5.9 Table 5.1 summarises the outcomes of referrals made by the Registrar to the Board for hearings and determination of appropriate responses, for the period from July 2004 to April 2007.

Table 5.1: Board Enforcement Outcomes (July 2004 to April 2007)

Disciplinary Proceedings	2004-05	2005-06	2006-07 (April)
Number of cases determined by the Board	10	7	12 ^(a)
Number of breaches (proven)	17	10	14
Number of cases dismissed by the Board	1	-	-
Underage cautions ^(b)	11	11	10
Court prosecution ^(c)	-	-	3
^(a) The figure does not include another five cases (including 20 alleged breaches) which were referred to the Board for subsequent hearings as at 5 April 2007. ^(b) Cautioning young people (under 18 years old) in the presence of a police officer required under section 30 of the Liquor Act. ^(c) These matters related to prosecution for breach of the Liquor Act by an adult (for allowing a young person to use their identification card) and minors.			

Source: ACT Audit Office analysis of OFT's quarterly reports and the Board's hearing records

5.10 Audit found that out of total 29 cases referred to the Board during the period July 2004 to April 2007, only one case was dismissed; this occurred in 2004-05 due to insufficient evidence. This suggests that the evidence presented to the Board and the alleged licensees, in most cases, was sufficient to substantiate the matters referred to the Board for imposing responses or penalties.

5.11 Audit noted that the level of responses determined by the Board in these cases ranged from monetary penalties to suspension of trading for a prescribed period of time. Audit understands that the level of responses was determined by the Board based on the nature and seriousness of the breach, the licensee's previous non-compliance records, and the maximum penalty allowed by the Liquor Act.

5.12 Audit found there were only two appeals to the AAT that related to the period under review. Case Study 5.1 outlines these two appeals where the AAT had generally affirmed the Board's decisions. The proportion of appeals, out of the total determinations made by the Board (29 from 2004-05 to April 2007 at Table 5.1), was small (6 %).

Case Study 5.1: Review of AAT's Cases

Ardglen Pty Ltd, Platform III on Licence 527 and Liquor Licensing Board ACTAAT 31 (25 November 2005)

The AAT considered that the Board's decision to impose a monetary penalty of \$250, as a result of allowing an under-age person on the licensed premises (even though the person did not consume any alcohol), was an appropriate decision.

Fitzpatrick and Liquor Licensing Board ACTAAT 25 (4 August 2006)

It was stated that the applicant (Fitzpatrick) operated the licensed premises located in the City. The licensee was found to have caused undue disturbance or inconvenience (loss of amenity in vicinity of licensed premises) on four occasions (in September 2004, April 2005 and May 2005) due to loud noise emanating from the premises that exceeded the limit allowed by the *Environment Protection Act 1997*. The applicant appealed to the AAT that the Board's decision for each of the four contraventions was unreasonable. The AAT's decision was in favour of the Board's determination to impose a monetary penalty for each of the four contraventions. However, the AAT ruled that the Board's direction to impose a limit on the noise from the licensed premises between the hours from 10.00 pm to 7.00 am was not made in accordance with the Liquor Act and relevant regulations. The AAT considered that such a matter could be dealt with where appropriate in the law courts.

5.13 Audit also found that there were another four appeals lodged with the AAT during the period from January 2000 to November 2005, and three AAT decisions were in favour of the Board and/or the Registrar.¹⁹

5.14 In summary, the majority of the AAT decisions generally found in favour of the Board and the Registrar, which suggests that their decisions were mostly made in accordance with the Liquor Act.

¹⁹ Jackson on Northbourne Pty Ltd and Registrar of Liquor Licences ACTAAT 33 (26 September 2000); Von Braun, Joseph and Liquor Licensing Board ACTAAT36 (13 October 2000); South Pacific Rugby Club Inc and Liquor Licensing Board ACTAAT31 (12 July 2002); and Akuna Club Limited and Liquor Licensing Board ACTAAT47 (20 November 2002). In South Pacific Rugby Club Inc and Liquor Licensing Board, the AAT dismissed the Board's decision to reprimand the South Pacific Rugby Club Inc for allowing a minor in the bar room of the club because the Registrar did not define a bar-room in the licence. Consequently the AAT stated that this would make proof of a necessary ingredient of the offence created under the Liquor Act impossible.

5.15 Audit's examination of the OFT's records also revealed that:

- its response to identified non-compliance was timely; and
- the decisions and directions made by the Board were documented and made available to the licensees within a reasonable time.

CONCLUSION

5.16 Overall, Audit considers that the Liquor Act provides an appropriate enforcement framework for the Board and the Registrar with a set of graduated responses to address non-compliances. The decisions made by the Board and the Registrar were documented and made in a timely manner. There was only a small number of appeals to the AAT and the majority of the AAT decisions generally find in favour of the Board and the Registrar. This suggests that the decisions made by the Board and the Registrar are mostly made in accordance with the Liquor Act.

APPENDIX A – AUDIT CRITERIA, APPROACH AND METHODOLOGY

AUDIT CRITERIA

Key issues to be determined included:

Governance consideration

- A structured and systematic risk management approach is applied to key aspects of regulatory administration, including:
 - strategic planning;
 - operational planning and execution; and
 - managing non-compliance.

Application controls

- Appropriate assessment methodology and practices are consistently applied in assessing and approving applications for liquor licences or permits and occupancy loadings in accordance with relevant legislation and departmental policy and guidelines.

Monitoring and addressing compliance

- A risk based monitoring strategy is developed and implemented to identify the types and frequency of compliance activities, consistent with available resources and an acceptable level of risk.
- Monitoring activities are scheduled and implemented in accordance with the monitoring strategy, and are regularly monitored and reported to senior management.
- Compliance assessments and regulatory decisions are documented and subjected to quality assurance processes to:
 - ensure they are lawful;
 - confirm they have followed established procedures; and
 - improve consistency of assessments and decision making over time and across the OFT.
- Regulatory action against licensee's non-compliance is made in a timely manner.

Accountability issues

- Delegation of decision-making authority is consistent with departmental policy.
- The performance management framework is structured and documented, and provides the means to effectively manage the planning, implementation and quality of regulatory administration.
- Mechanisms are in place that minimise the risk of corruption and misconduct, including actual or potential conflict of interest, regulatory capture, misuse of official information and abuse of power.

AUDIT APPROACH AND METHODOLOGY

The audit approach and methodology consisted of:

- reviewing relevant literature and work undertaken on this subject by other jurisdictions with the intention of finding better practices;
- identifying those documents that set out the policies and procedures to be followed when assessing the Department's operations and processes. This involved identifying the governance and accountability framework and related policy and procedures, researching documents and discussion with the relevant departmental staff;
- identifying procedures and controls used to give effect to the policies and guidelines and to ensure compliance;
- determining whether all the relevant administrative requirements, policies and guidelines had been adequately followed; and
- briefings, interviews, and correspondence with relevant agency staff.

APPENDIX B – BETTER PRACTICES IN ADMINISTERING REGULATION

In March 2007, the Australian National Audit Office (ANAO) issued a Better Practice Guide, titled *Administering Regulation*.

Regulation, as used in the ANAO's Guide, is a term covering a diverse set of instruments used by government to influence or control the way people and businesses behave in order to achieve economic, social or environmental policy objectives. Regulation includes any laws or other rules that govern the conduct of people or businesses. It is not limited to primary or delegated legislation; it also includes quasi-regulation (such as codes of conduct or advisory instruments) where there is a reasonable expectation by government of compliance.

Examples of regulatory functions that may be used to achieve policy objectives include:

- allocation and protection of rights
- certification or licensing of a product, service, person or business
- registration of professionals and non-professionals
- setting and/or imposing industry standards
- collection of taxes, fees or other revenue.

The Better Practice Guide prepared by the ANAO aims to assist Government regulators in meeting their core responsibility efficiently and effectively. It outlines a framework, including principles and better practice that a regulator can use in designing and implementing strategies, systems and processes for administering regulation. Examples of how regulators are currently employing better regulatory practice are provided throughout the Guide.

Although the Guide's target audience is Australian Government regulators, it recognises that regulators operate across many different types of entities, and in very different industries and sectors of the economy. The Guide, therefore, focuses on better practice principles and characteristics relevant to the design and management of administrative operations for all regulators, irrespective of their size, organisational structure or regulatory objectives.

Sound regulatory administration:

- supports the achievement of regulatory policy objectives
- increases administrative efficiency and effectiveness, which reduces administrative costs for the regulator and compliance costs for regulated entities; and
- strengthens confidence in the regulator.

The guide is structured to discuss key elements of a regulatory management framework, and to outline better practice principles and approaches for undertaking key regulatory functions. In doing so, it covers:

- governance considerations;
- information management;
- relationship management
- resourcing issues;
- controlling entry;
- monitoring compliance
- addressing non-compliance; and
- responding to adverse events.

The ACT Auditor-General's Office suggests that regulators within the ACT Government refer to the Better Practice Guide as a useful resource in their development and review of regulatory functions.

The ANAO's Better Practice Guide is available from the ANAO's website at http://www.anao.gov.au/uploads/documents/Administering_Regulation_.pdf

AUDIT REPORTS

Reports Published in 2006-2007

Report No. 4 / 2007	Regulation of ACT Liquor Licences
Report No. 3 / 2007	Collection of Fees and Fines
Report No. 2 / 2007	Agency Implementation of Audit Recommendations
Report No. 1 / 2007	Credit Card Use, Hospitality and Sponsorship
Report No. 9 / 2006	Sale of Block 8, Section 48, Fyshwick
Report No. 8 / 2006	2005-06 Financial Audits
Report No. 7 / 2006	Annual Report 2005-2006
Report No. 6 / 2006	Vocational Education and Training
Report No. 5 / 2006	Rhodium Asset Solutions Limited

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Report No. 3 / 2006	Management of Trust Moneys and Other Non-Public Moneys
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Report No. 1 / 2006	Regulation of Charitable Collections and Incorporated Associations
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Report No. 6 / 2005	Government Procurement
Report No. 5 / 2005	Annual Management Report for the Year Ended 30 June 2005
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Report No. 6 / 2004	Workers' Compensation Supplementation Fund
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Report No. 4 / 2004	Data Reliability for Reporting on the ACT 'No Waste by 2010' Strategy
Review Report	Matters Relevant to the Office of the Special Advisor, Council of Australian Governments and Inter-Governmental Relations

Reports Published in 2003-2004

Report No. 3 / 2004	Revenue Estimates in Budget Papers 2002-03
Report No. 2 / 2004	Travel Arrangements and Expenses
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Report No. 1 / 2003	Effectiveness of Annual Reporting
Report No. 7 / 2002	Financial Audits with Years Ending to 30 June 2002
Report No. 6 / 2002	Annual Management Report for the Year Ended 30 June 2002
Report No. 5 / 2002	V8 Car Races in Canberra – Costs and Benefits

Details of reports published prior to 2002-2003 can be obtained from the ACT Auditor-General's Office or the ACT Auditor-General's homepage: <http://www.audit.act.gov.au>.

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