

Australian Capital Territory

Planning and Development (Remission of Lease Variation Charges for Community Purpose – Housing Assistance) Determination 2011 (No 1)

Disallowable instrument DI2011-318

made under the

Planning and Development Act 2007, Section 278B

Explanatory Statement

Terms

In this explanatory statement:

“Act” means the *Planning and Development Act 2007*.

“Regulation” means the *Planning and Development Regulation 2008*.

“determination” means the Planning and Development (Remission of Lease Variation Charges for Community Purpose – Housing Assistance) Determination 2011 (No 1) (disallowable determination) that is the subject of this explanatory statement.

“LVC” means lease variation charge.

“nominal rent lease” means as defined in the dictionary to the Act. The dictionary defines this lease as “a lease for nominal rent” ie a lease for which no significant rent is payable (as opposed to a rental lease).

“s276E chargeable variation” is defined in s276A(1) of the Act. Essentially these are lease variations whose LVC is fixed by the LVC Determination (LVC code) made by the Treasurer under s276E of the Act. These lease variations are identified in s276A(1) of the Act and s170A of the Regulation.

“s277 chargeable variation” is defined in s276A(1) of the Act. These are lease variations other than s276E chargeable variations or s276E chargeable variations whose LVC has not been set in the LVC Determination (the LVC code) made under s276E. The LVC for these variations is determined under s277 of the Act.

Background

A Lease Variation Charge (LVC) is charged when the lessee seeks to vary their lease and this is approved.

The Lease Variation Charge provisions were inserted into the Act by the *Planning and Development (Lease Variation Charges) Amendment Act 2011*. A detailed Explanatory

Statement on these provisions is available on the ACT Legislation Register at <http://www.legislation.act.gov>.

The variation of a lease is “development” for the purposes of the Planning and Development Act (s7 (1)(f)). Therefore, a lease variation requires a development application (DA) for development approval unless the variation is exempt from requiring development approval under s133 of the Act (and s20 of the Regulation).

There are three main categories of lease variations for the purposes of the LVC. These include variations of:

1. nominal rent leases for which no LVC is payable. Such leases are identified in the s276 definition of “chargeable variation”. For example, variations of two adjoining leases whose only effect is to alter the boundary between them;
2. nominal rent leases where the variation is a s276E chargeable variation; and
3. nominal rent leases where the variation is a s277 chargeable variation.

A variation to a rental lease i.e. leases other than nominal rent lease, does not attract a lease variation charge. Rather an adjustment to rental payments is determined in accordance with Division 9.6.2 of the Act;

Sections 278A to 278F of the Act permit the required LVC to be remitted (reduced) in whole or in part by a disallowable determination. Only the amount remaining after the remission needs to be paid before the lease variation can take effect (s276B (1) of the Act). For example, if the LVC was \$100 and the amount to be remitted was 80% then only \$20 needs to be paid. When the amount is paid the lease variation, approved through the development application process, can be executed and registered on the Register of Land Titles.

Overview

The disallowable determination is made under s278B of the Act. Section 278B provides that a determination can do two things: firstly it can determine a ‘community purpose’ in this instance the community purpose is ‘housing assistance’. Secondly, it can determine an amount to be ‘remitted’ for a lease variation charge for the community purpose. The amount can be between zero and 100 percent.

The determination is made by two Ministers: the Minister for Environment and Sustainable Development determines the ‘community purpose’ (s278B (2)) and the Treasurer (s278B (3)) who determines the amount to be remitted.

The determination provides for remissions for two types of LVC made under s276E or s277 of the Act. The overall effect of the determination is to remit (or reduce) the LVC for certain lease variations where the purpose of the variation is for the provision of housing assistance.

Section 3 of the determination applies to lease variations in the area of housing assistance. The remission applies to any variations of leases granted to the housing commissioner for a term beginning before 17 December 1987 and where the housing commissioner is the lessee. This continues Government policy that was in-place before the new amendments for lease variation charges.

If the lease variation is a s276E chargeable variation then there are three different ways of determining the amount of the remission. Sub-section (3) (a) provides that if another

determination (or the Act) i.e. not this determination, also applies to the proposed lease variation and the LVC being remitted through that determination is less than 50%, then through this determination a further amount is added until the amount being remitted equals 50% of the LVC. In this way the determination overall provides a 50% LVC remission. This is consistent with sub-section (3) (c).

Sub-section (3) (b) provides that if another determination (or the Act) i.e. not this determination, already provides a remission of 50% or more then no further remission is made through this determination. In other-words, this determination does not provide for additional remissions if the amount to be remitted already exceeds 50% of the LVC.

Sub-section (3) (c) provides that where no other remission is made either by the Act or another determination then the amount to be remitted is 50% of the added value. This is consistent with sub-section (3) (a).

If the lease variation is a s277 chargeable variation then the remission amount is an additional 25% on top of the 25% already provided for by s277 of the Act. This means that a section 277 lease variation attracts the same remission as a s276E chargeable variation determined by sub-section (3) (a) and (3) (b) above. This remission continues existing Government policy previously implemented through the former section 176 of the Regulation made under the former section 278 of the Act. These sections were repealed by the *Planning and Development (Lease Variation Charges) Amendment Act 2011*.

The Commissioner for Revenue must remit the amount of the LVC that is required to be remitted by this determination (s278B(5)).

Regulatory impact statement

The *Legislation Act 2001* section 36 states:

36. (1) A regulatory impact statement need not be prepared for a proposed subordinate law or disallowable instrument (the proposed law) if the proposed law only provides for, or to the extent it only provides for:
- (b) a matter that does not operate to the disadvantage of anyone (other than the Territory or a territory authority or instrumentality) by—
 - (i) adversely affecting the person's rights; or
 - (ii) imposing liabilities on the person;
 - (k) an amendment of a fee, charge or tax consistent with announced government policy.

In this case, a regulatory impact statement is not required. This is because the determination does not adversely affect any rights and does not impose liabilities. The instrument instead operates to a lessee's advantage by reducing the LVC in specified circumstances. In addition, the disallowable instrument has the end effect of amending a charge consistent with announced government policy.

Sections of the determination in more detail

Section 1 - Name of Instrument

Section 1 names the determination as the *Planning and Development (Remission of Lease Variation Charges for Community Purpose – Housing Assistance) Determination 2011 (No 1)*.

The section also makes reference to terms used in the instrument and provides that the terms have the same meaning as they have in the *Planning and Development Act 2007*.

Section 2 - Community purpose – Act, s 278B(2)

Section 2 identifies the provision of housing assistance as “community purposes” for the purposes of the Act.

Section 3 - Remission of lease variation charges – certain housing assistance variations – Act, s 278B(3)

Section 3 (1) provides that the section applies if the lease was granted to the housing commissioner for a term beginning before 17 December 1987 and the housing commissioner is the lessee. This means that if the housing commissioner was granted the lease before 17 December 1987 but is not now the lessee the remission does not apply. Similarly if the housing commissioner was granted a lease on or after 17 December 1987 and is still the lessee the remission does not apply.

Sub-section (2) states that it is the Treasurer who determines the remission amounts set out in sub-sections (3) and (4).

Sub-Section (3) applies to s276E chargeable variations. If another determination applies to the variation and the amount to be remitted is less than 50% then through this determination a further amount is remitted until the amount being remitted equals 50% of the LVC (sub-section (3) (a)).

If one or more other determinations already apply to the variation and through those determinations an amount greater than 50% of the LVC is already being remitted then no further remission is available through this determination (sub-section (3) (b)).

If the only remission determination applying to the variation is this determination, then the remission amount is 50% of the LVC (sub-section (3) (c)).

Sub-section (4) applies to s277 chargeable variations. In this case, the LVC is remitted by 25% of the added value. This is additional to the 25% remission provided under s277 of the Act and means that the total being remitted is 50%.

Sub-section (5) provides that added value has the same meaning as defined at section 179 of the *Planning and Development Regulation 2008*. Section 179 defines added value as the amount worked out by subtracting V_2 from V_1 . V is defined in the Act at section 277.

Section 4 - Remission of lease variation charges – other housing assistance variations – Act, s 278B (3)

Section 4 of the determination applies to a chargeable variation of a nominal rent lease which authorises development for the purpose of housing assistance in circumstances that are not covered by section 3 or section 4. In this case, the LVC is remitted by 0%. This makes it clear that only those lease variations that meet the criteria at section 3 sub (3) and (4) can access the remission determined in this instrument.