

**Planning and Development (Remission of Lease Variation Charge for Environmental Remediation) Determination 2012 (No 1)**

**Disallowable instrument DI2012-125**

made under the

**Planning and Development Act 2007, Section 278D (When Commissioner must remit lease variation charge – environmental remediation)**

**Explanatory Statement**

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**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 Environmental Remediation) Determination 2012 (No X) (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 the lease variation is approved by a development approval granted under the Act.

An LVC may be charged when the lessee seeks to vary their lease. The Act sets out what types of lease variations attract a charge. The variation of a lease is “development” for the purposes of the Act (s7(1)(f)). Therefore, a lease variation requires a development

application for development approval unless the variation is exempt from requiring development approval under s133 of the Act and s20 of the Regulation.

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 s278D of the Act. Section 278D provides for remissions to be made for lease variations sought in association with environmental remediation of the land.

The determination, made under s278D, requires a remission of the LVC for lease variations in association with disused service station sites. In summary, the remission is to apply to disused service station site if the site is remediated so that it can be used for purposes other than a service station site.

Section 278D of the Act applies to lease variations if:

- the variation has been approved by a development approval granted under the Act (s278D(1)(a));
- the above approval is granted on the condition that the lessee carry out remediation of the land under the lease (s278D(1)(b));
- any other circumstances identified in the relevant determination made by the Minister under s278D(2)(a) apply (s278D(1)(c)).

Section 3(1) of the determination sets out the additional circumstances that are to apply under s278D(1)(c) of the Act. The additional circumstances are determined by the Minister under

section 278D(2)(a). In summary, the additional circumstances that must be met are as follows.

- the lease variation must not yet be registered on the Register of Land Titles;
- the land must be assessed and remediated and an environmental audit completed affirming that the land is suitable for the uses authorised by the lease as varied;
- the environmental audit must be endorsed by the Environment Protection Authority and the endorsement must confirm that the audit:
  - affirms that remediation has been undertaken in accordance with the Contaminated Sites Environment Protection Policy NI2012-301 and
  - satisfies the requirements of the *Environment Protection Act 1997*; and
- the lease to be varied must authorise the land or part of the land to be used for the purpose of a service station, although it is not necessary for the lease to use the specific term “service station”. The proposed lease variation must have the effect that the lease no longer authorises the land or any part of the land to be used for the purpose of a service station.

The amount of the remission for lease variations to which s278D applies is as determined by the Treasurer under s278D(3). The amount can be between zero and 100 percent. The determination of this amount must take into account any criteria for working out the cost of the remediation determined by the Minister under s278D(2)(b).

Section 4 of the determination makes this remission amount 100% of the lease variation in all cases. This amount is determined by the Treasurer under s278D(3) of the Act. This amount has been set in order to provide the maximum financial incentive for the remediation and subsequent use of former service station sites.

In this case it was not necessary for the setting of the remission amount to take account of criteria determined by the Minister under s278D(2)(b) of the Act because no such criteria have been determined. Criteria under s278D(2)(b) are not required because the remission amount is to be 100% in all cases.

The Commissioner for Revenue must reduce the amount of the LVC that is required to be remitted by the determination (s278D(5) of the Act).

### **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.

## 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 Environmental Remediation) Determination 2012 (No X)*. The determination is made under s278D of the Act.

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 Act.

### *Section 2 – Commencement*

This section provides that the instrument commences on 1 July 2012.

### *Section 3 – Determination of additional circumstances which apply to the variation – Act, s 278D(2)(a)*

Section 3(1) of the determination sets out the additional circumstances which must apply to the lease variation if the variation is to qualify for a remission (reduction) of LVC under the determination pursuant to s278D of the Act. In order for the lease variation to qualify for the remission the circumstances set out in section 3 must be met in addition to the circumstances required under s278D.

The additional circumstances that must be met under section 3(1) of the determination are:

- the lease variation must not yet be registered on the Register of Land Titles;
- the land must be assessed and remediated and an environmental audit completed confirming that the land is suitable for the uses authorised by the lease as varied. The environmental audit must be endorsed by the Environment Protection Authority as:
  - showing that the assessment and remediation has occurred in accordance with the Contaminated Sites Environment Protection Policy 2012 NI2012-301 made under chapter 4 of the *Environment Protection Act 1997*; and
  - satisfying the requirements of the Environment Protection Act;
- the lease to be varied must authorise the land to be used for the purpose of a service station, however expressed, and the lease variation must have the effect that the lease as varied no longer authorises the land to be used as a service station; and
- for lease variations approved before the commencement of the *Planning and Development (Lease Variation Charges) Amendment Act 2011*, the required change of use charge for the lease variation must be unpaid as at 30 June 2009.

Section 3(2) of the determination defines the terms “change of use charge”, “environment protection authority”, “environmental audit”, “the land”, “service station” and “remediation” used in section 3(1).

### *Section 4 – Determination of the amount to be remitted – Act, s 278D (3)*

Section 4 of the determination provides that the Treasurer has determined that the remission amount is 100% of the charge. This remission amount is to apply all lease variations to which the determination applies.

### *Section 5 - Expiry*

Section 5 provides that the determination ends on 30 June 2016.