

Planning and Development (Remission of Lease Variation Charges—Economic Stimulus and Sustainability) Determination 2014 (No 1)

Disallowable instrument DI2014–48

made under the

Planning and Development Act 2007, s278 (When commissioner must remit lease variation charges—sustainability) and s278E (When commissioner must remit lease variation charges—other)

EXPLANATORY STATEMENT

1. OBJECTIVES

The objective of this disallowable instrument (instrument) is to generate building and construction industry activity and high level sustainability outcomes for the ACT. It does this by providing an economic stimulus to developers seeking to redevelop sites within the current economic climate. It also encourages developers to deliver higher sustainability outcomes by proposing development that will deliver above the industry norm. It does this by providing a further remission, or stimulus, for developments that propose high Green Star¹ energy ratings in the commercial sector and high NatHERS² ratings in the residential sector, and buildings that achieve compliance with the Australian Standard for adaptable housing (AS 4299-1995), Class C at 50% or 100% of the building.

2. BACKGROUND

Lease Variation Charge provisions were inserted into the Act by the *Planning and Development (Lease Variation Charges) Amendment Act 2011* (A2011-19). A detailed explanatory statement on these provisions is available on the ACT Legislation Register at <http://www.legislation.act.gov>. These provisions replaced the former change of use charge (CUC) provisions. It is important to note that the method for calculating a s277 chargeable variation uses the same formula that applied for CUC that is:

CUC formula $CUC = (V_1 - V_2) \times 75\%$

LVC formula $LVC = (V_1 - V_2) \times 75\%$

¹ Green Star – is rating tool developed by the Green Building Council of Australia and can be accessed at www.gbca.org.au

² NatHERS – means a rating under the Nationwide House Energy Rating Scheme administered through the Ministerial Council on Energy and can be accessed at www.nathers.gov.au

A Lease Variation Charge (LVC) is payable when a lessee seeks to vary a lease and the lease variation is approved by a development approval granted under the *Planning and Development Act 2007* (Act). LVC is a charge on the **added value**, if any, that results from the variation and is calculated through a formula in the Act. The Act also provides that part of the charge or the whole of the charge may be remitted under prescribed circumstances.

The instrument prescribes those circumstances and the amounts that must be remitted.

3. OVERVIEW

The ACT Government aims to generate construction and investment activity at a time when demand is easing off and to encourage higher sustainability outcomes in those developments. The instrument applies to any development application (DA) approved on or after 6 March 2014 and where the DA also relates to development of a building on the land under the lease. This means that a DA may have already been lodged, but not approved, and if the DA meets the criteria or circumstances prescribed in the instrument then it may be eligible for a remission. For the purposes of this explanatory statement a DA that the instrument applies to is called an 'eligible DA'.

The instrument only applies to a s277 chargeable variation as defined at section 276 *Definitions – div 9.6.3, s277 chargeable variations*. It cannot apply to a s276E chargeable variation.

This instrument is made under two sections of the Act:

- section 278 *When the commissioner must remit lease variation charge – sustainability*; and
- section 278E *When the commissioner must remit lease variation charges – other of the Act*.

Section 278 provides that the Minister may determine requirements for energy efficiency for a building and that the Treasurer may determine an amount to be remitted and when the remission may be made.

Section 278E (1) provides that the Minister may determine circumstances, in addition to s278 to s278D, in which an amount of the charge for a s277 chargeable variation must be remitted. The section provides that the Treasurer may determine an amount to be remitted for a variation that meets the determined circumstances.

Together s278 and s278E provides a platform to give effect to the objectives of the instrument. Section 278 provides a remission for sustainability while s278E provides a remission as both an economic stimulus and to encourage adaptable housing.

A lessee who seeks to vary a lease, and the variation is a s277 chargeable variation, will gain a economic stimulus remission of 25% of the added value under s278E. Further remissions, up-to the value of 25% of the LVC, under s278 and s278E are available if an eligible DA meets stated requirements or circumstances

i.e. the eligible DA nominates a high average Green Star rating or NatHERS rating or meets the Australian Standard for adaptable housing.

In this way the lessee will have the option to only take-up the economic stimulus component i.e. 25% of added value or to also access sustainability remissions up-to a further 25% of the LVC. The final amount of remission i.e. the total of all remissions under the instrument is a one-off transaction against the LVC and is made at the time the LVC is determined and a notice of assessment under s276D (the Act) is given to the lessee. An approved lease variation cannot be actioned until the LVC is paid.

The instrument will apply to all eligible DAs. If the DA has been lodged but not approved a proponent has options about how to proceed, they can:

1. withdraw the DA and resubmit it to ensure that it meets the stated circumstances and requirements.
This would be applicable where the DA was only for a lease variation and had not included a building as required under the instrument. Additional fees may apply.
2. ask the planning and land authority to amend the DA under s144 of the Act.
This would be applicable if the DA included a lease variation and a building but the proponent had not indicated sustainability ratings.

A proponent of a DA that had recently been approved, before the commencement of the instrument, is not eligible for a remission under this instrument. However, if the the lease variation has not been registered the proponent may decide to lodge a new DA that meets the stated circumstances and requirements. Additional fees will apply. Alternatively they may decide to proceed with the DA as approved.

4. RETROSPECTIVE LEGISLATION

The instrument takes effect from the date of announcement that is 6 March 2014 and will expire on 6 March 2016. However, because of the need to draft the instrument it will not be physically made until after it has taken to have commenced. In this respect the instrument is retrospective legislation. Retrospective legislation is not the norm but there is no provision prohibiting the enactment of retrospective legislation in the Australian Constitution. Rather a retrospective commencement is to be used only in exceptional cases and only with the parliamentary counsel's approval³.

In this instance retrospective legislation is acceptable as the government made the policy announcements for LVC remissions through a media release which was widely reported in the media including radio, television and print. The announcements indicated remission values and timeframes and the instrument gives effect to these.

Further, industry groups had been lobbying government for a number of months for reforms in LVC and remissions and the instrument directly responds to this. As

³ ACT Parliamentary Counsel's Office : Drafting Practice Guide : July 2012 : accessed on the web 18 March 2014

industry has known that government was intending to review LVC fees, amongst other things, for a number of months a proponent could withhold the DA until after the government's announcement if they desired as the economic advantage would likely out-weigh the time delay in progressing the DA.

The instrument does not unduly disadvantage a proponent of a DA that is lodged but not approved at the date of commencement. A proponent can still access remissions under the instrument if the DA is an eligible DA i.e. it includes a lease variation, is a section 277 chargeable variation for which LVC will be determined, and includes a design and siting for a building on the land in the lease.

A DA that has already been lodged and approved, but only seeks a lease variation i.e. it does not propose a building, would not be eligible for a remission in any case as it does not meet the prescribed circumstances and requirements.

The effect of the commencement of the instrument is as if it was made and effective on the date of the announcement. This means that all proponents of DAs from 6 March onwards are equally able to access the remissions made through the instrument. Further, the application of the instrument has been extended to those DAs already lodged but not approved as at 6 March 2014 providing the DA also meets prescribed circumstances or requirements.

This means that more proponents are able to access a remission than would have been available had the instrument been made before 6 March and commenced on 6 March 2014 and its application not been extended to apply to a DA already lodged. Proponents are also able to amend or withdraw the DA and re-lodge a DA so as to take-up a remission.

SPECIFIC PROVISIONS:

1 NAME OF INSTRUMENT

This section provides that the instrument is the *Planning and Development (Remission of Lease Variation Charges – Economic Stimulus and Sustainability) Determination 2014 (No 1)*. The name focuses on the economic stimulus and sustainability outcomes delivered through the instrument.

2 COMMENCEMENT

This section provides that the instrument is taken to have commenced on 6 March 2014. This means that an eligible DA can access remissions provided in the instrument from the 6 March 2014 onwards to 6 March 2016 when the instrument ends.

In this way all eligible DAs i.e. a DA for a section 277 chargeable variation that also includes design and siting for a building on the land in the lease, that is lodged but not approved will gain a minimum 25% remission calculated on the added value, under the economic stimulus component of the instrument. The sustainability remissions may be accessed if the eligible DA also nominates average Green Star, NatHERS or adaptable housing compliance standards for the building. Because of section 14 the instrument will expire on 6 March 2016.

The *Legislation Act 2001, Chapter 7 Presentation, amendment and disallowance of subordinate laws and disallowable instruments* applies.

3 APPLICATION

This section provides that the instrument only applies to a section 277 chargeable variation for a development application for a variation approved on or after the commencement of the instrument and the approval relates to a building on the land under the lease i.e. an *eligible DA*. This means that all eligible DAs will at a minimum be able to gain a 25% economic stimulus remission calculated on the added value with a possible further 25% sustainability remission calculated on the LVC.

The instrument does not apply to a DA lodged and approved before commencement of the instrument.

4 DETERMINED CIRCUMSTANCES – ECONOMIC STIMULUS – ACT, s 278E (1)

This section provides that the Minister for the Environment and Sustainable Development determines that a development application for a s277 chargeable variation of a nominal rent lease that is approved and that application relates to a building on the land under the lease is a circumstance for the purposes of s278E(1).

A development application that meets this circumstance is eligible for a remission under section 5 (2) and may also be eligible for a further remission under another section of the instrument.

5 REMISSION OF LEASE VARIATION CHARGE—ECONOMIC STIMULUS—ACT, s 278E (2)

This section provides that the amount of remission determined by the Treasurer for a development application that meets the required circumstance at section 4 is 25% of the added value and is calculated by a formula. Added value is the basis for calculating the LVC in the Act, section 277.

The remission amount is calculated through the formula:

$$(V_1 - V_2) \times 25\%.$$

The effect of the formula is to return 25% of the added value through the remission DI and is in addition to the already retained 25% of the added value delivered through the Act. This means that at a minimum an applicant will retain 50% of the added value achieved through the lease variation.

This is the economic stimulus component of the instrument and works in conjunction with sections 7, 9 and 10 to provide a package of remissions that may apply to an eligible DA.

6 DETERMINED ENERGY EFFICIENCY REQUIREMENTS—ACT, s 278 (2)

This section provides that the Minister for the Environment and Sustainable Development determines a Green Star rating of 5 or 6 or a NatHERS rating of 6.5 or 7 or 7.5 or higher as energy efficiency requirements for the purposes of the Act s278.

The instrument requires developments to deliver high sustainability ratings. It uses two industry accepted tools: Green Star and NatHERS.

Green star is a rating system developed by the Green Building Council of Australia. It is an industry recognised tool used in the commercial sector and can be accessed at www.gbca.org.au. There are two options for an eligible DA: either the development can deliver a Green Star average rating of 5 or it can deliver a Green Star average rating of 6. All of the building must deliver an average of the nominated rating meaning some parts may achieve a higher rating and some a lower but the average must be that nominated. A custom rating may be required to rate some developments.

NatHERS means the Nationwide House Energy Rating Scheme administered through the Ministerial Council of Energy. It is a tool used in the residential sector and can be accessed at www.nathers.gov.au. There are two options for an eligible DA: either the development can deliver an average NatHERS rating of 6.5 or 7 or it can deliver an average NatHERS rating of 7.5 or higher. All of the building must deliver an average of the nominated rating meaning some parts may achieve a higher rating and some a lower but the average must be that nominated.

An eligible DA must indicate in the application the average rating proposed for the building or buildings. A development may be made up entirely of one class of building: commercial or residential. Alternatively it may be made-up of mixed development i.e. part of the building is commercial and part of the building is

residential. For a residential building all or part of the building may seek to meet the Australia Standard for adaptable housing.

A lessee is not obligated to seek a remission under section 7 meaning that there is no requirement to meet a higher level of energy efficiency other than which is already required to meet normal building standards.

7 ADDITIONAL REMISSION OF LEASE VARIATION CHARGE FOR CERTAIN ENERGY EFFICIENT DEVELOPMENTS—ACT, S 278 (3) (A)

This section provides that the Treasurer may determine the rates of remission of LVC for different developments for an eligible DA that nominates an average rating of Green Star 5 or Green Star 6 or NatHERS rating of 6.5 or 7 or a NatHERS rating of 7.5 or more. The remission points are 10% and 25%.

Sustainability remissions are limited by section 10. The effect of section 10 is to limit the value of remissions available under this section and section 9 to 25% of LVC. Section 5 (2) provides a remission of 25% of the added value.

Sub-section (7) (1) provides that the section only applies to a section 277 chargeable variation. A chargeable variation is defined at s276A of the Act.

Sub-section (7) (2) (a) provides that if an eligible DA nominates an average Green Star rating of 5 for the building the amount of LVC to be remitted is 10%. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts i.e. under s5 (2) economic stimulus and s7 (2) (a) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and sections 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (7) (2) (b) provides that if an eligible DA nominates an average Green Star rating of 6 for the building the amount of LVC to be remitted is 25%. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts i.e. under s5 (2) economic stimulus and s7 (2) (b) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and sections 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (7) (2) (c) provides that if an eligible DA nominates an average NatHERS rating of 6.5 or 7 for the building the amount of LVC to be remitted is 10%. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts i.e. under s5 (2) economic stimulus and s7 (2) (c) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and sections 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (7) (2) (d) provides that if the relevant development application nominates an average NatHERS rating of 7.5 or more for the building the amount of LVC to be remitted is 25%. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts i.e. under s5 (2)

economic stimulus and s7 (2) (d) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and section 10 for a combination of compliance with energy efficiency and adaptable housing.

8 DETERMINED CIRCUMSTANCES FOR ADAPTABLE HOUSING—ACT, s 278E (2)

This section provides that the Minister for the Environment and Sustainable Development determines that a eligible DA for a section 277 chargeable variation of a nominal rent lease that is approved and the building, or parts of the building complies with AS 4299-1995 Adaptable housing is a circumstance for the purposes of s278E (2).

A chargeable variation is defined at s276A of the Act.

9 ADDITIONAL REMISSION OF LEASE VARIATION CHARGE FOR ADAPTABLE HOUSING—ACT, s 278E (2)

This section provides that the Treasurer may determine the rates of remission of LVC for different developments for an eligible DA that nominates that 50% (but not 100%) or 100% of the building will meet the AS 4299-1955 Adaptable Housing. Like energy efficiency remissions there are two remission points: 10% and 25%.

Sustainability remissions are limited by section 10. The effect of section 10 is to limit the value of remissions available under this section and section 7 to 25% of LVC. Section 5 (2) provides a remission of 25% of the added value.

Sub-section (2) (a) provides that if an eligible DA nominates that 50%, but not 100% of the building will comply with the AS than the amount of LVC to be remitted is 10%. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts i.e. under s5 (2) economic stimulus and s9 (2) (a) for adaptable housing are added together as are any further remissions made under section 7 (2) (a) or (b) or (c) or (d) for energy efficiency and section 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (2) (b) provides that if an eligible DA nominates that 100% of the building will comply with AS 4299-1955 the amount of LVC to be remitted is 25%. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts i.e. under s5 (2) economic stimulus and s9 (2) (b) for adaptable housing are added together as are any further remissions made under section 7 (2) (a) or (b) or (c) or (d) for energy efficiency and section 10 for a combination of compliance with energy efficiency and adaptable housing.

10 REMISSION OF LEASE VARIATION CHARGE FOR COMBINATION OF COMPLIANCE WITH ENERGY EFFICIENCY OR ADAPTABLE HOUSING REQUIREMENTS—ACT, s 278 (3) (A) AND S 278E (2)

This section provides that if an eligible DA for a s277 chargeable variation of a nominal rent lease nominates different compliance standards for different parts of

the building that the amount of LVC that can be remitted is an amount equal to 25% of the charge.

The examples provided demonstrate the effect of the section. Example one shows how an applicant may access sustainability remission of 20% of the determined LVC. Example 2 shows that even though the value of remissions under s7 (2) (d) and s9 (2) (b) add up to 50% the amount of LVC to be remitted under s10 (1) is 25% of the determined LVC. This amount is additional to the amount remitted under section 5 (2).

The lessee is under no obligation to seek a remission under section 7 (2), 9 (2) or 10. They may decide that the development will meet one or both of the requirements for energy efficiency or adaptable housing, a combination of both or none. If they do seek a further remission, other than that available under section 5 (2) then they must nominate the level of energy efficiency and the level of adaptable housing, if any, that the development will achieve. This leaves the final mix of the development to the discretion of the lessee, who may decide to only take-up the economic stimulus component of the instrument. Alternatively the lessee may decide to seek a remission for energy efficiency or adaptable housing or both.

Sub-section 3 provides the meaning of *compliance standard* and *relevant provision* for the section.

11 WHEN AMOUNTS MUST BE REMITTED—ACT, s 278 (3) (B)

This section provides that the amount to be remitted under section 7 and 10 is remitted at the time the LVC is determined and the notice of assessment is provided to the lessee.

The note provides that the amount to be remitted under section 5 and 9 may be remitted at the same time.

A notice of assessment (refer the Act s276D) of the amount of lease variation charge that is payable will state the LVC charge (refer the Act s277), the amount to be remitted under sections 278 and 278E (refer the instrument section 5 (2), section (7), (9) and (10)) and the amount the lessee is required to pay before the variation can be executed (refer the Act s276B).

12 DISAPPLICATION OF LEGISLATION ACT, s 47 (5)

The material mentioned in section 12 is incorporated into the disallowable instrument. The Legislation Act, s 47 (5) provides that an incorporated document is taken to be a notifiable instrument. A notifiable instrument must be notified on the legislation register under the Legislation Act.

However, the Legislation Act, s 47 (5) may be displaced by the authorising law (the Act) or the incorporating instrument (this disallowable instrument) (see s 47 (7)). The Legislation Act, s 47 (5) is displaced here because the incorporated material may be subject to copyright and is available over the Internet.

13 DEFINITIONS

This section provides definitions for *Green Star rating* and *NatHERS rating* for the instrument.

14 EXPIRY

This section provides that the instrument expires on 6 March 2016. The instrument is taken to have commenced on 6 March 2014.

It is appropriate that the instrument expires at this time as the main objective of the instrument is to generate construction and investment activity at a time when demand is easing off and to encourage higher sustainability outcomes in those developments.

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 instrument:

- 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. The lessee determines whether or not they will take-up any component of the instrument and it operates in the same way for all lessees.
- gives effect to announced government policy.