

Australian Capital Territory

Planning and Development (Lease Variation Charges) Determination 2014 (No 1)

Disallowable instrument DI2014-201

made under the

Planning and Development Act 2007, Section 278F (When commissioner must remit lease variation charges – chargeable variations generally)

EXPLANATORY STATEMENT

1. TERMS

In this explanatory statement:

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

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

“determination” means the *Planning and Development (Remission of Lease Variation Charges for Community Purpose – Childcare Services) Determination 2014 (No 1) (DI)*.

“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” i.e. 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 are the chargeable lease variations that are able to be codified under the LVC Determination. A chargeable lease variation that is not a s276E chargeable variation or is not covered by the LVC Determination is a s277 chargeable variation.

2. BACKGROUND

A Lease Variation Charge (LVC) is charged when the lessee seeks to vary their lease and this is approved. A variation of a lease is “development” for the purposes of the Act (s7 (1) (f)) meaning a development application (DA) for development approval is required unless exempt from requiring approval under s133 of the Act (and s20 of the Regulation).

Sections 278 to 278F of the Act permit the required LVC to be remitted (or reduced) in whole or in part by a disallowable determination (DI). Only the amount remaining after the remission needs to be paid before the lease variation can take effect and be registered (see s276B (1) of the Act).

3. OVERVIEW

The disallowable determination (DI) is made under s278F of the Act. Section 278F provides that the DI can determine an amount to be remitted for a financial year for each lease variation charge for a chargeable variation for which a notice of assessment has been given under s276D of the Act. This means that for a charge that is codified a remission may be made on the amount of the LVC advised in the notice of assessment.

The DI provides that for certain types of codified charges that seek to increase the number of dwellings or the gross floor area a remission of 55% of the determined LVC is applicable. The Act requires that the amount of the remission is expressed as a percentage of the LVC and that the DI must be made 1 year before the beginning of the financial year to which it applies. This means that the community has clear information about charges and remissions available.

Unlike other remissions the authority to make the DI resides with the Treasurer alone (opposed to other remission instruments where the Minister for the Environment and Sustainable Development and the Treasurer make the instrument.) This is appropriate as the Treasurer has the sole responsibility for determining the original codified charges.

Because the DI must be made at least a year ahead of its financial year commencement date the instrument must be made by 30 June 2014 if it is to take commence on 1 July 2015. Although the instrument is made ahead of its commencement the existing DI2011-197 will continue to have effect until the DI commences. This means that until 1 July 2015 existing remissions under DI2011-197 will continue to apply.

The DI increases the percentage remission in 2015/16 financial year from 25%, under the existing DI2011-197, to 55% under this DI (which is the percentage amount of remission as at 6 March 2014). The retention of the remission percentage at 55% is consistent with the Governments announcement of 6 March 2014 which stated that remissions would be frozen at the current level until 6 March 2016. The DI operates past this date as the legislation requires the remission to operate on a financial year basis.

4. 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 DI 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 government policy.

5. 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) Determination 2014 (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 - Commencement

Section 2 provides that the instrument commences on 1 July 2015. The delayed commencement is required to comply with the requirements of section 278F (3). The effect of s278F (3) is to require the instrument to be made more than one year before the beginning of the financial year for which the instrument will apply.

Between now and when the instrument commences DI2011-197 will continue to have effect. This ensures that the remissions remain available until 30 June 2015 when the new remission i.e. this DI, starts on 1 July 2015.

Section 3 – Remission of lease variation charges – s 276E chargeable variation to increase number of dwellings – Act, s 278F (1)

Section 3 provides for what types of s276E chargeable variations the instrument applies to and the percentage amount to be remitted during the financial year 1 July 2015 to 30 June 2016. The instrument only applies if a lease variation charge is determined in an LVC Determination for the variation. This means that the LVC fee has been codified. Current codified fees are in disallowable instrument DI2011-198.

Sub-section (1) provides that for a section 276E chargeable variation that is mentioned at s276A (1) (a) or (c) (ii) or (f) (i) or (g) (i) and where the lease variation charge has been codified i.e. in DI2011-198. Section 276A (1) (a) or (c) (ii) or (f) (i) or (g) (i) are lease variation types that increase or limits the number of dwellings allowed on the lease.

Sub-section (2) provides that the percentage amount to be remitted from the codified fee is 55% of the fee. For example, DI 2011-198, schedule 2 provides that the codified fee to increase the number of residential dwellings in Amaroo is \$45,000 per dwelling. The effect of the instrument is to remit 55% of the fee i.e. \$24,750 leaving the proponent \$20,250 to pay for the approved s276E chargeable variation. This is the same percentage value as applies for the financial year 2013-2014.

Section 4 - Remission of lease variation charges – s 276E chargeable variation to increase maximum gross floor area of non-residential building or structure – Act, s 278F (1)

Section 4 provides for what types of s276E chargeable variations the instrument applies to and the percentage amount to be remitted during the financial year 1 July 2015 to 30 June 2016. The instrument only applies if a lease variation charge is determined in an LVC Determination for the variation. This means that the LVC fee has been codified. Current codified fees are in disallowable instrument 2011-198.

Sub-section (1) provides that for a section 276E chargeable variation that is mentioned at s276A (1) (c) (i) or (f) (ii) or (g) (ii) and where the lease variation charge has been codified i.e. in DI2011-198. Section 276A (1) (c) (i) or (f) (ii) or (g) (ii) are lease variation types that increase or has the effect of increasing, the maximum gross floor area (GFA) of any building or structure permitted for non-residential use on the land under the lease.

Sub-section (2) provides that the percentage amount to be remitted from the codified fee is 25% of the fee. For example, DI2011-198, schedule 3 provides that a lease variation to increase the GFA in Amaroo is \$490 per square metre meaning for an increase of 50 square metres the LVC codified fee is \$24,500. The effect of the instrument is to remit 25% of the fee i.e. \$6,125 leaving the proponent \$18,375 to pay for the approved s276E chargeable variation. This is the same percentage value as applies for the financial year 2013-2014.

The remission also applies to items 9 and 10 in Schedule 1.

Section 5 - Remission of lease variation charges – all other chargeable variations - Act, s 278F (1)

Section 5 it applies to a chargeable variation other than one mentioned in section 3 or 4 (section 276A (1) (a) or (c) (i), (ii) or (f) (i), (ii) or (g) (i), (ii) chargeable variation).

DI2011-198 contains 3 schedules of codified fees. Remissions are not available on all types of codified fees.

Sub-section (2) provides that all other chargeable variations, not mentioned in section 3 or 4, the percentage amount to be remitted is zero. The sub-section provides clarity that a remission is not available unless covered by section 3 or 4. All other lease variations covered by the Code Determination i.e. DI2011-198, must pay the full amount of the charge for an approved lease variation.

Section 6 - Repeal

Section 6 provides that this instrument repeals DI2011-197. This is necessary as two instruments cannot operate at the same time for the same determined circumstances but for different outcomes. DI2011-197 will continue to have effect even when this instrument is made because this instrument does not commence until 1 July 2015. DI2011-197 will cease to have effect on 30 June 2015.

Continuation of DI2011-197 between now and 1 July 2015 will ensure that remissions are still available.

Section 7 Expiry

Section 7 provides that the instrument expires on 30 June 2016. This is consistent with the Governments announcements on 6 March 2014 that remissions would be frozen for two years. The latest date for a remission under DI2011-197 was 30 June 2016.