Australian Capital Territory

Planning and Development (Remission of Lease Variation Charges–Environmental Sustainability) Determination 2018 (No 1)

Disallowable instrument DI2018–40

made under the

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

EXPLANATORY STATEMENT

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1. Objectives

The objective of this disallowable instrument (instrument) is to support high level sustainability outcomes for the ACT.

It does this by encouraging developers to deliver higher sustainability outcomes by proposing development that will deliver above the industry norm. It does this by providing a remission for developments that propose high Green Star[1] energy ratings in the commercial sector and high NatHERS[2] ratings in the residential sector.

2. Background

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.

The previous instrument, DI 2016-28, expires on 6 March 2018, and this current instrument will extend the environmental sustainability remission only contained in the previous instrument. This extension will end on 30 June 2019.

3. Overview

The instrument applies to any development application (DA) approved on or after 7 March 2018 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

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[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

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 section 277 chargeable variation as defined at section 276 *Definitions – div 9.6.3, s277 chargeable variations*. It cannot apply to a section 276E chargeable variation.

This instrument is made under section 278 of the Act: *When the commissioner must remit lease variation charge – sustainability*.

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.

A lessee who seeks to vary a lease, and the variation is a section 277 chargeable variation, will gain a LVC remission of up to 25 per cent if the eligible DA nominates a high average Green Star rating or NatHERS rating.

SPECIFIC PROVISIONS:

1 NAME OF INSTRUMENT

This section provides that the instrument is the *Planning and Development (Remission of Lease Variation Charges–Environmental Sustainability) Determination 2018 (No 1)*.

2 COMMENCEMENT

This section provides that the instrument commences on 7 March 2018. This means that an eligible DA can access remissions provided in the instrument from 7 March 2018.

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, that is, an *eligible DA*.

4 Determined energy efficiency requirements—Act, s 278 (2)

This section provides that the Minister for Planning and Land Management 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 section 278 of the Act.

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, that is, part of the building is commercial and part of the building is residential.

A lessee is not obligated to seek a remission under section 7 of the instrument, 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.

5 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 per cent and 25 per cent.

Sub-section (5) (1) provides that the section only applies to a section 277 chargeable variation. A chargeable variation is defined at section 276A of the Act.

Sub-section (5) (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 per cent.

Sub-section (5) (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 per cent.

Sub-section (5) (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 per cent.

Sub-section (5) (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 per cent.

6 When amounts must be remitted—Act, s 278 (3) (b)

This section provides that the amount to be remitted under section 5 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 may be remitted at the same time.

A notice of assessment (refer to section 276D of the Act) of the amount of LVC that is payable will state the LVC charge (refer to section 277 of the Act), the amount to be remitted under section 278 and the amount the lessee is required to pay before the variation can be executed (refer to section 276B of the Act).

7 Disapplication of Legislation Act, s 47 (5)

The material mentioned in section 12 is incorporated into the disallowable instrument. The *Legislation Act 2001* sub-section 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 2001* sub-section 47 (5) may be displaced by the authorising law (the Act) or the incorporating instrument (this disallowable instrument) (see sub-section 47 (7)). Sub-section 47 (5) is displaced here because the incorporated material may be subject to copyright and is available over the Internet.

8 Definitions

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

9 Expiry

This section provides that the instrument expires on the commencement of the *Planning and Development (Lease Variation Charge Deferred Payment Scheme) Amendment Act 2018*.

It is anticipated that a new instrument will be issued at this time to ensure the remission continues to be available until 30 June 2019.

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.