

Planning and Development (Remission of Lease Variation Charges—Environmental Sustainability) Determination 2018 (No 2)

Disallowable instrument DI2018–89

made under the

Planning and Development Act 2007, s 278 (Remission of lease variation charges)

EXPLANATORY STATEMENT

1. Objectives

This disallowable instrument replaces DI2018-40 Planning and Development (Remission of Lease Variation Charges—Environmental Sustainability) Determination 2018 (No 1). The energy efficiency remission requirements determined in DI2018-40 have not changed, however this instrument inserts a new requirement that applicants nominating for an energy efficiency remission enter into a deferral arrangement with the Commissioner of ACT Revenue.

The object being to facilitate compliance with the remission requirements contained in this instrument and to allow for the repayment of any remitted amount to the Territory if nominated energy efficiency requirements are not met for constructed buildings.

The overall objective of this instrument is to support high-level environmentally sustainable outcomes for the ACT. It does this by encouraging developers to deliver higher sustainability outcomes above the industry norm, and by providing a remission for developments that meet high Green Star¹ energy ratings in the commercial sector and high NatHERS² 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* (the Act). LVC is a charge on the added value, if any, that results from the variation.

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.

Section 278 of the Act provides that the Minister for Planning and Land Management may determine circumstances in which an amount of the charge must be remitted. If the Minister makes a determination, the Treasurer must determine an amount to be remitted for each LVC to which the determined circumstances apply. The Commissioner for Revenue must then remit the amount determined.

This instrument describes the circumstances and the amounts that must be remitted for development applications that nominate energy efficient outcomes for building in the ACT.

Specific Provisions:

1 Name of instrument

This section provides that this instrument is the Planning and Development (Remission of Lease Variation Charges—Environmental Sustainability) Determination 2018 (No 2).

2 Commencement

This section provides that the instrument commences on the commencement of the *Planning and Development (Lease Variation Charge Deferred Payment Scheme) Amendment Act 2018*, section 2.

3 Determination of circumstances for environmental sustainability remission – s 278 (1)

This section sets out the circumstances under which an applicant will be entitled to a remission. To be eligible:

- (1) The LVC must be for a section 277 chargeable variation. A section 277 chargeable variation is defined at section 276 of the Act. This instrument does not apply to a section 276E chargeable variation.
- (2) The development application (DA) to which the LVC relates must be a DA that is approved on or after the commencement date of this instrument.
- (3) The approval for the DA must relate to the development of a building on the land.
- (4) The building, once constructed, must comply with the requirements for energy efficiency of:
 - (a) A Green Star rating of 5 or 6; or
 - (b) A NatHERS rating of 6.5 or 7, or 7.5 or more.
- (5) Evidence of compliance with stated energy efficiency requirements must be obtained by the applicant from an independent, licensed building assessor and supplied to the Commissioner for Revenue. This facilitates an independent audit of the building for compliance with Green Star or NatHERS ratings and provides a means by which the applicant can demonstrate to the Commissioner of Revenue that the applicant has satisfied remission requirements.
- (6) The applicant must have entered into a deferral arrangement with the Commissioner for Revenue for the payment of any LVC payable. This enables

the deferment of the application of the remission to a time when the building is constructed and compliance with energy efficiency requirements can be properly evaluated. This serves as a revenue protection measure and ensures the repayment to the Territory of any amounts that would have been remitted had the applicant complied with the energy efficiency requirements of this instrument.

For example if the applicant fails to construct the building, or if the completed building does not meet the energy efficiency ratings required for a remission, the applicant would be required under the deferral arrangement to pay back the amount that would have been remitted within a specified period.

In the situation where the completed building meets a different energy efficiency rating to that nominated by an applicant in their DA, a partial remission may be granted. For example:

If an applicant made a nomination that the building would deliver an average Green Star rating of 6 but on completion the building only achieved an average Green Star rating of 5, then an amount of 10% of the LVC would be remitted, instead of 25% of the LVC (the amount remittable had the building achieved a nominated Green Star rating of 6). The repayment would be of an amount equivalent to the difference between these two values.

Green Star and NatHERS ratings

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: 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: 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.

A 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 nominate and thereby seek a remission under section 4 of this 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.

4 Determination of lease variation charge remission amounts for certain energy efficient developments - s 278 (2)

This section sets out the rates of remission for different completed developments. The remission points as determined by the Treasurer are 10 per cent and 25 per cent of the amount of LVC payable.

Sub-section (a) provides that if a building to which an eligible DA relates complies with an average Green Star rating of 5 for the building, the amount of LVC to be remitted is 10 per cent.

Sub-section (b) provides that if a building to which an eligible DA relates complies with an average Green Star rating of 6 for the building, the amount of LVC to be remitted is 25 per cent.

Sub-section (c) provides that if a building to which an eligible DA relates complies with 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 (d) provides that if a building to which an eligible DA relates complies with an average NatHERS rating of 7.5 or more for the building, the amount of LVC to be remitted is 25 per cent.

5 Disapplication of Legislation Act, s 47 (5)

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

6 Definitions

This section provides definitions for *Green Star rating*, *licensed building assessor*, and *NatHERS rating*.

7 Revocation

This instrument revokes and replaces DI2018-40, the Planning and Development (Remission of Lease Variation Charges-Environmental Sustainability) Determination 2018 (No 1).

8 Expiry

Section 8 provides that this instrument expires on 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:

(a) a matter that is not of a legislative nature, including, for example, a matter of machinery, administrative, drafting or formal nature;

(j) a matter advance notice of which would enable someone to gain unfair advantage;

(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:

- (i) Introduces a process for administering the remission and provides a mechanism by which the amount of the remission can be recovered where energy efficient requirements for the building developed on the land have not been satisfied;
- (ii) Applicants of the remission may gain an unfair advantage with advance notice of the requirements of this instrument, as they do not have to enter into a deferral arrangement with the Commissioner of Revenue prior to the commencement of this instrument.
- (iii) The requirement that the remission is available only if applicants enter into a deferral arrangement with the Commissioner of Revenue has had government policy approval.