ACT CIVIL & ADMINISTRATIVE TRIBUNAL

EMPIRE GLOBAL DEVELOPMENTS NO. 3 PTY LTD v COMMISSIONER FOR ACT REVENUE (Administrative Review) [2020] ACAT 118

AT 13/2020
AT 32/2020

Catchwords: **ADMINISTRATIVE REVIEW** – Lease Variation Charge (LVC) – dispute as to the amount of remission to be applied to the LVC – whether the Tribunal has jurisdiction to determine remissions under section 278of the *Planning and Development Act 2007* – operation of section 84 of the *Legislation Act 2001* – whether applicant has an accrued right

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 ss 26, 68
Legislation Act 2001 ss 82, 84
Planning and Development Act 2007 ss 144, 162, 163, 169, 276E, 277, 277B, 277C, 277D, 277E, 278, 279, 407, 408A, Sch 1
Taxation Administration Act 1999 ss 9, 108, 108A, 279A

Subordinate Legislation cited:
Disallowable instrument DI 2016-28 Planning and Development (Remission of Lease Variation Charges – Economic Stimulus and Sustainability) Determination 2016 (No 1)

Cases cited:
Commissioner of Taxation v Futuris Corporation Limited [2008] HCA 32
Diethelm Manufacturing Pty Ltd v Commissioner of Taxation [1993] FCA 437
Georgalis v ACT Planning and Land Authority [2012] ACAT 1
Moore and National Trust of Australia (ACT) & Environment and Sustainable Development Directorate [2012] ACAT 35
JR Exports Pty Ltd v Australian Trade Commission (1987) 14 FCR 161
Resort Management Services Limited v Noosa Shire Council (1996) 92 LGERA 387
St Landco No 1 Pty Ltd ACN 614 636 805 v Commissioner for ACT Revenue [2020] ACAT 81

List of Texts/Papers cited: Planning and Development (Lease Variation Charges) Amendment Bill 2011 Explanatory Statement

Tribunal: Senior Member Prof. T Foley

Date of Orders: 22 December 2020
Date of Reasons for Decision: 22 December 2020

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 13/2020

BETWEEN:

EMPIRE GLOBAL DEVELOPMENTS NO. 3 PTY LTD
Applicant

AND:

COMMISSIONER FOR ACT REVENUE
Respondent

TRIBUNAL: Senior Member Prof. T Foley

DATE: 22 December 2020

ORDER

The Tribunal orders that:

1. The application is dismissed for want of jurisdiction.

.....
Senior Member Prof. T Foley

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 32/2020

BETWEEN:

EMPIRE GLOBAL DEVELOPMENTS NO. 3 PTY LTD
Applicant

AND:

COMMISSIONER FOR ACT REVENUE
Respondent

TRIBUNAL: Senior Member Prof. T Foley

DATE: 22 December 2020

ORDER

1. The Tribunal finds the application of remissions under section 278 is not a reviewable decision within the meaning of the *Planning and Development Act 2007*.

.....
Senior Member Prof. T Foley

REASONS FOR DECISION

1. Empire Global Developments No. 3 Pty Ltd (**the applicant**) has sought review of the decision of the Commissioner for ACT Revenue (**the Commissioner**) about the amount to be paid by a Crown lessee for a Lease Variation Charge (**LVC**) in relation to a Crown lease. Specifically, it seeks review of its failure to apply an economic stimulus remission of 25% of the LVC.

2. Whether the Tribunal has jurisdiction to review the respondent's decision under the *ACT Civil and Administrative Tribunal Act 2008* (**the ACAT Act**) is at issue. The review is an application for review by the ACT Civil and Administrative Tribunal pursuant to section 68 of the ACAT Act. Pursuant to section 26, the Tribunal may in reviewing the matter inform itself in any way it considers appropriate in the circumstances.

3. In the reasons below, a reference to 'ACAT' or 'tribunal' refers to the ACT Civil and Administrative Tribunal generally, whereas 'Tribunal' refers to the member who heard the application.

The hearing

4. The matter was heard on 14 September 2020. The Tribunal had before it the documents provided by the respondent on which its decision was based (**the T-Documents**). The applicant filed Statement of Facts and Contentions (**ASFC**) dated 22 June 2020. The respondent filed Amended Statement of Facts and Contentions (**RSFC**) dated 27 August 2020. The applicant was represented by Mr B Buckland of counsel instructed by Mills Oakley Lawyers. The respondent was represented by Mr M Hassall of counsel instructed by the ACT Government Solicitor. The matter was relisted for further submissions on 1 December 2020 in the light of the tribunal's decision in *St Landco No 1 Pty Ltd ACN 614 636 805 v Commissioner for ACT Revenue* (***St Landco***).[1] On that occasion Mr J Bird of counsel appeared on behalf of the respondent.

5. The respondent tendered proof of evidence of Mr Hayden Pini dated 14 August 2020. Mr Pini was not called but his witness statement was entered into evidence. Both parties made submissions and responded to questions of the

[1] [2020] ACAT 81

Tribunal. At the conclusion of the hearing the Tribunal reserved its decision and indicated it would provide written reasons. These are those reasons.

Background

6. The subject land is vacant land of approximately 1.096 hectares at Block 1, Section 78, Greenway.

7. The applicant was granted the Crown lease for the land on 26 October 2015 pursuant to a contract of sale from the Land Development Agency. The lease presently allows for residential and mixed-use development.

8. On 12 May 2017 the applicant submitted a development application (**DA**), DA 201731587 to vary the Crown lease, *inter alia*, to increase the number of permitted residential dwellings. On 14 June 2017 the ACT Planning and Land Authority (**ACTPLA**) accepted DA 201731587 for lodgement in the merit track.

9. DA 201731587 was amended on several occasions with the last amendment submitted on 20 November 2017.[2]

10. On 27 April 2018 DA 201731587, as amended, was approved conditional on the granting of two new Crown leases with an entitlement of 571 residential units.

11. On 11 November 2019 the respondent issued a notice of assessment for the Lease Variation Charge (**LVC**) payable in respect of the lease variations in the sum of $5,097,500. The assessment made no provisions for remissions pursuant to section 278 of the *Planning and Development Act 2007* (**PDA**) but did include two uplifts, one under section 182 (Recently Completed Lease) and one under section 276E (Subdivision).

12. On 10 January 2020 the applicant submitted a tax objection in relation to the respondent's failure to apply remissions pursuant to section 278 of the PDA in the notice of assessment. On 13 February 2020 the respondent advised the applicant that the applicant did not have a right to object to the notice of assessment in these terms.

[2] T-Documents pages 317-319

13. On 12 March 2020 the applicant filed an application under section 108A of the *Taxation Administration Act 1999* (**TAA**) with the Tribunal for a review of what it contends is the respondent's deemed refusal to consider the applicant's tax objection to its failure to apply remissions to the LVC assessed by the Commissioner (AT13/2020) (**the tax objection proceedings**).

14. On 26 March 2020 the applicant sought reconsideration of the notice of assessment both as to the valuation and as to the failure to apply remissions. The respondent did not make a substitute decision or confirm the original decision by 23 April 2020 and is taken to have confirmed the original decision.

15. On 21 May 2020 the applicant filed a second application with the Tribunal for a review of the respondent's redetermination decision (AT32/2020) (**the LVC proceedings**).[3]

16. A number of matters in dispute between the parties have been resolved through mediation. The sole remaining issue in dispute for the Tribunal's decision is the respondent's failure to apply a remission of 25% to the LVC for "economic stimulus" as provided for in DI 2016-28.[4]

17. The threshold question is whether the Tribunal has jurisdiction to hear each of the applications. A number of other matters arise for decision only if jurisdiction is found to exist.

Matters at issue

A. The jurisdiction argument AT32/2020 (the LVC proceedings)

The relevant law

18. Where ACTPLA approves a DA under Division 7.3.6 of the PDA, and the DA involves a variation to the terms of a "nominal rent lease", the approval may give rise to liability on the part of the DA applicant to pay a LVC determined in accordance with Division 9.6.3 (variation of nominal rent leases) of the PDA.

[3] T-Documents pages 7-69

[4] Disallowable instrument DI 2016-28 Planning and Development (Remission of Lease Variation Charges – Economic Stimulus and Sustainability) Determination 2016 (No 1)

Division 9.6.3 is a tax law under the TAA.[5] Relevant sections of Division 9.6.3 are extracted below.

19. Section 277 (in part) provides:

277 Lease variation charges—s 277 chargeable variations

(1) The commissioner for revenue works out the lease variation charge for a s 277 chargeable variation of a nominal rent lease as follows:

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

(2) In this section:

"LVC" means the lease variation charge payable for the s 277 chargeable variation of the lease.

V1—

(a) for a variation other than a consolidation or subdivision, means the capital sum that the lease might be expected to realise if—

(i) the lease were varied as proposed; and

(ii) the lease were genuinely offered for sale immediately after the variation on the reasonable terms and conditions that a genuine seller would require; and

(iii) the rent payable throughout the term of the lease or, for a variation that involves the surrender of a lease and issue of a new lease, the new lease, were a nominal rent;

V2—

(a) for a variation other than a consolidation or subdivision, means the capital sum that the lease might be expected to realise if—

(i) the lease were not varied during the remainder of its term; and

(ii) the lease were genuinely offered for sale immediately before the variation on the reasonable terms and conditions that a genuine seller would require; and

(iii) the rent payable throughout the term of the lease, or lease to be surrendered, were a nominal rent;

*(3) If the amount worked out as **V1** is equal to or less than the amount worked out as **V2**, no lease variation charge is payable.*

[5] RSFC at [5]

20. Section 277B deals with providing a working out statement:

277B Lease variation charge under s 277—working out statement

(1) This section applies if—

(a) a development application in relation to a s 277 chargeable variation of a nominal rent lease is approved; and

*(b) the lease variation charge in relation to the s 277 chargeable variation has been worked out (the **original decision**); and*

(c) the commissioner for revenue gives a notice of assessment of a lease variation charge under section 276D (1); and

(d) an application has not previously been made under section 277C for reconsideration of the original decision.

*(2) The applicant for the development application may ask the commissioner for revenue for a statement (a **working out statement**) explaining the commissioner's working out of the original decision.*

(3) The commissioner for revenue must give the applicant a working out statement within 20 working days after the day the applicant asks for the statement unless—

(a) the notice of assessment contains the matters that the working out statement would contain; or

(b) a document that contains the matters that a working out statement would contain has already been given to the applicant.

21. Sections 277C-277E deal with LVC reconsideration:

277C Lease variation charge under s 277—application for reconsideration

(1) The applicant for the development application may apply for reconsideration of the original decision on the earlier of—

(a) the day the applicant receives a working out statement; and

(b) the end of the 20-working day period mentioned in section 277B (3).

(2) If a development approval of a development application relates to more than 1 chargeable variation of a nominal rent lease, this section only applies to the part of the lease variation charge that is worked out for a s 277 chargeable variation.

(3) This section does not apply to a reassessment of a lease variation charge under section 279A.

(4) If the applicant for the development application is not the lessee, the lessee may apply for reconsideration under this section instead of the applicant.

*(5) An application for reconsideration of the original decision (the **reconsideration application**) must be made not later than—*

(a) the later of—

(i) 80 working days after the day the notice of assessment under section 276D (1) is given; and

(ii) if a later day is prescribed by regulation—that day; or

(b) any longer period allowed by the commissioner for revenue.

277D Lease variation charge under s 277—requirements for reconsideration application

(1) The reconsideration application must be in writing and signed by—

(a) the lessee; and

(b) if the application is made by the applicant for the development application who is not the lessee—the applicant.

(2) Also, the reconsideration application must—

(a) set out the grounds on which reconsideration of the original decision is sought; and

*(b) in relation to the original decision—include an independent valuation that works out the amounts represented by **V1** and **V2** in section 277; and*

(c) if the commissioner for revenue gives the applicant a working out statement before the end of the 20-working day period mentioned in section 277B (3)—include the statement.

(3) If subsection (2) (c) applies, the applicant for the reconsideration must give the valuer for the independent valuation the commissioner for revenue's working out statement.

(4) The independent valuation must be prepared by an accredited valuer who—

(a) was not involved in working out or advising on the original decision; and

(b) is—

(i) agreed to by the applicant for the reconsideration and the commissioner for revenue; or

(ii) if the applicant and the commissioner cannot agree—appointed in writing by a person prescribed by regulation; and

(c) satisfies any requirement prescribed by regulation.

(5) The applicant for the reconsideration is responsible for the cost of the independent valuation.

277E Lease variation charge under s 277—reconsideration

(1) Within 20 working days after receiving a reconsideration application, the commissioner for revenue must—

(a) reconsider the original decision; and

(b) either—

(i) make a decision in substitution for the original decision that the commissioner could have made; or

(ii) confirm the original decision.

(2) The 20-working day period mentioned in subsection (1) may be extended for a stated period by agreement between the commissioner for revenue and the applicant for the reconsideration.

(3) In reconsidering the original decision, the commissioner for revenue—

(a) must consider the independent valuation required under section 277D (2) (b) and any other information given in the reconsideration application; and

(b) may consider any other relevant information.

*(4) The commissioner for revenue must ensure that, if the original decision is made by the commissioner or a person on the commissioner's behalf (the **original decision-maker**), someone other than the original decision-maker reconsiders the decision.*

22. Sections 278 and 279 deal respectively with remissions and uplifts:

278 Remission of lease variation charges

> *(1) The Minister may determine circumstances in which an amount of a lease variation charge for a chargeable variation of a nominal rent lease must be remitted.*
>
> *(2) If a determination is made under subsection (1), the Treasurer must determine an amount to be remitted for each lease variation charge for a chargeable variation to which the determined circumstances apply.*
>
> *(3) The amount must be expressed as a percentage of the lease variation charge for a chargeable variation.*
>
> *(4) The commissioner for revenue must remit the amount determined under subsection (2) for a chargeable variation to which the determination applies.*
>
> *(5) A determination under this section is a disallowable instrument.*
>
> *279 When commissioner must increase lease variation charge*
>
> *(1) The commissioner for revenue must increase a lease variation charge for a chargeable variation of a nominal rent lease as prescribed by regulation.*
>
> *(2) A regulation may prescribe the amount of the increase under subsection (1).*
>
> *(3) Subject to any disallowance or amendment under the Legislation Act, chapter 7, the regulation commences—*
>
> *(a) if there is a motion to disallow the regulation and the motion is negatived by the Legislative Assembly—the day after the day the disallowance motion is negatived; or*
>
> *(b) the day after the 6th sitting day after the day it is presented to the Legislative Assembly under that chapter; or*
>
> *(c) if the regulation provides for a later date or time of commencement—on that date or at that time.*

23. For certain types of lease variation the LVC is set by regulation.[6] The amounts set for these charges are not reviewable by ACAT given that they are chargeable variations with codified charges pre-set by "black and white rules" in regulation with no scope for the exercise of discretion.[7]

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[6] Section 276E applies.

[7] *Planning and Development (Lease Variation Charges) Amendment Bill 2011*, explanatory statement at [34]

24. For other types of lease variation, while the LVC is set by the formula provided for in section 277, the formula itself requires the calculation of before and after approval values "the lease might be expected to realise" if certain events were to occur. As such, the determination of the LVC in these cases requires the exercise of discretion. Section 277B provides the Commissioner must, in such cases, provide to the DA applicant on request with a "working out statement" explaining the Commissioner's working out of its LVC "original decision". Original decisions made under section 277 are then subject to reconsideration (sections 277C-277E), and are reviewable by ACAT.[8]

25. Given this, the applicant's application with respect to the setting of the calculation of before and after approval values has the necessary jurisdiction for a valuation challenge pursuant to section 277. However, this aspect of the application has since been resolved between the parties.

26. As regards the remaining remission issue, section 278 provides for the remission of an amount of a LVC set under section 277 in circumstances in which the Minister determines. Section 279 similarly provides for an uplift in a LVC determination when an increase is prescribed by regulation.

27. Decisions to remit an amount of a LVC under section 278 were explicitly reviewable by ACAT up until June 2011.[9] That review provision was removed by the *Planning and Development (Lease Variation Charges) Amendment Act 2011*.[10] A similar situation existed as to section 279 uplifts which were reviewable until June 2011, with jurisdiction then removed.

The applicant's contentions

28. The applicant's argument is that notwithstanding the explicit removal of section 278 reviews, the Commissioner's decision not to remit amounts under section 278 as provided for in DI 2016-28, specifically a remission for "economic stimulus", still forms part of the Commissioner's "original decision" made

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[8] PDA, sections 408A, 407 & schedule 1, item 29

[9] PDA, sections 408A, 407 & schedule 1, item 28. At the time of the Tribunal's decision in *Georgalias v ACT Planning and Land Authority* [2012] ACAT 1 such jurisdiction existed.

[10] *Planning and Development (Lease Variation Charges) Amendment Act 2011* section 13, schedule 1

under section 277 (which is reviewable) and accordingly that aspect of the decision remains reviewable.

29. The applicant contends the LVC is worked out "in relation to" the section 277 chargeable variation "once any remissions have been applied in accordance with s 278 and any uplift has been applied in accordance with s 279".[11] The applicant refers in this regard to the notice of assessment of the LVC it received which includes as part of the "Lease Variation Charge Payable" two components, in addition to the section 277 charge, namely two uplifts similar in kind to section 279.[12] The applicant says the form of this statement is indicative that "LVC is not fully ascertained by the respondent until both remissions and uplifts are applied".[13]

30. The applicant contends the Tribunal will, as a consequence, not have "complied with the terms of the PDA if it determines a value for LVC without considering the remissions".[14]

The respondent's contentions

31. The respondent contends there is no such entitlement to request reconsideration of determinations of the Commissioner as to the application of remissions under section 278.[15] The respondent says that a determination by the Commissioner as to the application of remissions under section 278 is now not a reviewable decision within the meaning of the PDA.[16] The Tribunal's role on review of a decision under section 277E is thus confined in substance to a determination of the correct and preferable values for V1 and V2 under section 277.[17]

32. The respondent argues that to include decisions with respect to section 278 remissions or section 279 uplifts as part of the "original decision", subject to reconsideration under section 277C and to subsequent review, goes beyond the provisions of the PDA. The respondent argues with respect to section 278

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[11] ASFC at [25]
[12] T-Documents pages 154-156
[13] ASFC at [25]
[14] ASFC at [26]
[15] RSFC at [20]
[16] RSFC at [22]
[17] RSFC at [23]

remissions that the obligation placed on the Commissioner that it "must remit the amount determined" by the Minister in a disallowable instrument does not form part of determining the LVC. The obligation placed on the Commissioner under section 278 does not change the LVC amount after it has been determined, it merely adds a concession for stated circumstances determined by the Minister in regulation.

Tribunal's conclusions on the first matter at issue

33. A LVC set under section 277 differs from that set under section 276E. The latter is a codified charge pre-set by legislation and not subject to review. A section 277 LVC requires the calculation of before and after approval values before applying the V1-V2 x 75% formula. This is necessarily a discretionary decision. As such the applicant is given the entitlement to ask the Commissioner for a "working out statement" explaining the Commissioner's working out of this value (section 277B(2)). That entitlement applies if certain conditions are met, *inter alia*, section 277B(1)(b)

> *The lease variation charge in relation to the s 277 chargeable variation has been worked out (the **original decision**)*

Given that this is a pre-condition to providing a working out statement the entitlement requires "the original decision" to have already been made. That decision is clearly subject to reconsideration (section 277C). The Commissioner on reconsideration then has powers under section 277E similar to the Tribunal's powers under section 68 of the ACAT Act. Such a reconsideration decision is reviewable by ACAT.

34. Section 278 provides discretionary powers to the Minister to determine circumstances in which an amount of a LVC are to be remitted. If the Minister determines such circumstances an obligatory power is imposed on the Commissioner to remit a percentage of the LVC (section 278(2)-(4)). The question is whether the determination of remission under section 278 (or uplift under section 279) forms part of the original decision.

35. The tribunal's recent decision in *St Landco* covers this ground. The tribunal found that the Minister's determination about the circumstances in which an

amount of LVC must be remitted refers to an LVC which has already been made. The operation of section 278 was found to be such that the Commissioner must remit the amount for a chargeable variation in which the Minister's determination applies but that remission can only be made in respect of an existing LVC.[18] The tribunal concluded it had no jurisdiction to consider section 278 remissions.

36. The applicant made further submissions in respect of that decision. The applicant submits the sequence the tribunal reached, "that section 277B(1)(b) only applies if something has already occurred, namely that the chargeable variation has been worked out. That decision is the starting point and hence is referred to as the 'original decision' " [19] is not correct. The applicant says instead, section 277(2)-(3) speak of a LVC being 'payable' (or not payable) following certain calculations. That then gives rise to the entitlement to the working out statement provided for in section 277B. The applicant says the original decision pre-requisite in section 277B(1)(b) is wider than merely the section 277 calculation but includes section 278 reductions or section 279 increases. The applicant hangs his hat on the phrase 'in relation to' in section 277B(1)(b) to push for a wider meaning of the LVC, namely that the chargeable variation worked out in section 277 is just the beginning point, not the conclusion. It is a subset but not the whole of the LVC itself, that whole includes any other required calculations (such as section 278 reductions or section 279 increases) and it is that which forms the original decision.

37. Though this is an inventive analysis of the words of the subsection it is not a logical one in the context of the Division and is not persuasive. The Tribunal finds that the determination of remission under section 278 (or uplift under section 279 or, indeed otherwise) is made after, and is not part of, the original decision. Therefore, the power of review under section 277E does not extend past the original section 277 decision, which does not include any entitlement to section 278 remissions.

38. The jurisdictional argument made in AT32/2020 therefore fails.

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[18] [2020] ACAT 81 at [212]-[213]
[19] [2020] ACAT 81 at [211]

B. The jurisdiction argument AT13/2020 (the tax objection proceedings)

The relevant law

39. The Tribunal has jurisdiction under part 10 (Objections and reviews) of the TAA to review certain decisions of the Commissioner with respect to notices of assessment. The applicant argues that the levying of a LVC is a tax and the notice of assessment it received is a notice of assessment of its liability for that tax. The applicant claims an entitlement to review the assessment contained in the notice of assessment and to have that decision subject to review.

40. Part 10 (Objections and reviews) relevantly provides in sections 108-108A:

108 Reviewable decision notices

If the commissioner makes a reviewable decision in relation to an objection by a taxpayer, the commissioner must give a reviewable decision notice only to the taxpayer.

108A Applications for review

The taxpayer in relation to whom a reviewable decision is made may apply to the ACAT for review of the decision.

41. Also relevant is section 279A of the PDA which provides:

279A Lease variation charge—reassessment

(1) This section applies if—

(a) a development application for approval of a chargeable variation of a nominal rent lease is approved; and

(b) the commissioner for revenue gives a notice of assessment of a lease variation charge under section 276D (1); and

(c) the planning and land authority executes a variation of the lease to which the lease variation charge relates.

(2) The commissioner for revenue may reassess the lease variation charge under the Taxation Administration Act 1999, section 9 (Reassessment).

(3) The commissioner for revenue must give—

(a) a notice of assessment of the lease variation charge to the lessee; and

> *(b) if the development application in relation to the chargeable variation is made by someone other than the lessee—a copy of the notice to the applicant.*
>
> *(4) For this division, the Taxation Administration Act 1999, part 10 (Objections and reviews) applies only to a reassessment of a lease variation charge under this section.*

The applicant's contentions

42. The applicant contends that the Tribunal has jurisdiction under section 108A TAA to review the respondent's failure to apply remissions in its notice of assessment.[20] The applicant argues that the levying of a LVC is a tax and the notice of assessment is a notice containing the respondent's assessment of the applicant's liability for that tax. As such, the applicant says it was entitled to object to the assessment contained in the notice of assessment.[21]

43. To provide a jurisdictional basis for this the applicant urges a wide interpretation of section 279A of the PDA that would not exclude the operation and review scheme in Part 10 of the TAA. The applicant contends a "narrow" interpretation of subsection 279A(4) which excludes the application of part 10 of the TAA from the whole of Division 9.6.3 of the PDA (which contains, *inter alia*, sections 276-279), subject to the single exception provided under section 279A(2), is "contrary to the scope and purpose of the TAA" given that "rights of merit review are central to the operation of tax administration legislation".[22] The applicant relies on the decision of the High Court of Australia in *Commissioner of Taxation v Futuris Corporation Limited* (***Futuris***)[23] which held excluding such rights should be done in a cautionary fashion.

The respondent's contentions

44. The respondent contends that section 279A(4) unambiguously provides that Part 10 of the TAA has no application in relation to LVC determinations, save for reassessments pursuant to section 279A(2).[24] The respondent concedes that an exclusory provision applicable to the whole of Division 9.6.3 being inserted in subparagraph 4 of section 279A is oddly placed but, nonetheless, that is the

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[20] ASFC at [28]
[21] ASFC at [29]
[22] ASFC at [30]
[23] [2008] HCA 32 at [21]-[25]
[24] RSFC at [24]

effect of the subsection. This is confirmed, in the respondent's submission,[25] by the explanatory statement accompanying the amending legislation,[26] which stated in part:

> *Importantly, Part 10 Objections and Reviews of the Administration Act will not apply to the Commissioner's original decision as to the amount of LVC for a proposed lease variation. In addition, Part 10 of the Administration Act will not apply to any reconsideration and ACAT merit review of the original decision. Part 10 will only apply to any re-assessment decision of the Commissioner under new s279A of the Planning and Development Act and s9 of the Administration Act. This is the effect of new s279A(4).*

Tribunal's conclusions on the second matter at issue

45. The effect of section 279A of the PDA is to restrict objections with respect to LVCs under part 10 (Objections and reviews) of the TAA to reassessments made under section 9 of the TAA. In this matter the notice of assessment was made under section 276D(1) of the PDA. There was no reassessment of this assessment under section 9 of the TAA. On its face subsection 279A(4) excludes the application of part 10. The applicant's contention that interpretation is "contrary to the scope and purpose of the TAA" in its review provisions might well be salient. Nonetheless, the statement in the explanatory statement shows this clear intention: "Part 10 Objections and reviews of the Administration Act will not apply to the Commissioner's original decision as to the amount of LVC for a proposed lease variation".

46. The 'wide' reading of section 279A(4) the applicant relies on says *Futuris* is not supported by the language of the relevant provision nor by the scope or purpose of the amendment described in the explanatory statement. In *Futuris* the taxpayer retained review rights in the face of a non-invalidity provision favouring the Commissioner which the High Court held should be applied with caution.[27] That is not the case here where rights to review assessments are explicitly excluded.

47. The jurisdictional argument made in AT13/2020 therefore fails.

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[25] RSFC at [25]

[26] *Planning and Development (Lease Variation Charges) Amendment Bill 2011*, explanatory statement at [157]

[27] [2008] HCA 32 at [25]

C. The accrued right argument

48. The decision of the Tribunal is that it has no jurisdiction to review the Commissioner's decision not to apply the economic stimulus remission provided for in DI 2016-28 under section 178 of the PDA. An ancillary matter argued at the hearing was whether the applicant had an accrued right entitling it to the benefit of that remission. The Tribunal was urged by the applicant to express a view about whether such a right had accrued notwithstanding it has no power to review whether a remission should have been applied to the LVC.

49. The applicant's argument is that the right, or the potential enforcement of the right, had accrued before the expiry (6 March 2018) or repeal (17 May 2018) of DI 2016-28 and that the entitlement was protected by the provisions of Chapter 9 of the *Legislation Act 2001*.[28] A threshold aspect is the question as to whether the timetable for dealing with the DA was adhered to by ACTPLA in this matter, and if not, the consequence of that.

The relevant law

50. Section 162 of the PDA sets out the timeframe for deciding a DA. Section 162 (extracted in part) provides:

> *162 Deciding development applications*
>
> *(1) The planning and land authority or, for a development application that the Minister decides to consider under division 7.3.5 (Ministerial call-in power for development applications), the Minister, must—*
>
> *(a) approve a development application; or*
>
> *(b) approve a development application subject to a condition; or*
>
> *(c) refuse a development application.*
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> ...
>
> *(4) The planning and land authority or Minister must take action under subsection (1) in relation to a development application not later than the end of the prescribed time period for the application.*
>
> ...
>
> *(7) In this section:*

[28] ASFC at [33] and [45]

"prescribed time period", for a development application, means—

(a) the period set out in part 7.2 (Assessment tracks for development applications) for deciding an application for a development proposal in the assessment track that applies to the proposal; or

(b) if the period mentioned in paragraph (a) is extended under division 7.3.7—the period mentioned in paragraph (a) plus each extension that applies to the application under division 7.3.7.

Note The time for deciding a development application is 20 working days for a development proposal in the code track (see s 118), 30 or 45 working days for a development proposal in the merit track (see s 122) or different periods for a development proposal in the impact track (see s 131).

51. Section 163 makes provision for deemed refusal of a DA:

163 Power to approve etc development applications deemed refused

(1) This section applies if—

(a) a development application has been made; and

(b) the time for deciding the application has ended; and

(c) neither the planning and land authority nor the Minister has decided the application under section 162.

(2) The planning and land authority or, if the Minister has decided to consider the application under division 7.3.5, the Minister, may approve the application, or approve the application subject to a condition, under section 162 despite the ending of the time for deciding the application.

(3) To remove any doubt, if neither the planning and land authority nor the Minister has decided an application under section 162, the authority is taken to have decided to refuse the application under the ACT Civil and Administrative Tribunal Act 2008, section 12 (When no action taken to be decision).

52. Section 144 of the PDA sets out provision for making amendments to the DA. Relevantly, section 144 provides:

144 Amending development applications

(1) The planning and land authority may, if asked by the applicant, amend a development application.

...

(3) The planning and land authority must, not later than 5 working days after the day the applicant asks for the amendment—

(a) amend the development application; or

(b) refuse to amend the development application.

(4) If the planning and land authority does not tell the applicant that the authority refuses to amend the application within the time given under subsection (3), the authority is taken to have amended the application.

53. Section 169 of the PDA (extracted in part) sets out the timeframe effect of the making of amendments to the DA:

169 Extension of time—application amended

(1) This section applies in relation to a development application if the application is amended under section 144.

(2) The time for deciding the development application under section 162 is extended by the period—

(a) starting on the day the application is made; and

(b) ending on the later of the following days:

(i) the day the application is amended under section 144;

(ii) if the amended application must be publicly notified under division 7.3.4 (see s 146 (1) (b))—the day after the public notification period for the application ends.

54. Chapter 9 of the *Legislation Act 2001* (***Legislation Act***) makes provisions with respect to the repeal and amendment of laws. Section 84 provides for the preservation of certain rights or liabilities upon the repeal of an existing law:

84 Saving of operation of repealed and amended laws

(1) The repeal or amendment of a law does not—

(a) revive anything not in force or existing when the repeal or amendment takes effect; or

(b) affect the previous operation of the law or anything done, begun or suffered under the law; or

(c) affect an existing right, privilege or liability acquired, accrued or incurred under the law.

> *(2) An investigation, proceeding or remedy in relation to an existing right, privilege or liability under the law may be started, exercised, continued or completed, and the right, privilege or liability may be enforced and any penalty imposed, as if the repeal or amendment had not happened.*
>
> *(3) Without limiting subsections (1) and (2), the repeal or amendment of a law does not affect—*
>
> *(a) the proof of anything that has happened; or*
>
> *(b) any right, privilege or liability saved by the law.*
>
> *(4) This section does not limit any other provision of this chapter and is in addition to any provision of the law by which the repeal or amendment is made.*
>
> *(5) This section is a determinative provision.*
>
> *(6) In this section:*
>
> *"liability" includes liability to penalty for an offence against the law.*
>
> *"penalty" includes punishment and forfeiture.*
>
> *"privilege" includes immunity.*
>
> *"right" includes capacity, interest, status and title.*

55. Section 82 of the *Legislation Act* provides that 'law' means an Act or statutory instrument, and 'repeal' includes lapse and expire.

56. The parties' reached consensus at the hearing on certain of the timing milestones under the PDA.

57. It was agreed the application was made to ACTPLA on 14 June 2017 in the merit track. The prescribed period for ACTPLA to "take action" under section 162(2) is 45 working days as per section 122.

58. Two valid amendment requests were made.

59. On 4 August 2017 the applicant sought the first amendment. It was accepted that ACTPLA was taken to have amended the DA under section 144(4) on 11 August 2017. As provided for in section 169(2) the effect of the amendment is to extend the time for deciding the DA by the period "(a) starting on the day the

[original] application is made" [14 June 2017] and "(b) ending on the day the application is amended" [11 August 2017]. It was accepted this was a period of an additional 43 days.

60. On 20 November 2017 the applicant sought the second amendment. It was accepted that ACTPLA was taken to have amended the DA under section 144(4) on 28 November 2017. As provided for in section 169(2) the effect of the amendment is to further extend the time for deciding the DA by the period "(a) starting on the day the [original] application is made" [14 June 2017] and "(b) ending on the day the application is amended" [28 November 2017]. It was accepted this was a further additional period of 118 days.

61. It was accepted at the hearing that both extension of time periods following each of the amendment under section 144 are to be included, even though this involves double-counting of an overlapping period. The extended deadline for deciding the DA was agreed therefore as follows:

    (a) The initial time for deciding as per section 122, 45 working days.

    (b) The first additional amendment period under section 169 from 14 June to 11 August 2017, 43 working days.

    (c) The second additional amendment period under section 169 from 14 June to 28 November, 118 working days.

    (d) This is a total of 206 working days. The due date for ACTPLA to approve the application was 9 April 2018.

62. The DA was approved with conditions on 27 April 2018.

63. Relevantly, DI 2016-28 expired on 6 March 2018 and was repealed on 17 May 2018.

64. The non-adherence to the timeframe by ACTPLA is relevant to the accrued right argument the applicant makes.

The applicant's contentions

65. The applicant contends that section 84(1)(c) preserves its existing right to the benefit of the LVC remission provided for under DI 2016-28.[29] The applicant contends that by virtue of section 84(2) it retained the right to promote that rights by "starting" or "continuing" an "investigation, proceeding or remedy".[30] The applicant concedes its right to remissions under the 2016 instrument would only come into effect in the event of the approval of its DA. Nonetheless, it contends that being conditional on the approval of the DA does not prevent the right from having accrued.[31]

66. The applicant relies on the decision of the Tribunal in *Moore and National Trust of Australia (ACT) & Environment and Sustainable Development Directorate* (***Moore***).[32] In *Moore*, Presidential Member Spender considered the nature of an accrued right protected by section 84. The applicant correctly paraphrases *Moore* in summarising the primary task of the Tribunal in such circumstances as applying the test extracted from *JR Exports Pty Ltd v Australian Trade Commission (**JR Exports**)*,[33] namely:

    (a) To determine whether something in the nature of a cause of action has arisen, or is claimed to have arisen, before amendment.

    (b) In circumstances which would render it manifestly unjust for the appeal of the law to affect the situation adversely.[34]

67. As to the second point, the applicant says the statement in *Moore* to "circumstances which would render it manifestly unjust" requires ascertaining what is a just result, and that this interpretative task should be guided by the criteria identified in the case law.[35]

68. The applicant urged an approach to construction of the continuing benefit of DI 2016-28 in a manner consistent with what the Tribunal in *Moore* described

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[29] ASFC at [40]
[30] ASFC at [41]
[31] ASFC at [45-46]
[32] [2012] ACAT 35
[33] (1987) 14 FCR 161
[34] [2012] ACAT 35 at [44]
[35] [2012] ACAT 35 at [45]

as the "so called benevolent approach" of French J in *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* (***Diethelm***),[36] namely that in the case of "an exemption which exists for the purpose of encouraging, rewarding or protecting some class of activity" a provision should be widely construed.[37]

69. The applicant says with respect to the second point,[38] the question whether or not circumstances exists to allow the exercise of the cause of action should be determined by the justice criteria which *Moore* notes were well categorised by Fryberg J in *Resort Management Services Limited v Noosa Shire Council* (***Resort Management***).[39]

The respondent's contentions

70. The respondent contends that what the applicant had was a right to have its DA determined in accordance with the statutory timeframes set out in the PDA. If failure by ACTPLA to adhere to the timeframes for deciding the DA set out above meant the applicant risked losing the benefit of the remissions other remedies were open to it. It was open to the applicant to bring an application for a deemed refusal under section 163 of the PDA. That right was exercisable by it as from 9 April 2018 after DI 2016-28 had expired but before it was repealed.

71. The respondent further contends that the applicant had at the time DI 2016-28 expired on 6 March 2018 no statutory entitlement, nor any accrued right, to a decision from ACTPLA on DA 201731587 and as such had no accrued right to a particular application of DI 2016-28 which depended on that approval.[40]

Tribunal's conclusions on the accrued right argument

72. The applicant claims a right to remissions under DI 2016-28 in the event of approval of its DA. It says that right accrued upon its lodgement of its final amended DA on 20 November 2017. In the normal course if the DA had been approved the applicant would have gained this entitlement. Under section 84 of the Legislation Act the expiry of DI 2016-28 on 6 March 2018 should not affect

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[36] [1993] FCA 437 at [21]
[37] ASFC at [47]
[38] ASFC at [43]
[39] (1996) 92 LGERA 387
[40] RSFC at [80]

this accrued right. But that right has been lost and the applicant seeks a remedy from the Tribunal.

73. The appropriate test as the Tribunal in *Moore*[41] frames it, as per *JR Exports*, to determine whether there is:

> *...something in the nature of a cause of action which has arisen, or is claimed to have arisen, before the repeal or amendment, in circumstances which would render it manifestly unjust for the repealing or amending Act to affect the situation adversely.*[42]

74. Two questions arise. Is the expectation, as section 278(4) of the PDA provides, that the Commissioner "must remit" the amounts determined under DI 2016-28 "something in the nature of a cause of action"? The expectation certainly moves beyond an indulgence or a discretion as distinguished in *Moore*,[43] because it is a mandatory impost on the Commissioner. It has the flavour of a right given this essentially certain character. Secondly, do the circumstances occasioned by ACTPLA's failure to decide the application by the statutorily required date of 9 April 2018 render "it manifestly unjust for the repealing or amending Act to affect the situation adversely"? The question of assessing a "manifestly unjust" outcome is on its face broad; but as *Moore*[44] says there are well categorised criteria identified by Fryberg J in *Resort Management* that provide a clear direction.[45] The most significant of these are the requirement that:

> *...a statutory right available to the public in general is not likely to be taken to be an accrued right...unless the claimant has taken appropriate steps, or some event has happened, to enable him or her to take advantage of the right by the date of repeal. By that step, a person's right becomes specific rather than general.*[46]

75. In addition to these initial qualities whether any such 'right' is "something in the nature of a cause of action" remains a clear issue. In the case of *Moore*, the right at issue was the right of the applicants to have their objection to a DA determined on its merits (if the DA they were opposing was approved) by

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[41] *Moore and National Trust of Australia (ACT) & Environment and Sustainable Development Directorate* [2012] ACAT 35 at [44]
[42] (1989) 14 FCR 161 at page 163 per Fox J
[43] [2012] ACAT 35 at [54]-[55]
[44] [2012] ACAT 35 at [45]
[45] (1996) 92 LGERA 387 at pages 394-395
[46] (1996) 92 LGERA 387 at page 395

application to the Tribunal. The Tribunal concluded the applicants did, because the applicants had taken a step to assert the right under a statutory provision in lodging the objection, rather than simply having a power to take advantage of an enactment which 'more or less lay fallow' until exercised.

76. Here, the right at issue was the right to have the 'benefit' of the section 278 remission as provided for in DI 2016-28 (if the applicant's DA was approved). The clear difficulty that confronts the applicant is that even if the Tribunal concludes that the applicant has an accrued right that is protected by section 84 this has no effect on the absence of jurisdictional power in the Tribunal to hear such application. There is simply nothing in the nature of a cause of action the Tribunal can decide. Whether there are alternative avenues open to the applicant which gives it something which is enforceable such as remedies under the *Administrative Decisions (Judicial Review) Act 1989* is not a matter for the Tribunal.

77. The accrued right argument in this jurisdiction therefore fails.

Decision

78. The Tribunal dismisses AT13/2020 for want of jurisdiction.

79. As to proceedings AT32/2020 the Tribunal finds the application of remissions under section 278 is not a reviewable decision within the meaning of the *Planning and Development Act 2007*.

.....
Senior Member Prof T Foley

Date(s) of hearing	14 September 2020 1 December 2020
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