

Planning and Development (Lease Variation Charges) Determination 2011 (No 1)

Disallowable instrument DI2011–198

made under the

Planning and Development Act 2007, s 276C (2) (a) (Lease variation charges—amount payable) and s276E (1) (Lease variation charges—s 276E chargeable variations)

EXPLANATORY STATEMENT

Terms for this explanatory statement

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

“the Regulation” means the Planning and Development Regulation 2008

“LVC” means the lease variation charge that applies to a chargeable lease variation and which must be paid before the proposed lease variation can be executed (refer s276B of the Act). This requirement does not apply to lease variations that are not “chargeable variations” and does not apply to variations of leases for which more than a nominal rent is paid. The LVC is worked out under s276C.

“LVC Determination” means the *Planning and Development (Lease Variation Charges) Determination 2011 (No 1)* made by the Treasurer under s276E of the Act. The LVC Determination is the subject of this explanatory statement.

“s276E chargeable variation” see the definition in s276A(1) of the Act. These 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.

“s277 chargeable variation” see the definition in s276A(1) of the Act. The lease variation charge for section 277 chargeable variations are not covered by the LVC Determination and instead are worked out under s277 of the Act.

“Non-residential lease” means a lease other than a residential lease (including leases that authorise the land to be used for both commercial and residential purposes).

“Residential lease” is defined in s234 of the Act. The term means a lease that authorises only residential use of the land comprised in the lease

Background

As part of the 2009-10 Budget, the Government agreed to the Codification of the Lease Variation Charge (LVC) in the Territory to improve efficiency and transparency in the planning system and minimise unnecessary delays in development approvals.

The codification is achieved in part through the development and application of a set of codes or schedules. The Act refers to these codes as the “LVC Determination”.

The LVCs for lease variations covered by the LVC Determination are worked out under the LVC Determination (ie the code) and not under s277 of the Act.

The reasons for determining the charges covered by the LVC Determination and how they were worked out are set out in schedule 4 of the LVC Determination.

The LVC Determination permits the relevant LVC to be worked out by reference to the schedules and maps in the Determination. In summary, a lessee should be able to work out the applicable LVC by:

- checking the location of the lease against the maps in the LVC Determination (reference to the maps is not necessary for variations covered by schedule 1)
- cross referencing the location with the description applying to the lease variation in the schedules 2, 3.

There should be no ambiguity as to what the LVC is for a lease variation covered by the LVC Determination.

This LVC Determination does not apply to the LVC for variations that are not s276E chargeable variations and does not apply to lease variations of leases that are not nominal rent leases (ie leases for which significant rent is payable).

The LVC Determination consists of four schedules and attached maps (Attachment A):

- schedule one – specific lease variations that apply irrespective of location
- schedule two – lease variations to increase the maximum number of dwellings permitted
- schedule three – lease variations to increase the maximum amount of gross floor area permitted for non-residential use
- schedule four – statement of reasons for determining the charges covered by the LVC Determination and how the charges were calculated

1 Name of instrument and commencement

This instrument is the Planning and Development (Lease Variation Charges) Determination 2011 (No 1)

This LVC Determination commences on the day after its notification day as no alternate date is specified in the instrument (s73(2) of the Legislation Act).

2. Working out lease variation charge for multiple s276E chargeable variations – Act, s276C(2)(a)

Where a lease variation includes two or more s276E chargeable variations, the total LVC payable shall be worked out by adding the determined charges together. The following is an example:

Schedule 1 provides that a variation to consolidate 4 leases is calculated at the rate of \$7,500 for the first 3 leases plus \$5,000 for each additional lease:

$$1 \times \$7,500 + 1 \times \$5,000 = \$12,500$$

If the lease variation seeks to also increase gross floor area in a CZ1 zone in the City from an existing 5,000 sq metres to 21,000 sq metres:

$$16,000 \times \$525 = \$8.4 \text{ million} - \text{applicable remission (say, 25\%)} = \$6.3 \text{ million}$$

$$\text{The total LVC is: } \$12,500 + \$6.3 \text{ million} = \$6,012,500.$$

3. Determination of lease variation charges – schedule 1 – Act, s276E(1) – Act, s276E(1)

This section applies to section s276E chargeable variations listed in schedule 1.

Specifically this section applies to the variations identified in the descriptions in columns 2 and 3 of schedule 1, the “specific charges”. These are charges of a very specific nature which are able to be applied uniformly in the ACT. In other words, the charges do not vary from location to location. These variations are able to be identified in a simple list in schedule 1. These items include the following matters.

A variation to insert into a lease a limit on the number of dwellings that can be built on the lease is included in this schedule 1 (items 1 to 4). For example, an existing lease might permit the land to be used for residential purposes but have no express limit on the number of dwellings that can be built. A variation to insert a limit (eg to specify that a maximum of five dwellings can be built) is covered in this schedule. A lessee might seek a variation of this type in order to be able to subsequently unit title the lease under the *Unit Titles Act 2001*. This is a requirement of section 20(2A) of the Unit Titles Act which section was inserted into that Act by Part 1.2 of schedule 1 of the *Planning and Development (Lease Variation Charges) Amendment Act 2011* effective 1 July 2011. This is not a new requirement as it previously existed as a requirement under the Territory Plan.

A lease variation to consolidate two or more leases is also listed in schedule 1 (items 5 and 6). Similarly subdivision of a lease into two or more leases is listed in schedule 1 (refer to items 7, 8).

There are also a number of other lease variations identified in schedule 1 such as lease variations to increase the maximum:

- gross floor area that can be used for a service station (item 9)
- number of care beds or self care units in a retirement complex (item 11 and 12)
- number of children that can be provided care in a child care centre (item 13)

Section 4(1) identifies the matters that are covered by this section, ie the matters listed in schedule 1. The schedule consists of a list with item numbers in column 1, descriptions of the item in columns 2, 3, 4 and the determined charge in column 5.

Section 4(2) provides that a lease variation that meets the descriptions in columns 2, 3, 4 attracts the charge indicated in column 5.

Section 4(3) is a rule on how to apply this LVC Determination. The section applies to lease variations to which both schedule 1 and another schedule applies. In this situation, schedule 1 has priority in other words schedule 1 must be applied and the other schedule must not be applied. An example of this rule is provided.

4. Determination of lease variation charges – schedule 2 – Act, s 276E(1)

This section applies to section s276E chargeable variations listed in **schedule 2**.

Section 5(1) states the lease variations to which this section applies. Specifically this section applies to the variations of a lease to increase the maximum number of dwellings permitted by the lease. These are section 276E chargeable variations to which section 276A(1) *definition of chargeable variation* applies and includes a lease variation to increase the:

- maximum number of dwellings (sub (a))
- number of dwellings permitted on the land under the lease (sub (c)(ii))
- number of dwellings permitted on the land under a consolidated lease (sub (f)(i))
- number of dwellings permitted on the land under a subdivided lease (sub (g)(i)).

In **schedule 2** the following columns are repeated for each suburb:

- column 1 - is the total number of dwellings that would be permitted on the final lease were the proposed lease variation to be executed
- column 2 (3 and 4) is the charge per additional dwelling to be applied corresponding to the total in column 1 for the specified suburb.
 - column 2 applies only to leases in **locality A**.
 - column 3 applies to leases in **locality B**
 - column 4 applies to leases in **locality C**

The “**locality A, B, C**” referred to in columns 2, 3 and 4 respectively refer to “**residential localities**” as identified in the attached maps (Attachment A¹). The boundaries of these suburbs are taken from the Territory Plan. For some suburbs columns 3 and 4 are blank as there are no such residential localities identified. “**Residential locality**” is defined in section 4(3) as “... a locality identified as residential in the legend in a map of the suburb set out in Attachment A (i.e. the maps)”.

Section 4(2) states that the determined charge for schedule 2 lease variations is worked out as the:

Increased number of dwellings X additional dwelling amount

These terms are defined in section 4(3). The “increased number of dwellings” means the number of dwellings that would be added to the permitted maximum were the proposed lease variation to be executed ie the difference between the maximum specified in the original lease and the maximum specified in the lease as varied. The additional dwelling amount is the amount indicated in either column 2, 3 or 4 depending on the locality identified on the attached maps.

The following is an example of how this formula is to be applied. A residential lease in Chapman, residential locality C permits two dwellings to be built on the land. The lessee obtains development approval to vary the lease to permit 6 dwellings on the land. The determined charge is:

increased number of dwellings (4) X additional dwelling amount (\$65,000)

The \$65,000 figure above is the figure in column 3 (for locality C) corresponding to the “5-10 dwellings” item in column 1. The “5-10 dwellings” item in column 1 applies because the total number of dwellings on the varied lease is 6.

5. Determination of lease variation charges – schedule 3 – Act, section 276E(1)

Section 5(1) states the lease variations to which this section applies. In summary, this section applies to the s276E chargeable variations listed in schedule 3.

This section applies only to leases that:

- are located in a suburb/zone listed in columns 1 and 2 of schedule 3; and
- specify a maximum gross floor area that can be used for non-residential purposes and only if the proposed lease variation is to increase the maximum gross floor area permitted for a non-residential use.

In relation to the Act these are s276E chargeable variations to which the following provisions apply. These variations are the ones mentioned in the s276A(1) definition of s276E chargeable variation and include a lease variation:

- to increase the maximum gross floor area permitted for non-residential use (sub (c)(i));

¹ Attachment A means attachment A to the Determination and not this explanatory statement.

- for a consolidation of 2 or more nominal rent leases that increases the maximum gross floor area permitted for non-residential use – this section applies to the increase in gross floor area component only of the lease variation (sub (f)(ii)); and
- for a subdivision of 1 or more nominal rent leases that increases (or has the effect of increasing) the maximum gross floor area permitted for non-residential use— this section applies to the increase in gross floor area component only of the lease variation (sub (g)(ii)).

In this schedule 3 the following columns are repeated for each suburb:

- column 1 refers to the zone to which the charge applies
- column 2 refers to the suburb to which the determined charge (column 4) applies
- column 3 refers to additional criteria, if any, that must be met for the charge to apply
- column 4 refers to the determined charge to apply for lease variations that meet all of the descriptions in columns 1, 2 and 3. The charge is expressed as a dollar amount per square metre of “additional gross floor area”.

The suburbs referred to in column 2 are as identified in the attached maps (Attachment A). The boundaries of these suburbs are taken from the Territory Plan. The zones are as identified in the attached maps; the locations of these zones are also taken from the Territory Plan. In the case of a lease variation that also includes a consolidation; the suburb/zone criteria apply to the lease as consolidated.

The term “additional gross floor area” in column 4 is the difference between the maximum gross floor area permitted under the existing lease for non-residential use and the maximum gross floor area that would be permitted were the proposed lease variation to be executed.

The additional criteria in column 3 (see the definition in s5(3)) refers to either:

- a range of maximum gross floor area for non-residential use. This range refers to the maximum gross floor area that would be permitted under the lease after the proposed variation is executed; or
- a location for the relevant lease. In the case of a lease variation that also includes a consolidation; the location criteria apply to the lease as consolidated.

Section 5(2) states that the determined charge for schedule 2 lease variations is worked out as the:

increased gross floor area X additional gfa amount

These terms are defined in section 5(3). “Increased gross floor area” is the difference between the maximum gross floor area permitted under the existing lease for a non-residential use and the maximum gross floor area that would be permitted were the proposed lease variation to be executed. “Additional gfa amount” is the amount set out in column 4 of schedule 2 applying to lease variations that meet the descriptions in the corresponding columns 1, 2 and 3.

The following is an example of how this formula is to be applied.

A non residential lease in Dickson, in commercial zone CZ3 permits a maximum gfa of 8,000 square metres to be built on the land. The lessee obtains development approval to vary the lease to increase the gross floor area to permit a maximum of 15,000 square metres. The determined charge is:

increased gross floor area 7,000 square metres X additional gfa amount (\$550)

The \$550 figure above is the figure in column 4 (for additional gross floor area amount per square metre) corresponding to the “10,000m² – 20,000m² GFA maximum” item in column 3. The “10,000m² – 20,000m² GFA maximum” applies because the maximum amount of gross floor area permitted on the lease after the variation is 15,000m² .

6. Reasons for determining lease variation charges – Act s276E(4)

Section 276E(4) of the Act requires the LVC Determination to include a statement of the reasons for determining the lease variation charges covered by the LVC Determination and how the charges were determined. This statement is in schedule 4 of the LVC Determination.

7. Definitions

This section provides definitions for *dwelling* and *suburb* but also notes that other terms used in this instrument such as *gross floor area* and *nominal rent lease* have the same meaning as their defined meaning in the *Planning and Development Act 2007*.

Regulatory impact statement

The Legislation Act 2001 section 36(1) states in part:

- (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.

The proposed law supplements other legislative reform that delivered on a major Government policy objective announced in the 2009-2010 Budget.

8. Examples

The following examples demonstrate how the rules are applied for a LVC for lease variations with multiple components. The examples are not exhaustive and do not form part of the instrument.

1. Consolidation of two or more residential leases.

If the variation is a consolidation only then the LVC is for the consolidation and there is no other LVC. For example, lease A permits up to 3 dwellings on the lease and lease B permits up to 2 dwellings on the lease. The relevant development approval approves a consolidation of these two leases resulting in a lease that permits up to 5 dwellings.

The only LVC is for the consolidation, there is no LVC payable in respect to the number of dwellings permitted in the consolidated lease as there is no increase in the total number of dwellings permitted.

2. Consolidation of two or more non-residential leases.

If the variation is a consolidation only then the LVC is for the consolidation and there is no other LVC. For example, lease A permits up to 900m² of gross floor area on the lease for non-residential purposes and lease B permits up to 600m² of gross floor area. The relevant development approval approves a consolidation of these two leases resulting in a lease that permits up to 1500m² of gross floor area.

The only LVC is for the consolidation (Schedule 1), there is no LVC payable in respect to the increase in gross floor area permitted in the consolidated lease as there is no increase in gross floor area permitted.

3. Subdivision of a residential lease.

For example, an original lease that permits up to 5 dwellings is subdivided into two leases that permit up to three dwellings and two dwellings respectively.

The only LVC is for the subdivision, there is no LVC payable in respect to the number of dwellings permitted in the subdivided leases as there is no increase in the total number of dwellings permitted.

4. Subdivision of a residential lease into two leases and an overall increase in the number of dwellings permitted on the resulting two leases.

For example, an original lease that permits up to 5 dwellings is subdivided into two leases that permit up to three dwellings and four dwellings respectively (ie an aggregate increase of two dwellings).

In this case the LVC is the sum of the LVC for the:

- Subdivision (Schedule 1) and
- increase in the maximum number of dwellings from five to seven (Schedule 2)

5. Subdivision of a non-residential lease.

For example, an original lease that permits up to 900m² of gross floor area is subdivided into two leases that permit up to 400m² and 500m² respectively.

The only LVC is for the subdivision, there is no LVC payable in respect to the maximum gross floor area in the subdivided leases as there is no increase in the total amount of gross floor area.

The next 3 examples demonstrate application of the rules when a lease variation charge application triggers more than one LVC charge.

6. **Subdivision of a non-residential lease into two leases and an overall increase in the maximum amount of gross floor area permitted on the resulting two leases.**

For example, an original lease that permits up to 900m² of gross floor area is subdivided into two leases that permit up to 400m² and 700m² respectively.

In this case the LVC is the sum of the LVC for the:

- **Subdivision** (Schedule 1); and
- increase in the **maximum gross floor area** from 900m² to 1100m² (Schedule 3).

7. **Consolidation of two or more residential leases and an increase in the number of dwellings permitted on the consolidated lease.**

For example, lease A permits up to 3 dwellings on the lease and lease B permits up to 2 dwellings on the lease. The relevant development approval approves a consolidation of the two leases and an increase in the total number of dwellings with the result that the consolidated lease authorises 7 dwellings.

In this case the LVC is the sum of the LVC for the:

- **Consolidation** (Schedule 1); and
- increase in the **permitted number of dwellings** from 5 to 7 (Schedule 2).

8. **Consolidation of two or more non-residential leases and an increase in the maximum gross floor area.**

For example, lease A permits up to 900m² of gross floor area on the lease and lease B permits up to up to 600m² of gross floor area. The relevant development approval approves a consolidation of the two leases and an increase in the total gross floor area with the result that the consolidated lease authorises 2000m² of gross floor area.

In this case the LVC is the sum of the LVC for the:

- **Consolidation** (Schedule 1); and
- increase in the **maximum gross floor area** from 1500m² to 2000m² (Schedule 3)