

Australian Capital Territory

Planning and Development (Lease Variation Charges) Determination 2017 (No 1)

Disallowable instrument DI2017–176

made under the

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

EXPLANATORY STATEMENT

Terms for this explanatory statement

Act means the *Planning and Development Act 2007*.

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 under section 276B 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 section 276C.

LVC Determination means this instrument, which is made by the Treasurer under section 276E of the Act, specifying that the Treasurer may determine the LVCs for a s 276E chargeable variation by disallowable instrument.

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 means a lease that authorises only residential use of the land comprised in the lease—see section 234 of the Act.

s 276E chargeable variation—see the definition in section 276A (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 s 276E chargeable variation or is not covered by the LVC Determination is a s 277 chargeable variation.

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

Summary

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, minimise unnecessary delays in development approvals and minimise ambiguity as to what the LVC is for a lease variation covered by the determination. 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.

LVC Determination

This instrument commences on 1 July 2017.

The LVC Determination applies a set of codes and schedules so that the relevant LVC can be worked out by reference to the instrument. The LVCs for lease variations covered by the LVC Determination are worked under the LVC Determination (the code) and not under section 277 of the Act.

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); and
- cross referencing the location with the description applying to the lease variation in schedules 2 or 3.

This LVC Determination does not apply to the LVC for variations that are not s 276E chargeable variations and does not apply to lease variations of leases that are not nominal rent leases (i.e. leases for which significant rent is payable).

In considering whether to determine the relevant LVCs, s 276E (2) (a) of the Act requires the Treasurer to obtain and have regard to advice from an accredited valuer before the start of each financial year. This is in order to make a fresh determination with respect to the LVC fees and schedules. It must also state the reasons for determining the LVC and how the charge was determined under s 276E (4).

Previous determinations

The original LVC Determination, DI2011-198, commenced on 15 July 2011. DI2015-205 amended schedules 3 and 4 of DI2011-198, effective 1 July 2015, to update the schedules of industrial and commercial LVC fees (schedule 3) and the statement of reasons (schedule 4) as required by s 276E (4) (a) of the Act.

This instrument replaces both DI2011-198 and DI2015-205 (both of which are revoked).

Changes in this instrument

The purpose of this instrument is to incorporate a 2017-18 Budget initiative to increase the codified Lease Variation Charge required to enable unit titling on certain residential leases from a fee of \$7,500 or \$5,000 per dwelling to a flat fee of \$30,000 per dwelling.

This increase will improve consistency with the 'per unit' charges which apply to other types of residential lease. The increased LVC amount applies to development applications that are submitted to the planning and land authority through its online lodgement system on or after 1 July 2017. To ensure fairness and equity for developers who were notified of the change when the 2017-18 Budget was announced, the previous charges continue in effect for variations if the relevant development application was submitted before 1 July 2017.

This instrument consolidates the schedules of codified LVCs in the *Planning and Development (Lease Variation Charges) Determination 2011 (No 1)* DI2011-198, as amended by the *Planning and Development (Lease Variation Charges) Amendment Determination 2015 (No 1)* DI2015-205 into one instrument.

However, this instrument does not modify the other charges that applied under DI2011-198 as amended by DI2015-205.

Retrospectivity

Under s 276D(2), the LVC payable on a development application is determined on the day that the development application is approved. This instrument commences on 1 July 2017 and sets a new LVC for applications submitted after 1 July 2017. Therefore, it does not have retrospective application with respect to the increased LVC that becomes payable.

The LVC determination continues to apply the existing LVC rate for development applications submitted prior to 1 July 2017. To this extent, the determination may be considered to have retrospective effect. However, the determination is not prejudicial to this class of applications as it continues to apply the existing LVC rate. The LVC determination does not have any prejudicial provisions that commence retrospectively.

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.

Consolidation of 2 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 2 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.

Consolidation of 2 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 2 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.

Subdivision of a residential lease

For example, an original lease that permits up to 5 dwellings is subdivided into 2 leases that permit up to 3 dwellings and 2 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.

Subdivision of a residential lease into 2 leases and an overall increase in the number of dwellings permitted on the resulting 2 leases

For example, an original lease that permits up to 5 dwellings is subdivided into 2 leases that permit up to 3 dwellings and 4 dwellings respectively (an aggregate increase of 2 dwellings).

In this case the LVC is the sum of the LVC for the subdivision (schedule 1) and the increase in the maximum number of dwellings from 5 to 7 (schedule 2).

Subdivision of a non-residential lease

For example, an original lease that permits up to 900m² of gross floor area is subdivided into 2 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.

Subdivision of a non-residential lease into 2 leases and an overall increase in the maximum amount of gross floor area permitted on the resulting 2 leases

For example, an original lease that permits up to 900m² of gross floor area is subdivided into 2 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 the increase in the maximum gross floor area from 900m² to 1100m² (schedule 3).

Consolidation of 2 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 2 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 the increase in the permitted number of dwellings from 5 to 7 (schedule 2).

Consolidation of 2 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 2 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 the increase in the maximum gross floor area from 1500m² to 2000m² (schedule 3).

Details of the instrument

Section 1 Name of instrument

This section provides the name of the instrument.

Section 2 Commencement

This section provides the instrument commences on 1 July 2017.

Section 3 Definitions

This section defines key terms for this instrument.

Other terms used in this instrument have the same meaning as their defined meaning in the Act (see section 148 of the *Legislation Act 2001*).

Section 4 Working out lease variation charge for multiple s 276E chargeable variations—Act, s 276C (2) (a)

Where a lease variation includes 2 or more s 276E chargeable variations, the total LVC payable must 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:

$$3 \times \$7,500 + 1 \times \$5,000 = \$27,500$$

If the lease variation seeks to also increase gross floor area in a CZ1 zone in the City from an existing 5,000m² to 21,000m²:

$$16,000 \times \$525 = \$8,400,000$$

$$\$8,400,000 - \text{applicable remission (say, 25\%)} = \$6,300,000$$

The total LVC is: $\$27,500 + \$6,300,000 = \$6,327,500$.

Section 5 Determination of lease variation charges—schedule 1—Act, s 276E (1)

This section applies to s 276E 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 (items 1 to 3). 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 (for example, to specify that a maximum of 5 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*.
 - The increase announced in the 2017-18 Budget applies in item 1.
 - Former items 1 and 2 in DI2011-198 are re-determined as items 1A and 1B by this instrument. Items 1A and 1B provide for the previous charges to continue in effect for any variation for which the relevant development application was submitted before 1 July 2017.
- A variation to consolidate 2 or more leases (items 4 and 5).
- A variation to subdivide a lease into 2 or more leases (items 6 and 7).
- A variation to increase the maximum:
 - gross floor area that can be used for a service station (item 8);
 - gross floor area of a club holding a club licence (item 9); or
 - number of care beds or self care units in a retirement complex (items 10 and 11).
- A variation of a lease that authorises an incorporated association to use the land to remove the reference to the association (item 12).

A variation to increase the number of children that can be provided care in a child care centre (item 13 in DI2011-198, schedule 1) has been removed in this instrument. The *Planning and Development (Lease Variation Charge Exemption—Childcare Centres) Amendment Regulation 2016 (No 1)*, effective 8 April 2016, removed this variation as a s 276E chargeable variation. The *Planning and Development Regulation 2008*, section 170 (1) (d) now provides that the variation is exempt from the LVC.

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

Section 5 (2) provides that a lease variation that meets the descriptions in columns 1, 2 and 3 attracts the charge indicated in column 4.

Section 5 (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 above.

Section 6 Determination of lease variation charges—schedule 2—Act, s 276E (1)

This section applies to s 276E chargeable variations listed in **schedule 2**.

Section 6 (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 include s 276E chargeable variations to increase the:

- maximum number of dwellings;
- number of dwellings permitted on the land under the lease;
- number of dwellings permitted on the land under a consolidated lease; and
- number of dwellings permitted on the land under a subdivided lease.

(See the definition of *s 276E chargeable variation* in the Act, section 276A (1).)

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; and
- columns 2, 3 and 4 are 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**; and
 - column 4 applies to leases in **locality C**.

Locality A, Locality B and Locality C referred to in columns 2, 3 and 4 respectively refer to residential localities as identified in the maps in Attachment A to this instrument. **Residential locality** is defined in section 6 (3) as ‘a locality identified as residential in the legend in a map of the suburb set out in Attachment A’. 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.

Section 6 (2) states that the determined charge for schedule 2 lease variations is worked out as follows:

Increased number of dwellings* × *additional dwelling amount

These terms are defined in section 6 (3). ***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, that is 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 2 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) × *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 and the increased number of dwellings is 4.

Section 7 Determination of lease variation charges—schedule 3—Act, s 276E (1)

Section 7 (1) states the lease variations to which this section applies. In summary, this section applies to the s 276E 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 s 276E chargeable variations to which the following provisions apply. These variations are the ones mentioned in the definition of *s 276E chargeable variation* and include a lease variation:

- to increase the maximum gross floor area permitted for non-residential use;
- 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; 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.

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 of this instrument). 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 “criteria” in column 3 (see the definition in section 7 (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 7 (2) states that the determined charge for schedule 3 lease variations is worked out as the:

increased gross floor area × *additional gfa amount*

These terms are defined in section 7 (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 gross floor area of 8,000m² 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 15,000m². The determined charge is:

increased gross floor area (7,000m²) × *additional gfa amount* (\$510)

The \$510 figure above is the figure in column 4 (for additional gross floor area amount per square metre) corresponding to the “10,000m² to 20,000m² GFA maximum” criteria in column 3. The “10,000m² to 20,000m² GFA maximum” applies because the maximum amount of gross floor area permitted on the lease after the variation is 15,000m².

Section 8 Reasons etc for determining lease variation charges—Act, s 276E (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.

Section 9 Revocation

This section revokes DI2011-198 and DI2015-205.

Schedule 1 Specific charges

This schedule details the specific lease variations that apply irrespective of location.

Schedule 2 Residential

This schedule details lease variations to increase the maximum number of dwellings permitted.

Schedule 3 Commercial and industrial

This schedule details lease variations to increase the maximum amount of gross floor area permitted for non-residential use.

Schedule 4 Statement of reasons

This schedule is the statement of reasons for determining the charges covered by the LVC Determination and how the charges were calculated.

Attachment A

This attachment contains suburb maps for the purposes of identifying zones and localities under this instrument.

Authorised by the Acting Treasurer
Yvette Berry MLA