



## **RISKS FROM DELAY IN GIVING AN ANNUAL ESTIMATE OF OPERATING EXPENSES FOR A “RETAIL SHOP LEASE”**

### ***Operating expenses payable under a lease***

A lease can provide for a tenant to make payments additional to rent, generally for the ‘operating expenses’ of the leased premises, and often apportioned on the basis of the ‘lettable area’ as between the leased premises and any other premises which benefit from the expense.

### ***Is your lease a “retail shop lease”?***

Where the lease provides for the premises to be used for a retail business that sells, or predominantly sells, goods rather than services (or is in a retail shopping centre or in a business prescribed by regulation) then the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* (**Retail Shops Act**) regulates as to how the ‘operating expenses’ are dealt with.

### ***How operating expenses must be dealt with under a ‘retail shop lease’***

The Retail Shops Act requires the landlord to give to the tenant an estimate of operating expenses in a disclosure statement prior to entering into the lease, and annually, and to give an annual reconciliation as against the operating expenses actually incurred in the lease year.

Restrictions are imposed on categories of operating expenses that are recoverable under a retail shop lease, and on how to apportion them between all premises which benefit from the operating expense, and to prevent a landlord imposing a margin on the costs that comprise it.

Leases often allow operating expenses to be claimed on demand, by invoicing the tenant and giving them 14 days to pay when the account arrives, or instead giving them a written estimate of anticipated expenses for the year, to be paid by the tenant in 12 equal monthly instalments, then reconciled at the end of the year, with the tenant then invoiced or credited the difference.

### ***Sanction for any delay in giving a written annual estimate of operating expenses***

However, for a ‘retail shop lease’ the Retail Shops Act provides that a tenant is not required to make payment of, and the landlord not entitled to recover, operating expenses until at least one month after the landlord gives the tenant a written annual estimate of operating expenses.



## ***What happens if a written estimate is not given before the end of the lease year?***

If by the end of the lease year the landlord of a retail shop lease has failed to give to their tenant a written annual estimate of operating expenses then the tenant is not obliged to pay, and the landlord not entitled to recover, any operating expenses for that particular lease year.

This will also mean an audited operating expenses statement cannot be given for that particular lease year. However, an unaudited statement can be given for land tax, water, sewerage and drainage charges, local government rates and charges or insurance premiums and is accompanied by copies of assessments, invoices, receipts or other proof of payment. Until the landlord complies with that requirement the tenant is not obliged to pay, and the landlord is not entitled to recover, future operating expenses beyond that particular lease year.

## ***What if by year's end the tenant has already paid that year's operating expenses?***

It will not be until the end of the lease year that a tenant can first know if they were given an estimate by then, by which time the tenant may already have paid operating expenses if they did not earlier insist on their right not to do so until one month after being given an estimate.

Nevertheless, if agreed terms of the lease would also not oblige payment of operating expenses until an estimate is first provided, then the tenant may be entitled to recover what they did pay.

Any entitlement to recover any such mistaken payments could extend as far back as six years.

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

**Author:** Kevin Morgan (Special Counsel: Dispute Resolution & Litigation)

Email: [kevin.morgan@murfett.com.au](mailto:kevin.morgan@murfett.com.au)

### **Directors:**

[Jason De Silva](#) (Director: Business Advisory, Insolvency & Litigation)

[jason.desilva@murfett.com.au](mailto:jason.desilva@murfett.com.au)

[Kelly Parker](#) (Director: Business Advisory, Commercial & Insolvency)

[kelly.parker@murfett.com.au](mailto:kelly.parker@murfett.com.au)

[Peter Broun](#) (Director: Property & Real Estate)

[peter.broun@murfett.com.au](mailto:peter.broun@murfett.com.au)