

Information Sheet – Outgoings

What are outgoings?

Outgoings are costs incurred by a landlord in relation to a premises or in the case of a multi occupancy property, such as a shopping centre, the premises and the property.

The *Retail Leases Act 2003* (Vic)(the **Act**) contains provisions relating to 'outgoings'.

The Act (section 3) defines 'outgoings' as follows:

'outgoings' means a landlord's outgoings on account of any of the following—

- (a) the expenses directly attributable to the operation, maintenance or repair of—
 - (i) the building in which the retail premises are located or any other building or area owned by the landlord and used in association with the building in which the retail premises are located; or
 - (ii) in the case of retail premises in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre;
- (b) rates, taxes, levies, premiums or charges payable by the landlord because the landlord is—
 - (i) the owner or occupier of a building referred to in paragraph (a) or of the land on which such a building is erected; or
 - (ii) the supplier of a taxable supply, within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), in respect of any such building or land.'

Can outgoings be passed onto a tenant?

Whether outgoings can be passed onto a tenant primarily depends on what has been agreed between a landlord and tenant in a retail lease agreement.

The parties will usually agree that the landlord is entitled to pass on the cost of specified outgoings to the tenant. However, this is not always the case. The parties may agree that the tenant only pays rent and no outgoings.

If the Act applies, a landlord cannot pass outgoings onto a tenant unless the tenant has been given an estimate of outgoings (see further below).

The lease may specify that the tenant must pay particular outgoings:

- directly to the service provider; or
- to the landlord either before or after payment of the outgoing to the service provider by the landlord.

Tenants may be charged GST on outgoing

A tenant may be required to pay goods and services tax (**GST**) on outgoing payable by the tenant depending on a number of factors such as whether the landlord is registered for GST, whether the supply of the relevant service is a taxable supply, and whether the lease allows the landlord to pass on GST to the tenant.

Further information may be obtained from the Goods and Services Tax Determination (GSTD 2000/10) issued by the Australian Tax Office (**ATO**). Tenants and landlords requiring further information may also wish to contact the ATO.

Some outgoing cannot be passed onto tenants

The Act provides that the following outgoing cannot be passed onto tenants:

- land tax;
- expenses that do not benefit the premises;
- contributions to a sinking fund for capital works;
- rent payable by the landlord in respect of any head lease;
- management fees, unless the management fees relate to the management of the building or shopping centre in which the premises are located;
- capital costs; and
- interest on borrowings.

Additionally, a landlord is not permitted to pass on costs in relation to:

- legal or other expenses relating to the negotiation, preparation or execution of the lease;
- obtaining the consent of a mortgagee to the lease; or
- the landlord's compliance with the Act.

Note that a landlord is not prevented from claiming the reasonable legal or other expenses incurred by the landlord in connection with an assignment of the lease or a sub-lease, including investigating a proposed assignee or sub-tenant and obtaining any necessary consents to the assignment or sub-lease or preparing a new disclosure statement for the proposed assignee at the tenant's request.

Lease must specify outgoing

Section 39 of the Act provides that a tenant under a retail premises lease is not liable to pay an amount to the landlord in respect of outgoing except in accordance with provisions of the lease that specify (i.e. itemise) -

- the outgoing that are to be regarded as recoverable; and
- in a manner consistent with the regulations, how the amount of those outgoing will be determined and how they will be apportioned to the tenant; and

- how those outgoings or any part of them may be recovered by the landlord from the tenant.

Tenant must be given estimate of outgoings

Section 46 of the Act provides that the landlord must give the tenant an estimate of all outgoings before the lease is entered into, and at least one month before the start of each of the landlord's accounting periods (i.e. each year) during the term of the lease.

Prior to entry into the lease, it is usual for a landlord to give the tenant the estimate of outgoings as part of the disclosure statement that the landlord is obliged to provide to the tenant. Further information about, and the forms of, the disclosure statement can be obtained from the Victorian Small Business Commissioner's (VSBC) website at www.vsbcc.vic.gov.au.

Failure to provide the estimate of specific outgoings means that the tenant is not liable to contribute to any such outgoings (of which an estimate is required to be given under section 46 of the Act) until the tenant is given that estimate.

The Act does not specifically state whether a tenant must pay outgoings for the period prior to being given an estimate of outgoings (i.e. whether the landlord can retrospectively charge outgoings). However, legal advice obtained by the VSBC suggests that a landlord may not be able to seek reimbursement of outgoings from the tenant for the period prior to an estimate of outgoings being provided to the tenant.

A landlord or tenant should consider obtaining their own legal advice in relation to this issue.

What if the estimate of outgoings is inaccurate or too low?

Generally a tenant cannot avoid paying outgoings because the estimate given under s.46 proves to be incorrect.

However, it is possible if an estimate of outgoings is so inaccurate, it may not constitute an 'estimate' in compliance with the Act. Also, a landlord should take care to ensure that an inaccurate estimate does not mislead or deceive the tenant.

It is the practice of many landlords to issue an estimate revision during the landlord's accounting period.

Tenant must be given statement of outgoings together with an auditor's report or proof of payment

Section 47 of the Act requires the landlord to prepare a written statement that details all expenditure by the landlord, in each of the landlord's accounting periods during the term of the lease, on account of outgoings to which the tenant is liable to contribute.

The landlord must:

- make the statement available to the tenant at least once during each of the landlord's accounting periods during the term of the lease; and
- give the tenant the statement within 3 months after the end of the accounting period to which it relates.

The outgoings statement must be prepared in accordance with relevant principles and disclosure requirements of applicable accounting standards made by the Australian Accounting Standards Board.

The statement given to the tenant must be accompanied by a report prepared by a registered company auditor that states whether:

- (i) the statement correctly states the landlord's expenditure during the accounting period in respect of the total amount of outgoings, and each individual outgoing that comprises more than 10% of the total amount of outgoings, to which the tenant is liable to contribute; and
- (ii) the total amount of estimated outgoings for that period (as shown in the estimate of outgoings given to the tenant) exceeded the total actual expenditure by the landlord in respect of those outgoings during that period.

However, an auditor's report does not need to be given if the landlord gives the tenant copies of assessments, invoices, receipts or other proof of payment for all expenditure by the landlord included in the statement, where the statement relates only to the following outgoings:

- GST
- municipal council rates and charges
- fire services property levy
- water, sewerage and drainage rates and charges
- insurance
- owners corporation fees

An auditor preparing a report must ensure that the tenant is given a reasonable opportunity to make a written submission to the auditor on the accuracy of the outgoings statement.

Adjustment of contributions to outgoings

Section 48 of the Act provides that there is to be an adjustment between the landlord and tenant for each of the landlord's accounting periods during the term of the lease to take account of any underpayment or overpayment by the tenant in respect of outgoings during that period.

The adjustment is to take place within one month after the landlord gives the tenant the outgoings statement under section 47 for the period or within 4 months after the end of the period, whichever is earlier.

The adjustment is to be calculated on the basis of the difference between—

- (a) the total amount of outgoings in respect of which the tenant contributed (that is, the estimated total expenditure by the landlord on outgoings during the period); and
- (b) the total actual expenditure by the landlord in respect of those outgoings during the period, but taking into account only expenditure properly and reasonably incurred by the landlord in the payment of those outgoings.

Introduction of the Fire Services Property Levy

The Fire Services Property Levy (the **Levy**) is a new levy on property owners payable from 1 July 2013 and was introduced by the Victorian Government to replace the Fire Services Levy that previously applied to insurance policies.

The Levy is payable by property owners at the same time as Council rates are payable. The Levy will be separately identified on Council rates notices and will enable owners to see how the Levy has been calculated.

Disclosure statements for new leases must include an estimate of the amount of the Levy for the relevant building or centre if it is intended that the tenant be required to contribute to or pay the Levy.

As stated above, a tenant is not required to contribute to an outgoing unless the outgoing is specified in the lease and the tenant has been given an estimate of that outgoing. Therefore, if it is intended that the tenant be required to contribute to the cost of the Levy in accordance with the lease, the landlord should give the tenant an estimate of the Levy.

If a landlord has given a tenant an estimate of the outgoings prior to 30 June 2013 that did not include the Levy, and the Levy is a recoverable outgoing specified in the lease, a landlord may need to provide the tenant with an updated estimate of outgoings.

Legal advice obtained by the VSBC suggests while the amount of the Levy for a building or centre will be specified in a Council rates notice it is not sufficient for the landlord to have given an estimate of the rates payable in respect of the building or centre – a separate estimate of the Levy must be provided in order for the landlord to be entitled to recover contributions to the Levy or to require payment by a tenant of the Levy direct to Council.

The Act does not specifically state whether a tenant must pay outgoings for any period prior to being given an estimate of outgoings (i.e. whether the landlord can retrospectively charge outgoings). However, legal advice obtained by the VSBC suggests that a landlord may not be able to seek reimbursement or payment of outgoings including the Levy from a tenant for any period prior to an estimate of the Levy being provided to the tenant.

Further information about the Levy can be obtained at www.firelevy.vic.gov.au/faq.html

Resolving disputes concerning outgoings

The VSBC offers a dispute resolution service to assist parties to resolve business disputes. A dispute can be referred to the VSBC by submitting an application which summarises the issues and specifies the parties involved.

The Small Business Commissioner (**Commissioner**) appoints an officer to consider the application, contact the parties and, through providing preliminary assistance, seeks to resolve the dispute. There is no cost to the parties for this service. If the dispute cannot be resolved at this stage, the parties are invited to attend mediation.

Mediation involves a meeting between the parties in dispute and an independent mediator who will attempt to assist the parties to reach an agreement about the dispute. When all parties agree to mediation, the Commissioner appoints a mediator and the VSBC arranges the date, time and venue. The mediation can be in regional Victoria if it is more convenient for the parties. Mediation costs only \$195 per party per session and usually takes 3-4 hours.

The mediation is confidential. However, any settlement agreement may be taken to the Victorian Civil and Administrative Tribunal (**VCAT**) or an appropriate Court for enforcement, if necessary.

Each party pays their own costs at VCAT. However, where a party refuses to take part in mediation under the Act, VCAT has the power to order that party to pay the costs of the other party.

Further information, including the cost of mediation can be found on the VSBC's website at www.vsbv.vic.gov.au

Further Information

Contact the Office of the Victorian Small Business Commissioner

Call **13 VSBC (13 8722)**

TTY **(03) 9651 7596**

Or visit: www.vsbv.vic.gov.au

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