



Commercial Tenancy (Retail Shops) Agreements Act 1985

Allocation of operating expenses for non-standard trading hours

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (the Act) includes provisions concerning the allocation of operating expenses incurred during varying trading hours. Generally, a tenant will only be required to contribute to those expenses from which the tenant derives a benefit.

Provisions requiring a retail shop to open during specified hours

The Act provides that a provision in a retail shop lease which requires the tenant to open the shop during specified hours or at specified times is void. The landlord cannot therefore require a tenant to open during non-standard trading hours (or at any other time) and provisions of this nature should not be included in retail shop leases.

Allocation of operating expenses

In addition to rent, tenants are often required to pay a proportion of shopping centre operating expenses. Operating expenses (sometimes referred to in lease documents as ‘outgoings’ or ‘variable outgoings’) are the costs incurred by the landlord in operating, repairing, or maintaining the landlord’s premises, including any building common areas. Typically these costs include rates and taxes, cleaning, air-conditioning, security, insurances and other valid expenses of running the property. Capital expenses and management fees are not recoverable from tenants.

The Act sets out certain rules regarding the allocation of operating expenses and has different rules for how those expenses may be allocated depending on whether they were incurred during standard trading hours or outside of standard trading hours (non-standard trading hours).

The “standard trading hours” for the purposes of the Act are currently:

- 8am to 6pm – Monday, Tuesday, Wednesday and Friday;
- 8am to 9pm – Thursday; and
- 8am to 5pm – Saturday.

Recent changes to retail trading hours legislation will permit retailers to open at times outside the standard trading hours.

Expenses incurred during standard trading hours

For operating expenses incurred during the standard trading hours a tenant cannot be required to pay more than their “relevant proportion”. This is the tenant’s proportion of the total lettable area of the shopping centre - calculated by dividing the lettable area of the particular premises by the lettable area of the whole of the shopping centre or group of premises in question. A tenant can be required to pay their relevant proportion of all operating expenses incurred during the standard trading hours even if the tenant does not open for the whole of that period.

Expenses incurred during non-standard trading hours

A tenant cannot be required to contribute to operating expenses during non-standard trading hours if the tenant does not open its retail shop during those non-standard trading hours.

A tenant can only be charged operating expenses for those non-standard trading hours during which it is open. Landlords may recover the total operating expenses attributable to non-standard trading hours from the shops that do open. Landlords will therefore be required to allocate these expenses to tenants based on both the proportion of time during which a tenant opens and the lettable area of the premises.

Gross and semi-gross leases

Some leases make provision for payment of rental on a gross or semi-gross basis. The rental under these leases includes a payment for all (gross) or some (semi-gross) of the operating expenses.

Given that a component of these rental payments is attributable to operating expenses, the provisions of the Act concerning allocation of operating expenses incurred during non- standard trading hours will also apply to gross or semi-gross leases. The proportion of the gross or semi-gross rental attributable to operating expenses cannot be increased as a result of an extension in trading hours for a shopping centre unless the tenant is open during those non-standard trading hours and should be allocated as described above.

Examples

	What can be recovered from the tenant		
	Rent	Operating expenses for standard trading hours	Operating expenses for non-standard trading hours
Open standard trading hours only	Yes	Yes	No
Open during non-standard trading hours	Yes	Yes	Yes – based on proportion of non-standard trading hours open and proportion of lettable area.
Open less than standard trading hours	Yes	Yes	No

Shop	Lettable area of premises	Opening hours	Proportion of operating expenses for standard trading hours (8am - 6pm) Note – example applies to Mon, Tues, Weds and Fri only	Proportion of operating expenses for non-standard trading hours		
				6pm-7pm	7pm-8pm	8pm-9pm
A	400 m ²	8am – 9pm	400 ÷ 1000 (40%)	400 ÷ 800 (50%)	400 ÷ 600 (66.6%)	400 ÷ 400 (100%)
B	200 m ²	10am – 3pm	200 ÷ 1000 (20%)	nil	nil	nil
C	200 m ²	8am – 7pm	200 ÷ 1000 (20%)	200 ÷ 800 (25%)	nil	nil
D	200 m ²	10am – 8pm	200 ÷ 1000 (20%)	200 ÷ 800 (25%)	200 ÷ 600 (33.3%)	nil

In the above example, the operating expenses for the standard trading hours are allocated based on each shop’s relevant proportion. For the non-standard trading hours, the operating expenses are distributed only amongst the shops that are open. The proportion payable is determined by dividing the lettable area of each shop, by the total lettable area of all the shops that are open.

Between 6pm and 7pm only shops A, C and D are open. The lettable area of Shop A is 50% of the total lettable area of the open shops (A, B and C), therefore Shop A can be required to pay 50% of the operating expenses incurred between 6pm and 7pm. Shop A is the only shop open between 8pm and 9pm and is liable to pay 100% of the operating expenses incurred during that time.

The following example shows how the method of calculation set out above can be applied.

In this example, the calculations are based on the shopping centre remaining open from 6pm to 9pm on a Monday. Operating expenses are incurred for items such as air-conditioning, lighting, security and cleaning. If the operating expenses for the three hours are \$750 then the cost per hour is \$250.

Lettable area of premises	Closing time	Proportion of operating expenses for non-standard trading hours			Total payable
		6pm - 7pm	7pm - 8pm	8pm - 9pm	
		Total lettable area of open shops 3715 m ²	Total lettable area of open shops 3640 m ²	Total lettable area of open shops 3500 m ²	
Supermarket 3 500 m ²	9pm	$3500 \div 3715 = 94.2\%$ $\$250 \times 94.2\% = \235.50	$3500 \div 3640 = 96.15\%$ $\$250 \times 96.15\% = \240.38	$3500 \div 3500 = 100\%$ $\$250 \times 100\% = \250	\$725.88
Newsagent 140 m ²	8pm	$140 \div 3715 = 3.8\%$ $\$250 \times 3.8\% = \9.50	$140 \div 3640 = 3.85\%$ $\$250 \times 3.85\% = \9.62	nil	\$19.12
Hairdresser 60 m ²	7pm	$60 \div 3715 = 1.6\%$ $\$250 \times 1.6\% = \4.00	nil	nil	\$4.00
Kiosk 15 m ²	7pm	$15 \div 3715 = 0.4\%$ $\$250 \times 0.4\% = \1.00	nil	nil	\$1.00
					\$750.00

November 2010

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