



Retail Leasing in Shopping Centres

The Essentials

Tenants in shopping centres encounter circumstances that are not normally faced by retail tenants in other types of retail locations, such as in street front shopping, where each shop is independently owned. Some of the unique issues encountered by shopping centre tenants are covered in this information sheet.

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Introduction

With approximately one-third of all retail sales in Victoria generated in shopping centres, many retailers have been motivated to shift to or start their businesses in shopping centres.

In Victoria, there are over 160 shopping centres housing approximately 7,000 specialty shops. About half of these shops are owned by small business franchises or independent operators (an independent operator is defined as one with less than 3 shops).

For these small businesses understanding their retail lease is one of the most important things that they can do. Leases must be treated with high priority and examined carefully – before being entered into and during the life of the lease.

What is a Retail Lease?

A retail lease is a contract that represents the right to operate a business from a rented retail premises. A retail lease is a legally binding contract between the landlord and the tenant. It sets out the terms, conditions and rights as well as the obligations of both parties in relation to the occupancy of retail premises.

The retail leases sector encompasses a wide range of retail premises ranging from retail shopping centres and small businesses in shopping strips to large commercial rental properties. Retail leasing legislation in Victoria applies to tenancies in all retail environments including shopping centres.

Before signing a retail lease in a shopping centre it is essential to obtain a copy of the proposed or existing lease and discuss the implications of every clause with an experienced solicitor.

What is a Shopping Centre?

A retail shopping centre refers to a cluster of premises of which at least five are retail premises and all of which have a common landlord.

In Victoria, there are three main types of shopping centres. They are

1. Large regional centres (examples: Highpoint, Chadstone, Southland)
2. Shopping centres anchored by a discount department store, and
3. Shopping centres anchored by a supermarket-based centre.

There are also other variations as to the composition of a shopping centre, however, for a cluster of premises to be defined as a shopping centre, the predominant activity must be retailing and there must be at least five premises owned by one landlord.

Shopping centres are also promoted or generally regarded as a shopping mall, shopping court or shopping arcade.



Retail Leasing Legislation in Victoria

Depending on when they were entered into, leases in Victoria may be subject to the *Retail Tenancies Act 1986*, the *Retail Tenancies Reform Act 1998* or the common law.

The *Retail Tenancies Act 1986* applies to leases commenced before 1 July 1998 and the *Retail Tenancies Reform Act 1998* applies to leases commenced on or after 1 July 1998, but before 1 May 2003.

When leases under these Acts are renewed, they will be replaced by and become subject to the *Retail Leases Act 2003*.

All retail leases in Victoria entered into or renewed on or after 1 May 2003 are subject to the *Retail Leases Act 2003*. The *Retail Leases Act 2003* also amends some aspects of the *Retail Tenancies Act 1986* and *Retail Tenancies Reform Act 1998*.

The Retail Leases Act 2003

The *Retail Leases Act 2003* commenced operation on 1 May 2003. Key provisions of the *Retail Leases Act 2003* that deliver major benefits to retail tenants include:

- ...❖ Tenants must be offered a minimum of 5 years occupancy
- ...❖ Small businesses are protected from unconscionable conduct in their retail tenancy dealings, including rent negotiations, fitout costs and misuse of turnover figure protections
- ...❖ Tenants are compensated if the landlord's actions significantly affect a tenant's business during the term of the lease (eg. relocation) and
- ...❖ Landlords are prohibited from including their land tax liability in a tenant's outgoings.

Prospective tenants should contact a solicitor for more detailed information.

Application of Retail Leasing Legislation

The *Retail Leases Act 2003* will **not** apply to:

- ...❖ Retail tenants whose occupancy costs exceeds the occupancy cost threshold of \$1,000,000 per annum (the occupancy cost of retail premises is the combined cost of rent and outgoings)
- ...❖ Tenants that are listed corporations or subsidiaries of listed corporations
- ...❖ Leases for a term of less than one year
- ...❖ Businesses or premises as determined by the Minister.

A copy of the act may be obtained from Information Victoria. Tel Toll free: 1300 366 356. Legislation may also be downloaded from website www.dms.dpc.vic.gov.au (Click on Law Today).

The Office of the Small Business Commissioner

The Office of the Small Business Commissioner is an initiative of the State Government to ensure small business in Victoria has the opportunity to grow and thrive in a fair, competitive, innovative and connected economy.

One of the key roles of the Small Business Commissioner is to provide information and guidelines to tenants and landlords on retail leasing.

Landlords must notify the Office of the Small Business Commissioner with details of a lease, or the renewal of a lease, within 14 days after the tenant enters into the lease.

Dispute Resolution

The Office of the Small Business Commissioner can assist retail tenants with efficient dispute resolution in retail tenancy matters.

Retail tenants also have access to the Victorian Civil and Administrative Tribunal (VCAT). The Retail Tenancies List of VCAT provides for the resolution by the Tribunal of disputes between a landlord and tenant arising under or in relation to a retail premises lease.

A retail tenancy dispute may only be subject of proceedings before VCAT if the Small Business Commissioner has certified in writing that:

- ...: Mediation or another appropriate form of alternative dispute resolution has failed or
- ...: Is unlikely to resolve the dispute.

Applications for injunctive relief (i.e. ordering another party to do something, such as an order for repairs or reinstatement of the tenant in the premises) can be made directly to VCAT.

Further information about VCAT visit website www.vcat.vic.gov.au
TEL (03) 9628 9960
Fax (03) 9628 9988

Before Signing a Lease

A lease deals with many matters. A prospective tenant should ensure that its main features are acceptable. These include:

- ...: The term of the lease and options to renew
- ...: Rent and the basis of rental reviews
- ...: Outgoings or shared operating expenses
- ...: Obligations to repair/maintenance
- ...: Lease preparation expenses
- ...: Assignment.

These terms are explained in the information sheet *Signing a Retail Lease*. This can be obtained from the website www.business.vic.gov.au/workshops or by calling the Victorian Business Line
TEL 13 22 15 (local call cost)
Toll Free TEL 1800 136 034

The Disclosure Statement

Prospective shopping centre tenants should look closely at the retail shopping centre and the total cost of leasing in the centre. A good place to start this examination is to check the disclosure statement.

Landlords are required to provide a prospective tenant with a disclosure statement at least seven days before a retail premises lease is entered into, renewed or assigned.

The disclosure statement sets out important information such as:

- ...: Details of the parties
- ...: Description of the premises
- ...: The term of the lease
- ...: The permitted use under the lease
- ...: The rent, including any turnover rent
- ...: Contributions to outgoings and marketing
- ...: Requirements for fitout and/or refurbishment works
- ...: Existence of a relocation or demolition clause in the lease, and
- ...: Declarations by the landlord.

In the case of a shopping centre, landlords are required to disclose information including the tenancy mix, traffic flows, car parking, outgoings, trading hours, planning approvals and casual leasing arrangements.

The additional information requirements for shopping centre landlords generally relate to information about the centre and outgoings:

Shopping Centre Details

- ...: The total number of retail premises in the Centre
- ...: Lettable area of the Centre
- ...: Number of car park bays at the Centre, in total



- ...: Number of car park bays at the Centre for the Tenant's exclusive use
- ...: Core trading hours of the Centre
- ...: Hours of access to Premises outside core trading hours of the Centre:
- ...: Floor plan of the Centre
- ...: Tenancy mix (by category) of the Centre
- ...: Is the tenancy mix of the Centre likely to change over the term of the lease? Yes No

If so, provide details of presently known, or likely, changes.

- ...: Has the Landlord obtained planning approval for any renovations, redevelopments or extensions of the Centre? Yes No

If so, provide details.

- ...: Does the Landlord permit casual mall leasing? Yes No

If so, what arrangements are made for casual leasing in the Centre?

- ...: Does the Landlord have a policy on casual mall leasing which is available to the Tenant on request? Yes No

Outgoings (\$ Estimates)

- ...: Amenity facilities
- ...: Building or retail shopping centre management services
- ...: Communication facilities
- ...: Customer facilities
- ...: Hygiene services
- ...: Information services
- ...: Rates, taxes, levies, premiums, charges and fees
- ...: Repairs and maintenance services
- ...: Security services
- ...: Utility services
- ...: Core Trading Hours Outgoings

- ...: Outgoings directly assessed on Premise
- ...: After hours outgoings
- ...: Services (gas, telephone, electricity, water, etc.)

The *Retail Leases Regulations 2003* prescribe the form of the disclosure statement that the landlord is required to give to the tenant.

Prospective tenants should carefully examine disclosure statements before the lease is signed.

Important Aspects of Leasing in a Shopping Centre

Prospective tenants in shopping centres should ensure they take time to understand and identify:

- ...: The shop and the parties to the lease
- ...: Permitted use
- ...: Common areas
- ...: The term of the lease
- ...: Outgoings
- ...: Fit out and redecoration
- ...: Relocation.

These are discussed briefly:

Identification of the Shop and the Parties

The shop premises and the parties to the lease must be described with certainty. It is important that both parties are fully aware with whom they are dealing, the location, and other specifications of the property to be leased.

It is very useful if, (apart from the title references and a written description of the premises) there is attached to the lease a simple plan of the centre and the location of the shop premises within the centre.

Permitted Use

Understanding the permitted use clause of a lease is essential because it determines what type of business can and cannot be run from the premises. In some shopping centre leases, these clauses can be narrow and therefore restrictive.

Permitted use clauses might affect the ability to diversify the business or undertake necessary alterations. A restrictive permitted use clause may also affect the ability to sell the business.

In addition to permitted use clauses, leases may also contain restrictions on use which prohibit or prevent the tenant from doing certain things.

Common Areas

Apart from the area that is rented for a tenant's own business use, common areas such as passageways may sometimes be put to certain uses by tenants.

Tenants should ascertain whether or not they have the right to use the common area to place stock and other materials on display for sale. It is also important to determine whether other tenants have that right.

Terms

Many retail shopping centre leases are offered to tenants for a term of no longer than five years. Prospective tenants must ensure that one term of five years enables them to achieve their business objectives and recoup the cost of their business investment over that time.

At the expiration of a lease, there is no guarantee that the landlord will renew the lease or offer further options.

Outgoings

Outgoings, or shared operating expenses, are costs in addition to rent which may be incurred by tenants. Prospective tenants entering into a shopping centre lease should note carefully the various categories of outgoings to which they must contribute. These should be detailed and estimated in the disclosure statement.

Under certain circumstances under the act, landlord's are prohibited from passing on their land tax liability to tenants.

Fitout and Redecoration

It is common for shopping centre leases to require a tenant to redecorate or refit the shop from time to time.

Some leases specify that the redecoration of a premises can only be carried out with the landlord's permission. This means that the landlord has the power to 'veto' a tenant's choice of decor.

If such a clause is included in a lease, tenants should ensure that it is worded in such a way that the landlord's consent to any redecoration cannot be unreasonably withheld.

Prospective tenants should endeavour to estimate (or better still get a quote from an approved shopfitter) fitout costs before entering the lease and add these to the overall cost of the lease.

Relocation

Some leases contain a provision for relocation of tenants or the termination of the lease and offer of a new lease of alternative retail premises.

If a tenant is to be relocated:

- ...✚ The landlord must give at least three months notice of this relocation
- ...✚ The tenant is entitled to be offered a new lease of alternative premises but the same term remains and the same level of rent remains (for the new premises adjusted to account for commercial differences)
- ...✚ The tenant has the right to terminate the lease within one month of being given a relocation notice
- ...✚ Any reasonable costs of relocation will be paid by the landlord, and where this amount cannot be agreed, it will be determined by an independent quantity surveyor.



Landlord Responsibilities

Shopping centre landlords have certain responsibilities in a number of areas including:

- ...⚙️ Core trading hours
- ...⚙️ Turnover information
- ...⚙️ Statistical information
- ...⚙️ Advertising and promotion
- ...⚙️ Termination for inadequate sales
- ...⚙️ Geographical restrictions
- ...⚙️ Tenants' associations
- ...⚙️ Alteration and refurbishment.

These are discussed briefly:

Changes to Core Trading Hours

If a lease says that a shop must be open for certain core trading hours, the landlord cannot change those hours unless he or she has the consent of the majority of tenants in the shopping centre.

Confidentiality of Turnover Information

A landlord must not divulge or communicate to any person any information about the turnover of the tenant's business provided by the tenant in accordance with the lease.

Landlords face penalties for breach of this.

Availability of Statistical Information About the Retail Shopping Centre

Where the landlord prepares information and statistics on the operations of a shopping centre, and the tenant is required to contribute to the preparation of this information, the tenant is entitled to a copy of this information.

Advertising and Promotion

Requirements

Tenants cannot be forced to advertise their business. However, if the parties agree, the landlord may advertise the shopping centre and the tenant may agree to contribute to this advertising as being a legitimate outgoing.

Statement and report

The landlord should make available to the tenant a written statement that details the landlord's expenditure for advertising or promotion costs to which the tenant is required to contribute.

Marketing plan

Where the lease provides for the tenant to contribute to the landlord's costs of advertising and marketing, the landlord must give the tenant a copy of any marketing plan.

Unspent advertising and promotion contributions

Any excess contribution by a tenant to the advertising or promotional costs of a shopping centre is to be carried over by the landlord to pay for future advertising or promotion or refunded to the tenant at the end of the lease. The adjustment is to be made within 4 months after the end of the lease.

Termination for Inadequate Sales Prohibited

A lease cannot be terminated by the landlord because the tenant's business did not achieve specified sales or turnover levels.

Geographical Restrictions on Tenant Prohibited

A lease cannot prevent or restrict the tenant from carrying on other business outside of the shopping centre during or after the term of the lease. The only restriction is if the name of the shopping centre is used by the business that is outside of the centre.

Tenants' Associations etc.

A landlord cannot prevent a tenant from joining a tenants' association or similar body, or treat tenants differently if they chose to join one of these associations.

Alteration and Refurbishment by Landlord

Where a landlord plans to undertake alterations and refurbishments, notice must be given to the tenant. The landlord must not start to carry out any alteration or refurbishment which is likely to affect adversely the business of the tenant unless:

- ...❖ The landlord has notified the tenant in writing of the proposed alteration or refurbishment at least 60 days before it is started; or
- ...❖ The alteration or refurbishment is necessary because of an emergency and the landlord has given the tenant the maximum period of notice that is reasonably practicable in the circumstances.

Signing a lease in a shopping centre should be undertaken only after the most careful consideration and prospective tenants must ensure they don't sign anything before legal advice is sought – they should be absolutely sure that the terms and conditions of the lease are in their best interest.

Checklist



Before entering into shopping centre lease, check:

That the landlord has given you a copy of the proposed or existing lease, the disclosure statement and retail leasing information published by the Small Business Commissioner

The frequency of casual leasing and what the resulting impact may be on your business. Will the casual tenant take up space diverting foot traffic away from your shop or create direct competition?

If there are plans in place (eg. shopping centre refurbishment or expansion) that could result in the forced relocation of your shop

If there are options to renew the lease following the initial five year term (the lease should be long enough to realise your business objectives)

The permitted use clause. If it is too restrictive it may severely affect the ability of the business to expand or diversify in the future (hence, long-term viability) or restrict the sale of the business

The total cost of the lease – this includes all shared and outgoing expenses which are detailed in the disclosure statement

If the core trading hours will restrict the business or prove onerous in terms of the number of working hours required. How will this affect your personal/family life?

How much is required by way of contribution to funds for marketing and promotional purposes

For clauses relating to refurbishment of the retail shop – how will the frequency and capital required to effect this impact your business?

If there is an imposed minimum level of shop fitting and store decoration to be adhered to

The tenancy mix to see if and how many of the same type of business as yours there are in the centre

That a plan of the centre is contained in the lease and the space you intend on leasing is clearly identified

That the common areas are identified in the lease

That the formula as to how rent will be determined (eg, rent based on turnover) and frequency and method for review is specified in the lease.

Prospective tenants must ensure they clearly understand and accept these matters before signing a lease. Advice from an experienced solicitor should be sought.



Conclusion

Leasing law is complex and it is vital that anyone proposing to enter into a lease obtains professional advice from an experienced solicitor. Once a lease has been signed, it commits the tenant to pay rent and outgoings and fulfil all the other obligations of the lease for the full term. This may be a substantial commitment and should be undertaken only after the most careful consideration.

Retail leases are dynamic documents governing rights and obligations over the life of the lease. It is prudent for tenants to check the terms of their lease and obtain appropriate advice during the course of the lease.

Further Information

Under New Management

The Under New Management program provides more information about small business. The program enables individuals contemplating small business ownership and retail leasing to make informed decisions.

Under New Management consists of a choice of group and online workshops on three topics:

- ...❖ Buying a Business
- ...❖ Signing a Retail Lease
- ...❖ Buying a Franchise

Each group workshop, offered throughout Victoria, will be three-and-a-half hours in duration. Participants are also given the opportunity to follow up with a one-hour one-on-one business counselling session with an experienced business counsellor.

Under New Management also has information sheets on the following subjects:

- ...❖ Signing a Retail Lease
- ...❖ Buying a Franchise

- ...❖ Selecting a Retail Location For Small Business
- ...❖ Buying a Small Business
- ...❖ Valuing a Small Business
- ...❖ Selling a Small Business - the Process

TEL 13 22 15

Email: businessaccess@iird.vic.gov.au

Website www.business.vic.gov.au/workshops

Registering Business Names

Consumer Affairs Victoria (CAV) is where you register your business name and find out about your rights and responsibilities to consumers. CAV provides advice on customer service issues such as lay-bys, refunds, bag searches and warranty obligations.

Website: www.consumer.vic.gov.au

Tel (03) 9627 6000 or 1800 678 328

Information Victoria

Information Victoria is the central point for all information pertaining to the Victorian State Government. Information Victoria helps you access information on State Government services and programs. Copies of the legislation may be purchased from Information Victoria.

356 Collins Street
MELBOURNE
VICTORIA 3000
TEL (03) 9603 9900
Toll free: 1300 366 356

Legislation

Victorian legislation can be downloaded from website www.dms.dpc.vic.gov.au. Click on 'Victorian Law Today', then scroll down to the search engine.

The development of this program was funded from the Estate Agents' Guarantee Fund.

Victorian Government Small Business Information Services

Victorian Business Line

The Victorian Business Line provides a single access point to the Victorian Government's small business services. Services include business development information and referral to specialist business service providers.

TEL **13 22 15**

Email: businessaccess@iird.vic.gov.au

Website: www.businessaccess.vic.gov.au

Services and Programs Accessed Through the Victorian Business Line Are:

Business Licence Information Service (BLIS)

BLIS makes it easy to identify all the licences, permits and regulations involved with starting and operating a small business

Website: www.business.channel.vic.gov.au/blis

StreetLife

The StreetLife program concentrates its efforts entirely on assisting the growth of small business. StreetLife programs improve skills through tailored training and mentoring programs; business opportunities for youth; fostering new enterprises; business attraction; and creating jobs.

Website: www.businessaccess.vic.gov.au/streetlife

Victorian Business Channel

The Business Channel is an online information service containing comprehensive business-related information and services from State, Commonwealth and local Government.

Website: www.business.channel.vic.gov.au

Vic Export

Vic Export is a website providing export-related information. It also links to websites of other agencies able to assist in export development.

Vic Export can assist in developing a draft export strategy and helps examine the benefits, opportunities and risk of export.

Website: www.export.vic.gov.au

Small Business Counselling Service Incorporated (SBCS)

The SBCS is a non-profit organisation that provides counselling and mentoring to medium, small and micro business operators throughout Victoria. The SBCS consists of a number of volunteer business people – they offer small business operators the benefit of their experience, knowledge and skill. This service is provided for a small fee.

Website: www.sbcs.org.au

Grow Your Business

Grow your business provides advice, referral and assistance to Victorian businesses. Grants of between \$4,000 and \$7,500 are available to eligible businesses that have the management strengths, commitment to planning and desire for business growth. Additionally, up to \$15,000 is available for Group Programs. Eligibility requirements apply.

Website: www.business.vic.gov.au

Office of the Small Business Commissioner

The Office of the Small Business Commissioner will assist small business, promote informed decision-making and minimise disputes between small businesses and larger competitors, and encourage flexible Government regulation.

Website: www.sbc.vic.gov.au



Victorian Business Centres

Ballarat

Victorian Business Centre
48 Sturt Street
Ballarat VIC 3350
03 5320 5900
Fax 03 5320 5998

Bendigo

Victorian Business Centre
46 Edward Street
Bendigo VIC 3550
03 5442 4100
Fax 03 5442 5452

Dandenong

Victorian Business Centre
314A Thomas Street
Dandenong VIC 3175
03 9791 8572
Fax 03 9794 5644

Geelong

Victorian Business Centre
69-71 Moorabool Street
Geelong VIC 3220
03 5229 0641
Fax 03 5229 9503

Glenroy

Victorian Business Centre
Suite A, 3 Belair Avenue
Glenroy Vic 3046
03 9304 4344
Fax 03 9304 4355

Melbourne

Level 5, 55 Collins Street
Melbourne VIC 3000
13 22 15
Fax 03 9651 9725

Mildura

Victorian Business Centre
131 Langtree Avenue
Mildura VIC 3500
03 5051 2000
Fax 03 5051 2020

Shepparton

Victorian Business Centre
3/164 Welsford Street
Shepparton VIC 3630
03 5821 1811
Fax 03 5822 2554

Traralgon

Victorian Business Centre
33 Breed Street
Traralgon VIC 3844
03 5174 9233
Fax 03 5174 7845

Vermont

Victorian Business Centre
520 Canterbury Road
Vermont VIC 3133
03 9874 5733
Fax 03 9874 5135

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Victorian Business Centre
6/22 Stanley Street
Wodonga VIC 3689
02 6056 2166
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36 Ford Street
Wangaratta VIC 3677
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Fax 03 5721 2265

www.business.vic.gov.au

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