



# Negotiating a tenant friendly 'HOA'

## User guide 2.5 – Negotiating a tenant friendly 'HOA'

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# USER GUIDE 2.5 – 'Related user guides & tools'

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What makes a commercial lease '.....?'	User guide	UG1.1
What makes a commercial lease '.....?'	Video user guide	UG1.1-VIDEO
"Getting to a 'tenant friendly'....."	User guide	UG1.2
"Getting to a 'tenant friendly'....."	Video user guide	UG1.2-VIDEO
'Negotiating a tenant friendly HOA'	Video user guide	UG2.5-Video
'Negotiating a tenant friendly HOA'	Checklist guide	UG2.5-CHECKLIST
'Tenant friendly v tenant unfriendly HOA'	Template	UG2.5-TEMPLATE
The 'unfriendly HOA' case study	Case study	UG2.5-CASE
Glossary of leasing terminology	User Guide	UG-GLOSSARY
Recommendation Template	Template guide	



# **The LPC User Guide Series**

## **'Overview of the User Guides'**

**Key focus – Optimising your lease agreement & tenancy**

# Optimise your lease – The LPC guide

## #1 – Before the lease

- 'Clarify' business objectives
- 'Right' needs analysis
- 'Right' premises brief
- 'Right' premises search
- 'Right' evaluation of shortlist
- 'Right' Heads of Agreement
- 'Right' premises due diligence
- 'Right' lease terms
- 'Right' fit-out
- 'Right' relocation or refurbishment

## #2 – During the lease

- 'Never' miss a critical date
- 'Never' overpay your rent
- 'Never' overpay your outgoings
- 'Never' miss an opportunity
- 'Ensure' your landlord complies
- 'Ensure' you comply
- 'Ensure' the premises comply
- 'Ensure' a safe workplace
- 'Ensure' a productive workplace
- 'Ensure' leverage for the future

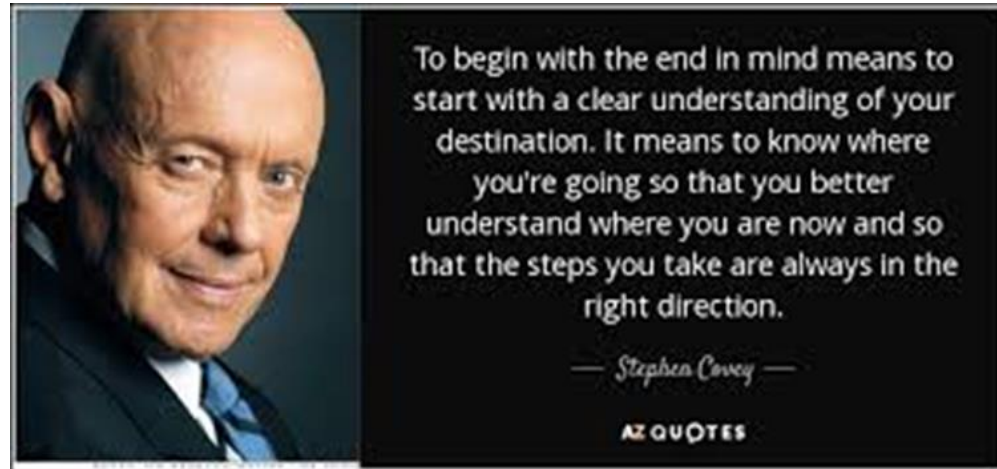
## #3 – Exiting the lease

- 'Clarify' strategic objectives
- 'Assess' option to renew
- 'Assess' opportunity to restructure
- 'Assess' rights to surrender
- 'Assess' rights to sub-lease or assign
- 'Assess' make good obligation
- 'Assess' relocation impacts and cost
- 'Execute' decision re stay or go
- 'Execute' make good or refurbishment
- 'Execute' relocation & lease exit

# #1 – Before the lease

- ❑ 'Clarify' business objectives
- ❑ 'Right' needs analysis
- ❑ 'Right' premises brief
- ❑ 'Right' premises search
- ❑ 'Right' evaluation of shortlist
- ❑ 'Right' Heads of Agreement
- ❑ 'Right' premises due diligence
- ❑ 'Right' lease terms
- ❑ 'Right' fit-out
- ❑ 'Right' relocation or refurbishment

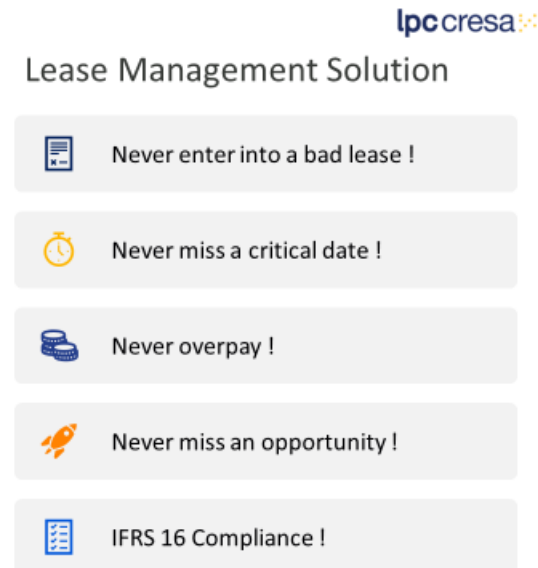
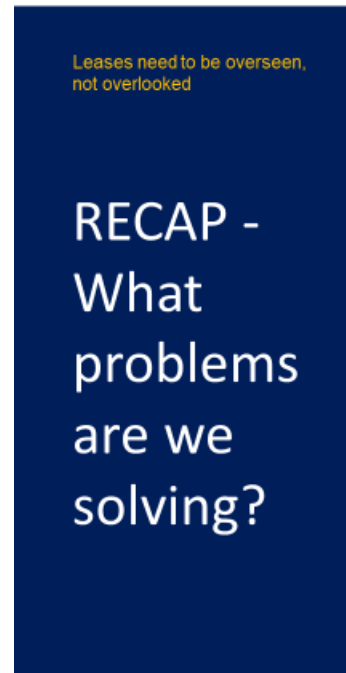
These **User Guides** focus on activities that take place '**before the lease**', to help lessees **clarify** their business strategy, their related **accommodation needs**, and they **guide lessees** through a process that results in a '**tenant friendly lease**'.



## #2 – During the lease

- ❑ 'Never' miss a critical date
- ❑ 'Never' overpay your rent
- ❑ 'Never' overpay your outgoings
- ❑ 'Never' miss an opportunity
- ❑ 'Ensure' your landlord complies
- ❑ 'Ensure' you comply
- ❑ 'Ensure' the premises comply
- ❑ 'Ensure' a safe workplace
- ❑ 'Ensure' a productive workplace
- ❑ 'Ensure' leverage for the future

These **User Guides** focus on activities that take place '**during the lease**', to help lessees **optimise** lease arrangements through **mitigating** common lease management **mistakes** made by lessees, together with **guidance** as to how to avoid common mistakes.





# #3 – Exiting the lease

- ❑ 'Clarify' strategic objectives
- ❑ 'Assess' option to renew
- ❑ 'Assess' opportunity to restructure
- ❑ 'Assess' rights to surrender
- ❑ 'Assess' rights to sub-lease or assign
- ❑ 'Assess' make good obligation
- ❑ 'Assess' relocation impacts and cost
- ❑ 'Execute' decision re stay or go
- ❑ 'Execute' make good or refurbishment
- ❑ 'Execute' relocation & lease exit

These **User Guides** focus on activities that take place **'to exit the lease'**, to help lessees **optimise their exit** having regard to the **lease constraints**, and to the occupier's **business risks and business objectives** into the future.



# **The LPC User Guide Series**

## **'Overview of the SECTORS we serve'**

**Key focus – Optimising your lease agreement & tenancy**

# Destination – “A tenant friendly commercial lease”

## Definition – ‘Lease’

A **contract** that creates the relationship of **landlord and occupier**. A contractually binding agreement that grants a **right to exclusive possession** or use of property, usually **in return for a periodic payment** called rent.

*Encyclopaedia of Real Estate Terms 2nd Edition, Damien Abbott*



# “A tenant friendly office lease”

## Types of commercial lease – #1 The Office Lease

### Definition – ‘Lease’

A **contract** that creates the relationship of landlord and occupier. A contractually binding agreement that grants a right to exclusive possession or use of property, usually in return for a periodic payment called rent.

*Encyclopaedia of Real Estate Terms 2nd Edition, Damien Abbott*

“An **office lease** starts with a blank piece of paper that gets populated with commercial terms through tenant / landlord negotiations. The outcome will either help or harm the tenant’s business”

*Julian Kurath & Ken Lam for LPC*





# “A tenant friendly retail lease”

## Types of commercial lease – #2 The Retail Lease

### Definition – ‘Lease’

A **contract** that creates the relationship of landlord and occupier. A contractually binding agreement that grants a right to exclusive possession or use of property, usually in return for a periodic payment called rent.

*Encyclopaedia of Real Estate Terms 2nd Edition, Damien Abbott*

“A **retail lease** gets populated with commercial terms through tenant / landlord negotiations within parameters set by legislation. The outcome will either help or harm the tenant’s business”

*Ken Lam for LPC*



# “A tenant friendly industrial lease”

## Types of commercial lease – #3 The Industrial Lease

### Definition – ‘Lease’

A **contract** that creates the relationship of landlord and occupier. A contractually binding agreement that grants a right to exclusive possession or use of property, usually in return for a periodic payment called rent.

*Encyclopaedia of Real Estate Terms 2nd Edition, Damien Abbott*

“An **industrial lease** is the outcome of tenant / landlord negotiations. In other words, the tenant gets what they negotiate. The outcome will either help or harm the tenant’s business”

*Michael Raymond & Julian Kurath for LPC*



# Destination – “A tenant friendly commercial lease”

## Lease Negotiations

“In **business** as in life – you don’t get what you deserve, **you get what you negotiate**”

*Chester L. Karrass*

One could substitute ‘business’ with **‘commercial leasing’** and the statement would be very applicable to commercial leasing, for **“you get the lease you negotiate”!**

*Ken Lam for LPC*



# Definitions & context

## The Heads of Agreement ('HOA')

**Key focus – Ensuring the HOA captures 'tenant friendly' commercial terms**



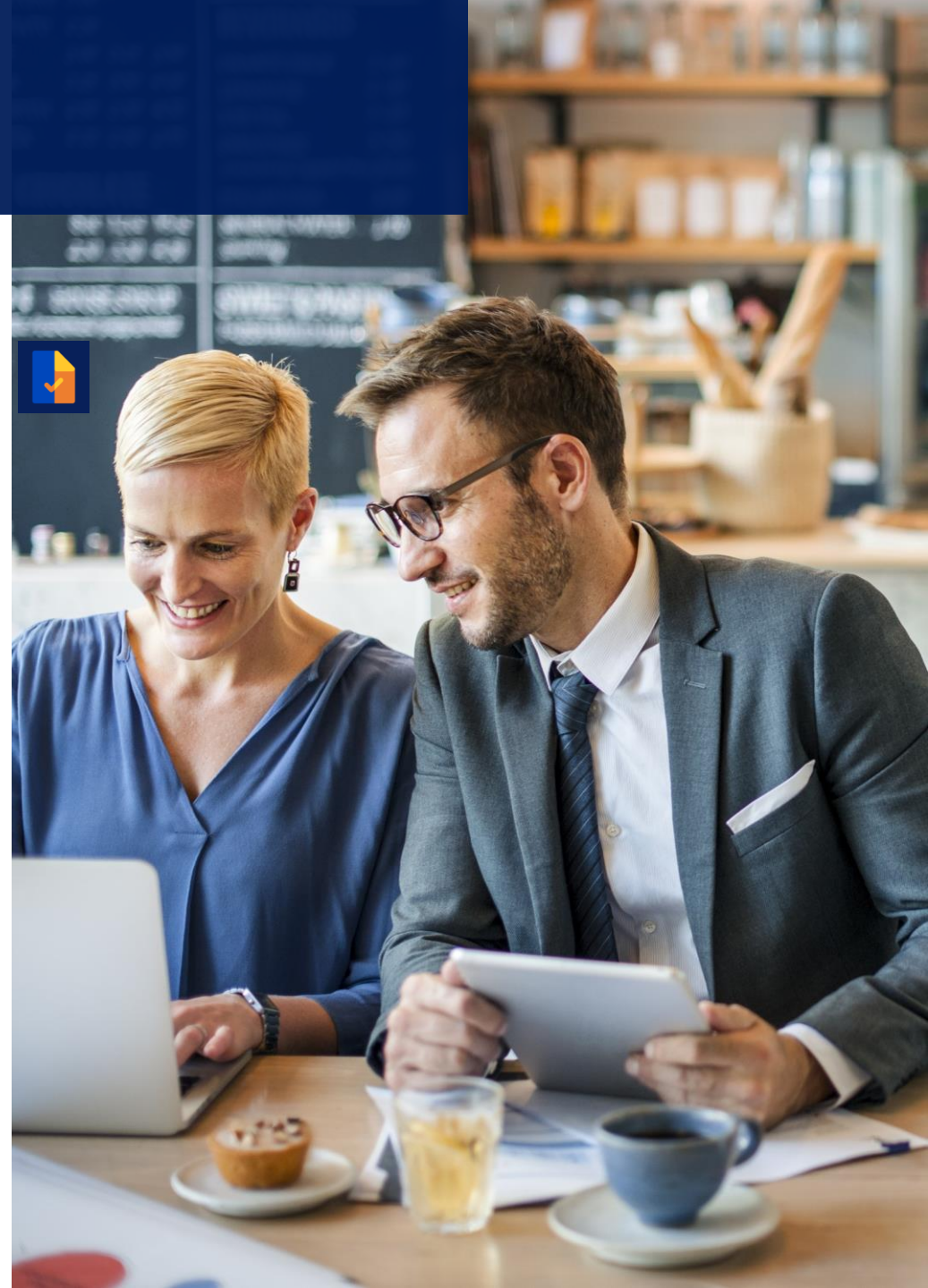
# What do we mean by a 'HOA'?

When we refer to a 'HOA', we are using an acronym for a 'Heads of Agreement'. The 'HOA' is a record of agreement reached between the relevant parties, which informs the development of the formal agreement. The 'HOA' is commonly used in the process of negotiating various types of commercial transactions, including leasing transactions.

In commercial leasing the 'HOA' is the agreement entered into by the lessor and the lessee prior to entering a lease, which sets out the key commercial terms that the Parties have agreed to in relation to the tenancy. When executed by both parties, the 'HOA':

- ❑ **Evidences** the party's commitment to progress to lease execution
- ❑ **Captures** the key commercial terms to be carried forward into the lease
- ❑ **Sets out** a framework for the development and execution of the lease
- ❑ **May be** binding or non-binding dependent on the drafting (Note – Lessee beware!)

Negotiating and agreeing a 'tenant friendly HOA' is critically important if a commercial tenant is to achieve a 'tenant friendly lease'. The next page deals with the question of whether or not the HOA is binding on the parties.



# What do we mean by a 'HOA'? – Continued

The 'HOA' is typically non-binding, but can be binding (refer to your solicitor). Most landlords offer non-binding lease heads of agreement with the condition that the proposal will not become binding until both parties execute formal lease documents.

As a tenant you should only enter into a binding lease heads of agreement if and when you are clear on all aspects of the lease terms and have consulted your solicitor. The heads of agreement should be very detailed in relation to key commercial terms, with little room for unforeseen negotiation during the lease execution phase. These are the minimum items we include in a HOA, ensuring clear expression of the agreed terms:

- ☐ Leased premises identity and description
- ☐ Premises use and limitations where applicable
- ☐ Premises rights related to signage and parking and storage
- ☐ Dates for access, occupancy, rent commencement
- ☐ Lease Term including Option(s) to renew
- ☐ Effective Rent determination and rent review mechanism(s)
- ☐ Outgoings scope and review mechanisms and obligations
- ☐ Rent review terms of reference for the Option(s) to renew
- ☐ Premises works rights and obligations of the parties
- ☐ Security provisions
- ☐ Insurance provisions
- ☐ Legal costs
- ☐ Landlord obligations for the building policy and building services
- ☐ Flexibility provisions for assignment and sublease
- ☐ Flexibility options for early termination and expansion / contraction
- ☐ Obligations or rights for refurbishment, redecoration, and make good
- ☐ Required disclosures and / or warranties from the landlord



# When does the 'HOA' get negotiated?

## 'Before the lease' – Agree the HOA!

Getting to tenant friendly HOA requires a tenant to:

- ❑ **Define their needs** – to clarify the accommodation criteria that match the tenant's future business objectives & risks
- ❑ **Establish options** – that meet the accommodation criteria to create a basis for effective negotiations and leverage
- ❑ **Assess alternatives** – to enable informed negotiation and leverage applied to the preferred alternatives
- ❑ **Implement the best option** – via the negotiation of a 'HOA' and subsequent lease execution

To build leverage, one will often develop a draft HOA for each shortlist alternative. This focuses attention on the detail of the commercial terms, and builds leverage in line with the objective of a 'tenant friendly' lease outcome.





# When does the 'HOA' get negotiated? – Continued

**'Before the lease'** – Getting to tenant friendly HOA requires a tenant to:

- ❑ **Define their needs** – to clarify the accommodation criteria that match the tenant's future business objectives & risks
- ❑ **Establish options** – that meet the accommodation criteria to create a basis for effective negotiations and leverage
- ❑ **Assess alternatives** – to enable informed negotiation and leverage applied to the preferred alternatives – **Draft HOAs**
- ❑ **Implement the best option** – via the negotiation of a 'HOA' and subsequent lease execution – **Final HOA**

To build leverage, one will often develop a draft HOA for each shortlist alternative. This focuses attention on the detail of the commercial terms, and builds leverage in line with the objective of a 'tenant friendly' HOA and lease outcome for the selected premises.



#1 Plan	#2 Generate	#3 Assess	#4 Implement
Establish the business requirement, the workplace strategy, & the leverage plan, having regard to the identified constraints.	Commercial evaluation of the existing 'option' having regard to the market, & establishment of viable alternatives	Evaluation of 'stay' option versus restructure versus 'go' alternatives having regard to requirement, & recommendation.	Execution of 'heads of agreement' & lease. Relocation or refurbishment plan & oversight of the project plan.



# Why is the 'HOA' important?

Getting stuck with a 'bad lease', and / or getting stuck 'in a bad premises', will invariably have its origins in an unfriendly HOA, or possibly the absence of a HOA. A tenant friendly HOA is the product of structured needs analysis and negotiations, and is an essential part of the negotiation process for a tenant intent on achieving a tenant friendly lease.

Entering into a heads of agreement to lease premises requires strategic thinking about accommodation needs into the future, and careful negotiating to ensure that you are getting a good deal for your lease. **The HOA can be regarded as the first step of entering into a long-term, binding contract**, and it is, therefore, worthwhile to canvas all of the critical issues upfront.

There are no rules as to what is to be considered in the HOA. While the typical HOA inclusions are listed in a previous slide, the best guide to the content and is to keep the destination of working towards a 'tenant friendly lease' in the forefront of one's thinking. Establishing a tenant friendly HOA that matches the business risks is a significant step towards a tenant friendly lease.

**Businesses cannot get away from bad leasing decisions once they are made.**



# Why is the 'HOA' important? – Continued

## Lease Negotiations

**In business as in life –  
you don't get what you deserve, you get what  
you negotiate.**

*Chester L. Karrass*

**This statement could read – “you get the lease  
you negotiate which is tied to the HOA you  
negotiate.”**

*Ken Lam for LPC*

*“Growth is painful.  
Change is painful.  
But, nothing is as  
painful as staying  
**stuck** somewhere  
you don't belong.”*

Mandy Hale



# Lease exit – Case study | HOA negotiation

## Case study #1 – the unfriendly HOA

**Situation & the need to negotiate a tenant friendly HOA**

**The HOA on the next page is a 'tenant unfriendly HOA'. This HOA illustrates a HOA with common omissions, and unwise acceptances, that make the lease 'tenant unfriendly', and that ultimately either harm the business or have the potential to harm the business.**

**For you to do**

- 1. Review the HOA and highlight what you think is tenant unfriendly**
- 2. Consider what you would omit, negotiate, and clarify to make the HOA more tenant friendly**

**HOA impacts on the final lease**

**This case study illustrates how a HOA, that has not been appropriately negotiated and that does not adequately capture key commercial terms, has the potential to harm the tenant's business into the future. Starting with the end in mind, and ensuring this end in mind is reflected in the HOA, is critical for a positive tenancy.**





# Lease exit – Case study | The ‘Unfriendly HOA’

## Heads of Agreement (Subject to Contract) 28<sup>th</sup> March 2018

Lessor

Lessor Solicitor: T: 02 – Attn:

Lessee: PTY LTD

ACN  
Lessee's Solicitor : T: 02 – Attn:

Premises: - , Marrickville NSW 2204

Use of premises: Offices, manufacturing, and wholesaling

Lease Term: 3 Years

Option of Renewal: two terms of 3 Years each

Lease commencement: 1<sup>st</sup> May 2018

Rental commencement: 1<sup>st</sup> July 2018

Commencing Rental: \$100,000 per annum excluding GST

Outgoings: Outgoings Payable by Lessee. Lessee is responsible for;

- 100% of all water rates and charges, Water usage, trade waste charges
- Utilities such as electricity
- Annual fire safety statement fees and costs associated with obtaining the AFSS

Rent Reviews: annually by the greater of 3% or CPI

Market Review: Market review at the commencement of each option period

**Bond/Guarantee:** The Lessee must provide a cash bond or unconditional bank guarantee for an amount equivalent to three months rental (\$27,500). This shall remain with the Lessor until the termination of the lease and vacation of the premises by the Lessee. The Lessor shall be entitled to deduct from the said sum or apply towards the satisfaction of any amount that may be payable to the Lessor as a result of any breach by the Lessee of any terms, conditions or covenants of the lease.

**Public Liability:** Lessee to maintain public liability cover of \$20,000,000 for the term of the Lease, option and any holdover and must nominate the landlord as an interested party on such policy.

**Guarantee:** Lessee to provide Personal Guarantee's for all Directors.

**Legal Costs:** The Lessee will be responsible for the lessors reasonable legal costs Estimated at \$1,500+ GST + Disbursements TBC (registration fee ,agency registration fee )

**Lessee Works:** Any work that is to be undertaken to the interior or the exterior of the building must be agreed upon by the Lessor in writing prior to the commencement of any such work. The Lessor will not unreasonably withhold authorisation.

The Lessee will return the premises to same condition as at the Lease commencement date, and in the event the Lessee undertakes capital upgrade works to the Premises (i.e. installation of air conditioning system), the Lessee will not be required to remove those items at the end of the lease.

**Council Approval:** The Tenant can terminate the Lease by 31 July 2018 in the event they do not receive Development Approval for the proposed Use. In the event the Lease is terminated the Tenant will forfeit one month's rental (i.e. \$9,166.67 inc GST). After the 31<sup>st</sup> July the lease will become unconditional. The Tenant will engage town planners and a principal Certifier to prepare and submit the DA with council.

### Agent:

(a) Has submitted this proposal as a general guideline of what it is prepared to recommend to the lessor and the proposal does not constitute an offer by or on behalf of the lessor;

(b) Has provided information in this proposal and in previous discussions in good faith but in relation to any descriptions, dimensions or consents for use and occupation they should not be relied upon by the lessee as statements or representations of fact and the lessee as statements or representations of fact and the Lessee must satisfy itself in relation to each of those matters;



# Task 1 – The importance of the HOA

## Task 1 – Checkpoint | Your lease & your HOA

At this stage we suggest you:

- ☐ Review your lease clauses and identify the provisions that are 'tenant unfriendly'
- ☐ Reflect back on the lease negotiation process:
  - Was a HOA negotiated and executed?
  - If a HOA was executed, did it fully capture the key terms?
  - What could have been done to agree a more tenant friendly HOA?
  - Did the lease accurately reflect the HOA?

Key focus – Ensure the HOA fits your business needs.



# **'A closer look at the HOA'**

**"If you want a tenant friendly lease outcome, then pay attention to commercial terms first and to then to the legal expression" – *John Reed for LPC***

# Summary – key HOA items & our guidance

**GUIDANCE** – The **HOA** must fully capture **agreed commercial terms**, leaving no room for ambiguity or exit by 1 party during the lease execution phase.

HOA item ....	Essential .....
#1 – The Premises	Premises details including plans, measurements, parking , storage, signage, rights to shared facilities, and any premises attributes important to you as the tenant.
#2 – Premises Use	Make this as broad as possible having regard to your business plans into the future, and to ensure you can adapt your premises use to a changing environment.
#3 – Premises Rights	Ensure you have no restrictions relating to access or making the premises fit for business, and ensure the premises attributes that are important to you are captured with related landlord obligations.
#4 – Key lease dates	Capture key dates such as the dates for access, rent commencement, lease expiry, option(s) to renew, and any other options that are agreed to. Also capture key dates to progress the HOA to lease execution.
#5 – Lease Term	Be clear on the Lease Term, the option term(s), and any related options to expand or contract or terminate early. Ensure that the landlord discloses anything that would or may interrupt the Lease Term.
#6 – Effective Rent	Record the Agreed Face Rental, the value and form of the incentives, and the Effective Rental. Be clear and specific about the incentives leaving no room for later disagreement.
#7 – Outgoings	Important to detail what is included in outgoings and what is specifically excluded. Seek to cap outgoings increases and include obligations on the landlord to ensure efficiencies.
#8 – Rent Review	In relation to the annual review, negotiate that the agreed adjustment is applied to the Effective Rent. For market review provisions, ensure no ‘ratchet’ and that the valuation relates to a new tenant.
#9 – Premises Works	Important that any known works to be carried out are recorded together with the related party responsible and the timing. Consider requiring landlord works at points during the Term of the lease.



# Summary – key lease HOA items & our guidance

**GUIDANCE** – The **HOA** must fully capture **agreed commercial terms**, leaving no room for ambiguity and an exit by 1 party during the lease execution phase.

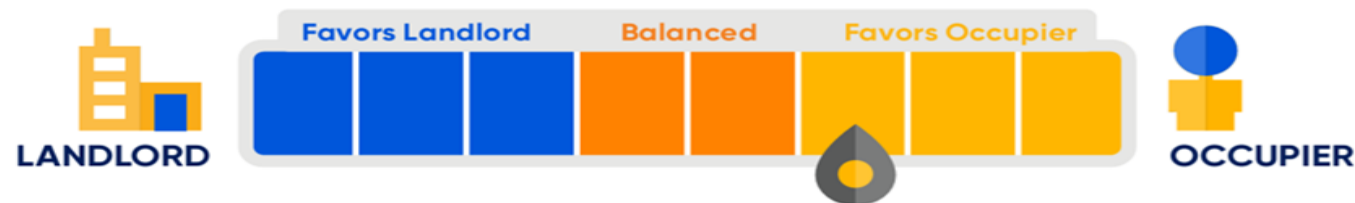
HOA item ....	Essential .....
#10 – Security Provisions	Landlord solicitors often strengthen security provisions so be specific about the security provisions and limit them. Seek to agree reduced guarantees over the Term & specify dates & process for release.
#11 – Insurance & indemnity	Landlord solicitors often try to strengthen landlord protections in the lease negotiations. Ensure your insurance and indemnity undertakings in the HOA are specific and limited.
#12 – Legal Costs	Ensure the HOA requires each party to bear their own legal costs relating to lease execution, and also relating to key lease events following lease execution.
#13 – Landlord Obligations	From HOA to lease execution the norm is for tenant obligations to increase. Limit this by specifying landlord obligations in the HOA (e.g. Premises policy, Building services, Works, End of trip, etc.)
#14 – Flexibility Provisions	Flexibility can end up being more important than rent provisions when things go wrong. Try to ensure the HOA records unrestricted rights to assign, sub-lease, and licence other activities on premises.
#15 – Flexibility Options	Having regard to business risks into the future, it may be important to negotiate options relating to contraction, expansion, & early termination. Be sure to capture these in the HOA.
#16 – Premises Obligations	In addition to #13 above, give consideration to what would make the Premises ‘fit for purpose’ throughout the Term and include related landlord obligations in the HOA.
#17 – Premises Rights	A commercial lease gives you certain rights to run a business from the Premises for the Term. Use the HOA to ensure that this right, and the business, is not compromised or limited by lease restrictions.
#18 – Disclosures & Warranties	It often occurs that a tenant unfriendly term like a Demolition clause is introduced during lease negotiations. Use the HOA to capture any disclosures or landlord warranties that protect the would be lessee
#18 – Exclusivity re competitors ++++	Think through all other items that make the lease work for your business over the Term and seek to include related provisions. A common item is a landlord undertaking about competitors or other tenants.



# Summary – key ‘HOA’ items & their importance

The way in which key items are captured in the HOA will determine if the HOA is tenant friendly

‘Tenant unfriendly’		Key HOA Item	‘Tenant friendly’
1	Narrowly defined such that surprise add-on occupancy costs materialise post the HOA	Leased Premises	Detailed & accurate per agreement including parking, storage, communal, end of trip .....
2	Narrow Premises Use rights that require landlord approval for business activities per business plan	Premises Use	Broad usage rights aligned to lessee business including right to licence activities at the Premises
3	Restricted rights and / or the need to get landlord approval for matters tied to the lessee’s business	Premises rights	Unrestricted access and rights in relation to the lessee’s business strategies into the future
4	Access and rent commencement are the same date resulting in double rent obligations	Key dates	Adequate access before rent commencement to enable relocation and fitout prior to rent
5	No provisions for contraction or early termination & above market increase terms & demolition clause	Lease Term	Options to renew together with favourable provisions for exit & contraction during the Term
6	Adjusts from effective to face rent in the option term and with ratchet provisions	Effective Rent	Net of incentives in the initial & option terms with no ratchet provision but with a collar
7	Broadly defined with risk borne by the tenant & no cap or landlord obligation to ensure efficiencies	Outgoings	Narrowly defined with the landlord accountable for building and outgoings efficiencies



# Summary – key ‘HOA’ items & their importance

The way in which key items are captured in the HOA will determine if the HOA is tenant friendly

	‘Tenant unfriendly’	Key HOA Item	‘Tenant friendly’
8	Annual increases with a minimum % on Face Rent, market review tied to Face Rent & ratchet.	Rent Review	Annual tied to effective rent & cpi or low fixed %. Market review tied to effective rent, no ratchet.
9	Undisclosed works that occur during term & that diminish tenancy without rent relief.	Premises Works	Disclosed works during term with provisions for rent reduction related to impact on tenancy
10	Onerous bank guarantee that increases with rent increase, plus personal or other security	Security Provisions	Ideally, no guarantee & bank guarantee with partial release during term. No personal guarantees.
11	Landlord requires tenant indemnities & warranties with more insurable risk by the tenant	Insurance & Indemnity	Limited tenant indemnities and warranties and insurances with risk transfer to landlord
12	Legal costs covered by the tenant for matters including lease preparation, disputes, & .....	Legal Costs	Incurred by the party that requires the legal advice and representation
13	Deep & broad tenant obligations & limited landlord obligations expressed with ambiguity	Landlord Obligations	Specific landlord obligations directed at ensuring the premises ‘works’ throughout the tenancy
14	Assignment & sub-lease & ability to licence subject to landlord approval, & with limitations.	Flexibility Provisions	Unrestrictive rights to assign, sub-lease, and licence with broad Premises Use rights.



# Summary – key ‘HOA’ items & their importance

The way in which key items are captured in the HOA will determine if the HOA is tenant friendly

‘Tenant unfriendly’		Key HOA Item	‘Tenant friendly’
15	Silent on flexibility options with implicit exclusion. Long term lease with limited exit provisions.	Flexibility Options	These ‘options’ include contraction & expansion options, & early termination options
16	Uncapped & onerous make good with deep tenant obligations for redecoration & maintenance	Premises Obligations	Ideally – nil or low make good’ ‘payment & landlord contribution to redecoration during Term
17	Restricted use of the premises & facilities with onerous tenant responsibilities	Premises Rights	Unrestricted use of the premises & facilities with related landlord obligations
18	Nil disclosures in relation to matters such as intended works, council plans, sale of asset .....	Disclosures	Full disclosures in relation to intended works, council plans, sale of asset .....
19	Deep & broad tenant warranties with limited landlord warranties	Warranties	Seek landlord warranties for matters the landlord has control of which are essential to the tenant
20	HOA is silent on exclusivity when this directly impacts the tenant’s business	Exclusivity	If the asset is multi-tenanted the tenant may seek landlord assurance of exclusivity



# Task 2 – The tenant friendly HOA

## Task 2 – Checkpoint | Your lease & your HOA

In the **client portal** you will find an example of a **tenant friendly HOA** (also in the pages that follow):

- ☐ Review the example of a tenant friendly HOA
- ☐ Reflect on the following:
  - How did this HOA help the tenant in the lease negotiations?
  - Which HOA terms could be more tenant friendly & why?

**Key focus** – Ensure the HOA fits your business needs.





# HOA – Case study | The ‘tenant friendly HOA’

LPC Cresa

## HEADS OF AGREEMENT

NON-BINDING

FOR THE LEASE OF

**2 Sydney Road, Sydney**

FOR & ON BEHALF OF

Landlord Entity  
(LESSOR)

&

Tenant Name  
(LESSEE)

1 January 2021

LPC Cresa  
Level 3  
16 O'Connell Street,  
Sydney NSW 2000

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**lpc cresa**

HEADS OF AGREEMENT "TENANT FRIENDLY"  
2 Sydney Road, Sydney  
January 2021

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NO	ITEM	DETAILS
Item 1.	<b>Property Address</b>	a) 2 Sydney Road, Sydney NSW 200
Item 2.	<b>Premises</b>	a) Tenancy 5: 600 sqm b) The Lessor, at its cost to prepare Survey plans. Except as provided elsewhere, Net Rent and Outgoings will be calculated using the NLA of the Premises.
Item 3.	<b>Lessor Entity Name in Full</b>	a) Landlord Details (ABN XXXX) (Lessor)
Item 4.	<b>Lessee Entity Name in Full</b>	a) Tenant Name (ACN XXXX) (Lessee)
Item 5.	<b>Lease Commencement Date</b>	a) 1 August 2021, subject to the Lessor Works being completed and handed over to the Lessee by 1 June 2021 ( <b>Handover Date</b> ). Any delay in the Handover Date will result in the same delay in the Lease Commencement Date.
Item 6.	<b>Access for Fitout and Occupation</b>	a) No rent or outgoings to be paid during fitout period. b) Handover Date to be no later than 1 June 2021 c) Prior to Handover Date, the Lessee must provide: (i) Lease executed by the Lessee; (ii) Certificates of Currency for Insurances required under the Lease; Copies of approved Fitout and Signage plans.
Item 7.	<b>Lease Term</b>	a) Five (5) years ( <b>Initial Term</b> ) b) Lease Expiry – 31 July 2026, or later date as provided for in Item 5.
Item 8.	<b>Options to renew</b>	a) One term of five (5) years ( <b>Option Period</b> ) b) Option notice to be served in the window between three (3) months and six (6) months prior expiry of the Initial Term.
Item 9.	<b>Sub Leasing or Assignment</b>	a) The Lessee requires the right to assign its lease, the right to sub lease all or part of the Premises and the right to grant licences to respectable entities who can demonstrate their ability to pay the rent, outgoings and other payments under the lease. b) The Lessor's approval will not be unreasonably withheld or delayed. c) While the Lessee is Tenant Name, assignment to a related body corporate (as defined under the Corporations Act) will not require the Lessor's consent.
Item 10.	<b>Commencing NET Rent</b>	a) \$400 sqm pa. At the commencement of the Option Period, the rent will be the then Market Rent (\$/sqm pa) x the GLA of the Premises.
Item 11.	<b>Rent Reviews</b>	a) On each anniversary of the Lease Commencement Date during the Initial Term the Net Rent shall increase by CPI% b) At the commencement of the Option Period, a Market Rent Review will apply. The Market Rent Review will comply in all respects with the relevant provisions of the NSW Retail Leases Act. For avoidance of doubt,

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		the Market Rent may be greater than or less than the Rent payable immediately prior to the Rent Review Date.
		c) On each anniversary of the date of commencement of the Option Period, the Net Rent shall increase by CPI%
Item 12.	<b>Outgoings</b>	<p>a) Outgoings are estimated at \$100/sqm per annum. Outgoings will be invoiced proportionally based on the NLA of the Premises / the NLA of the Centre. The Outgoings include all operating expenses and charges reasonably and properly incurred for the Land or the Building</p> <p>b) The Lessee is responsible for the utilities consumed on the Premises</p> <p>c) The Outgoings provisions in the lease will comply in all respects with the NSW Retail Leases Act and exclude any capital expenditure and any contributions to a sinking fund.</p>
Item 13.	<b>Method of Payment</b>	a) Rent, Outgoings and other charges are to be paid monthly in advance by Electronic Funds Transfer (EFT).
Item 14.	<b>Incentive Offered</b>	<p>a) The Lessor will provide the Lessee with an incentive equal to \$50,000 plus GST and Lessee can elect to apply the incentive as follows:</p> <ol style="list-style-type: none"> <li>1. Rent Free from the Lease Commencement Date.</li> <li>2. Towards fit out contribution</li> <li>3. Or a combination of item 1 and 2, at the Lessee's election</li> </ol>
Item 15.	<b>Lessee's Fitout Works</b>	<p>a) The Lessee will provide plans and specifications for the Lessee's Works for the Lessor's approval. Such approval shall not be unreasonably withheld, delayed or conditioned.</p> <p>b) The Lessee, at its cost will procure Council approval for the Lessee's Works, if relevant.</p>
Item 16.	<b>Lessor's Works</b>	<p>The premises must be handed over to the Lessee in good and substantial repair and condition ready for fitout works by the Lessee (Lessee Works). As a minimum, the Lessor at its cost and prior to the Handover Date will provide:</p> <p>a) Unless specified to the contrary below, all existing fixtures and fitting are to be removed from the premises, with any damage made good;</p> <p>c) Double entry automatic doors</p> <p>d) All internal faces of the perimeter walls shall be repaired as required to provide a uniform smooth finish and repainted, colour choice to be elected by the Lessee.</p> <p>g) Sub-divide the power and lighting, evaporative air-conditioning circuits and provide the Lessee with its own tenancy distribution board and sub-meter;</p> <p>h) Ceiling services including new high bay LED lighting, air-conditioning, fire services etc with specifications to be provided by the Lessee;</p> <p>j) The existing floor to be provided with no carpet and to be levelled and provided in a smooth polished concrete finish.</p> <p>k) Supply and install new toilet facilities, kitchenette including universal access toilet in a location to be agreed with the Lessee;</p>

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		<p>l) Any other repairs required in order to handover the Premises in fully refurbished condition;</p> <p>m) Confirmation (including required certification) that the Premises are fully compliant for occupation for the Permitted Use;</p> <p>Removal of all ceiling grid/ tile and to be provided in an exposed condition. The ceiling to be left in a clean, tidy, safe condition.</p> <p>n) All works must be completed by the Handover Date (1 June 2021). Any delay in the Handover Date will result in the same delay in the Lease Commencement Date.</p>
Item 17.	<b>Car parking</b>	<p>a) The Lessee has exclusive use of all car parking bays within the complex, at no additional charge.</p> <p>b) All customer parking shall be free of charge for the term of the lease.</p>
Item 18.	<b>Signage Rights</b>	a) External building signage is required on the signage pylons and on the facade of the building. The Lessee will provide its signage proposal for the Lessor's approval. Such approval not to be unreasonably withheld or delayed.
Item 19.	<b>Redecoration and Make Good at Expiry</b>	a) No redecoration provisions to apply during the term or Option Period. On lease expiry, the Lessee agrees to remove all personal property and including all inventory. The Lessee will remove any external signage installed by the Lessee. The Lessee's other obligations at lease expiry must be limited to rubbish removal and leaving the Premises in a clean and tidy condition
Item 20.	<b>Lessee Insurances to be maintained during the Term</b>	<p>a) Public Risk Insurance for not less than \$20 million</p> <p>b) Comprehensive insurance policy for the replacement value of the Lessee's Fixtures and Fittings and other assets located at the Premises.</p> <p>c) Plate glass insurance for internal glass (if any).</p> <p>d) Workers Compensation Insurance as required by Law.</p>
Item 21.	<b>Permitted Use</b>	a) Any use as permitted by law
Item 22.	<b>Marketing Levy</b>	a) Not applicable
Item 23.	<b>Lease Security</b>	a) No Lease Security will be required while the Lessee is Tenant Name.
Item 24.	<b>Loading</b>	a) The Lessee <del>at all times</del> will have access to the loading dock facility and the Lessee will be permitted to bring stock through the centre from the front entry of the complex.
Item 25.	<b>Building Compliance</b>	a) The Building, including Building Services, will be compliant at the Handover Date for the Permitted Use - Showroom
Item 26.	<b>Repairs and Maintenance - Lessor</b>	a) For the Term and Option Period, the Lessor must at its cost keep the building structure and the building services (air conditioning, fire services, hydraulic service etc) in good working order and to ensure compliance with all legislation and building regulations. It is noted that some items will be recoverable from the Lessee through the Outgoings.

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NO	ITEM	DETAILS
Item 27	Repairs and Maintenance - Lessee	a) The Lessee must, at its cost, keep the Premises and the Lessee's fixtures and things in good repair and condition, fair wear and tear excepted.
Item 28	Trading Hours	a) Unrestricted trading hours in accordance with the Retail Shops Act.
Item 29	Failure of Building Services	a) The Lessee shall make every reasonable provision in the event of failure of building services, including but not limited to air conditioning, fire services and hydraulic services. The lease provisions will include reasonable time periods for the Lessee to notify any failure prior to any maintenance.
Item 33	Consent to Security	a) The Lessee consents to the Lessee granting a mortgage of the Lease or security interest in relation to this lease (the security) and if required by the Lessee's Bank, Agents or under which a right of entry shall be given acceptable to the Lessee's Bank, acting reasonably. b) The Lessee agrees that none of: (i) the creation or existence of the security; (ii) the appointment of any individual or a receiver or manager to the Lessee; or (iii) the exercise by any trustee or any trustee, agent attorney or receiver appointed under any security (each and including Policy) of any powers conferred under or in connection with the security; will of itself constitute or constitute a breach or default under the Lease or entitle the Lessee to exercise any right or power, or its any damages or injunctive relief or to terminate or suspend the Lease but this does not affect any duties of the Lessee in relation to such breach of the Lease by the Lessee; and c) The Lessee agrees that, following enforcement of the security, its enforcing Party may, but is not obliged to, exercise all or any of the powers conferred under or in connection with the security or the Lease, and perform all or any of the obligations of the Lessee under or in relation to the Lease as if it were the Lessee to the exclusion of the Lessee during the period in which it is in possession (that not after that period). If the enforcing Party takes possession of the Premises, it will not be responsible for any liability of the Lessee in connection with the Lease arising prior to the date that it entered into possession.
Item 34	All other Terms and Conditions	a) Any other rights and obligations of the Lessee and the Lessee shall be in accordance with the Retail Shops Act.
Item 35	Exclusive Trading Period	a) Each part shall deal with the other exclusively for a period of thirty (30) business days from the execution of this Heads of Agreement.
Item 36	Other	a) GST: All amounts noted in this proposal are exclusive of GST. The Net Rent, Outgoings, Securities and all other amounts referenced under the Lease will be subject to the Goods & Services Tax (GST). The Lessee will be required to pay the Lessee for the GST attributable on the Net Rent and other amounts payable under the Lease including payments by the Lessee to third parties for which the Lessee is not entitled to input tax credits.

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NO	ITEM	DETAILS
		include an input tax credit, and the Lessee will obtain appropriate clearance to this effect.
Item 34	Heads of Agreement	a) Other than this Item 35, Item 37 and Item 41, the terms of this Heads of Agreement are not legally binding and are subject to, and conditional upon the approval of the Lessee Board and Service Management and the Lessee Bank. The Lessee Bank shall be in binding issue agreement between the Parties until the Lease documentation is executed by the parties. b) The terms and substance of this Heads of Agreement and any information disclosed by or on behalf of the Lessee or the Lessee in relation to this Heads of Agreement is confidential and must not be disclosed to any other party.
Item 35	Lease Documentation and Costs	a) The Lessee will prepare the Lease, at its cost. Therefore, the Lessee and the Lessee will be responsible for their own costs in relation to reviewing, editing and executing the documents. b) The Lessee, at its cost, shall arrange the content of the Outgoings (if any). c) The Lessee will register the Lease and the Lessee will be responsible for Landgate lease registration costs. The Lessee will do all things necessary to ensure that the Lessee can register the Lease.

# **'Common HOA mistakes & lessons learnt'**

***"Know where the mistakes are and don't go there" – John Reed for LPC***



# HOA – Common mistakes & their impact



**“Know where the mistakes are made and don’t go there!”**

John Reed for LPC

A well constructed and **effectively negotiated HOA is the key stepping stone to a tenant friendly lease agreement**. Unfortunately, the following common mistakes in relation to the HOA make the lease outcome less tenant friendly.

**Common ‘HOA’ mistakes during lease negotiations include:**

1. Executing a HOA that has tenant unfriendly terms
2. Executing a HOA with ambiguous or incomplete commercial terms
3. Entering into a binding HOA without ensuring tenant friendly terms

**Impacts on the lessee of these HOA mistakes include:**

- ❑ Getting stuck with a tenant unfriendly lease agreement
- ❑ Lessor fills in the ambiguous gaps in the HOA
- ❑ Losing leverage for alternative premises after exiting a HOA

**The pages that follow provide more detail about the specific impacts of these common mistakes on the lessee’s tenancy and their business together with ‘lessons learnt’.**

*“Growth is painful.  
Change is painful. But,  
nothing is as painful  
as staying **stuck**  
somewhere you don’t  
belong.”*

Mandy Hale

**Businesses  
cannot get away  
from bad leasing  
decisions once  
they are made.**



# #1 | HOA mistakes – executing an ‘unfriendly HOA’



“Know where the mistakes are made and don’t go there!”

*John Reed for LPC*

It is all too common that a tenant executes a HOA that favours the landlord. This is most problematic for the tenant, who is now well down the road to a tenant unfriendly lease agreement. Even if the tenant becomes aware that the commercial terms are ‘unfriendly’ post the HOA execution, and assuming the HOA is not binding, the tenant will find themselves in a situation where leverage is limited as alternatives have been set aside and as the HOA informs the lease. The key lesson is that **a tenant needs to ensure they do not sign up to an ‘unfriendly HOA’**:

Why do tenants sign up to an ‘unfriendly HOA’? – Reasons include:

- ☐ Emotional attachment to a premises lessens objectivity
- ☐ Inadequate attention to the detail of the commercial terms
- ☐ Not doing the ‘numbers’ to validate the terms agreed
- ☐ Asking wrong or conflicted parties for advice on commercial terms
- ☐ Too much focus on rent & too little focus on other commercial terms

Why is it essential to avoid agreeing to an unfriendly HOA –Impacts include:

- ☐ Tenant gets locked in to an unfriendly long term lease
- ☐ Tenant occupancy costs get worse through the Term
- ☐ Tenant gets occupancy cost surprises throughout the Term

Lessons learnt include:

- ☐ Don’t sign a HOA until one is sure ALL terms are ‘tenant friendly’ & fit the business
- ☐ Get the right advice on commercial terms from the right party
- ☐ Do the numbers to validate the selection
- ☐ Pay attention to terms that impact flexibility & costs ‘as you go’
- ☐ Don’t enter a binding HOA unless you are absolutely sure the HOA works for you



## #2 | HOA mistakes – an ambiguous & incomplete HOA



**"Know where the mistakes are made and don't go there!"**

*John Reed for LPC*

This is very similar to common mistake #1. The difference is subtle, in that the tenant has a clearer picture of lease required and high level terms are negotiated that the tenant is satisfied with, only to find that the lack of detail in the executed HOA works against the tenant in the lease negotiations and finalisation process. The key lesson is that **a tenant needs to ensure the HOA is detailed and captures the agreed commercial terms fully and unambiguously.**

**Why do tenants sign up to a 'HOA that is ambiguous & incomplete?' – Reasons include:**

- ☐ Inadequate attention to the detail of the commercial terms & their impacts
- ☐ Not recognising that the landlord's solicitor will 'translate' in favour of the landlord
- ☐ Relying on a 'good relationship' rather than on clearly expressed terms

**What are the impacts of an 'ambiguous and / or incomplete HOA'? – Impacts include:**

- ☐ Ambiguous & incomplete terms in the HOA become less tenant friendly in the lease
- ☐ Tenant gets locked in to an unfriendly long term lease
- ☐ Tenant occupancy costs get worse through the Term

**Lessons learnt include:**

- ☐ Don't enter a binding HOA unless you are absolutely sure the HOA works for you
- ☐ Don't sign a HOA until one is sure ALL terms are 'tenant friendly' & fit the business
- ☐ Get the right advice on commercial terms from the right party
- ☐ Do the numbers to validate the selection
- ☐ Pay attention to terms that impact flexibility & costs 'as you go'
- ☐ Make sure, make sure, make sure!





# #3 | HOA mistakes – binding but ‘unfriendly’

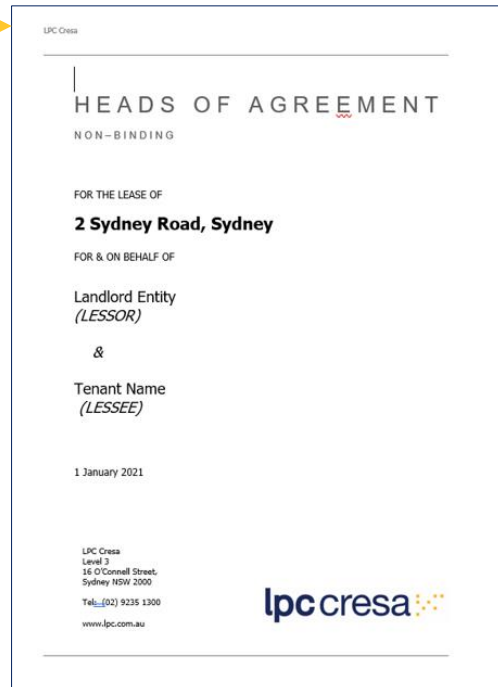


**“Know where the mistakes are made and don’t go there!”**

*John Reed for LPC*

No tenant wants to find themselves in the situation of having a binding HOA and then finding out that the terms agreed are tenant unfriendly and / or that business circumstances have changed such that the lease to be executed (based on the HOA) would cause harm to the business. The key lesson is **a tenant should ensure that a HOA is non-binding unless the tenant is absolutely certain about the premises, the location, that the terms are tenant friendly having regards to the business plans into the future, and that you have consulted with your tenant advisor and your solicitor.**

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# HOA – Case study | Right HOA then right lease



**“Know where the mistakes are made and don’t go there!”**

John Reed for LPC

## **Anecdote #1 – ‘Right HOA then right lease’**

### **Situation**

LPC was advising an office tenant that wanted to stay on at their current corporate office premises. Our advisors analysed the lease and the Option to Renew, having regard to the market conditions and to the our benchmark criteria for a ‘tenant friendly lease’. The review findings were that the lease terms had unfriendly terms that were increasing the occupancy cost significantly over the Term of the lease, and that would increase the occupancy cost significantly if the Option to Renew was exercised

### **Lease negotiations**

We approached the landlord, seeking a lease restructure and more tenant friendly commercial terms into the future. The landlord declined to participate in a restructure.

Through applying our 4-step stay or go process, viable alternatives were delivered and the existing landlord became responsive to the potential to restructure the lease and the terms to benefit the tenant. Lease negotiations resulted in a **draft HOA for each of the shortlisted premises**, which helped build leverage.

The detail of the commercial terms recorded in each draft HOA increased as negotiations progressed, with the HOA becoming increasingly tenant friendly through clarification of each term, and through focusing on the terms that mattered the most to the business over the Term. Over time the HOA relating to the existing premises was sufficiently favourable and complete that it was in the client’s best interests to conclude a **non-binding HOA with the existing landlord that informed the new lease**. The negotiation process had resulted in a HOA that was the foundation for a new lease with significantly improved commercial terms with reduced occupancy costs, increased flexibility, more risk and obligations borne by the landlord.

### **HOA impacts**

The attention given to the evolution of the accommodation brief into a draft HOA and then a final HOA for the preferred premises, helped to support the client’s business into the future.

**Refer – User HOA template**



# Task 3 – HOA mistakes & lessons learnt



## Task 3 – Checkpoint | Mistakes & lessons learnt

At this stage we suggest you answer the following questions:

1. What can you do to ensure you are not bound by a HOA?
2. When might you want the parties to be bound by a HOA and what measures can you take to mitigate the risk if you elect to be bound by a HOA?
3. How would you prevent lease negotiations from getting bogged down by landlord and tenant solicitors after signing a HOA?

**Key focus** – Ensure the HOA sets the foundation for a tenant friendly lease







# Negotiating a tenant friendly 'HOA'

## User guide 2.5 – Negotiating a tenant friendly 'HOA'

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