Proprietary interests can be a minefield to the uninitiated at the best of times, but when it comes to enforcing a security interest over personal property, it pays to be prepared with an undefeatable interest.

The *Personal Property Securities Act 2009* ("PPSA") comprises the single national body of law regarding personal property and management of security interests over personal property. The PPSA is specific to 'personal property', that is, as all property that is not land or a fixture to land.

The Act brought about the Personal Property Securities Register ("PPSR"), which acts as a public record of all secured interests in personal property. The legislation mimics that in Canada and in other jurisdictions, and is designed to create a public register, similar to that which operates for real property titles, but with a particular objective of recording security interests of financiers. In other words a company financing the purchase of a wide range of personal property, from motor vehicles to major items of industrial and commercial equipment, can register a charge over the asset to secure the debt owed. This is intended to make funding more commercially secure, in order to facilitate funding for greater capital investment, particularly items of plant and equipment that are not attached to real property, and therefore not attached to a real property mortgage.

However there are also innovative uses of the PPSR. The PPSR allows commercial landlords to confidently extend finance for tenant fitouts by securing their interest over personal property. This creates a viable alternative or supplement to the rent holiday as an effective lease incentive.

A landlord wishing to attract tenants by offering fitout financing can do so with confidence by securing their interest over the valuable components of the fitout. Where faced with a tenant in default, the landlord can rely on its interest in the secured fitout to protect itself against creditor's loss.

The general common law rule for fixtures is that an addition or improvement to real property that is *fixed* to that property becomes part of the premises, and thus belongs to the owner of that premises. In this instance, where all or part of a fitout is made up of 'fixed' items, that part of the fitout is not caught by the PPSA, so no security interest can be registered over that part. Ordinarily this would be of no real consequence to the landlord, as the fixtures remain with the premises at the conclusion of the lease term, as does the value in that improvement.

Where problems arise depends on the type of business conducted on the premises. Fitouts for operations of food outlets, gyms, medical centres and the like carry specific and often very valuable equipment, for which there is a market for secondary sale; unlike simple office premises, where the cost of removal of desks and dividers may easily exceed their actual value. In the former case, both landlord and tenant may see significant opportunity in retaining fitout equipment, by claiming that equipment to be either a fixture (in the case of the landlord), or personal property (in the case of the tenant). In the absence of a registered security interest or certainty that the equipment is a fixture, the landlord will struggle to claim title to that property, particularly if facing an insolvent tenant, and competing for title to the items of value with a liquidator.

It is vastly more reliable to secure an interest on the PPSR, than argue with a liquidator over an item of property that straddles the line defining a 'fixture'. Property with a legitimate registered interest is excluded from the pool of assets gathered in by liquidators, saving the landlord having to prove for debt in liquidation proceedings along with every other creditor in the queue. Provided that an interest over specific property is the first registered, it is 'undefeatable' and takes priority over all other claims. Evidently prompt registration of any security interest is essential to minimising the risk of creditor loss.

Aside from registration on the PPSR, the lease documentation itself ought to provide for the prospective registration of the landlord's interests. This provides some protection to the landlord in the period between granting of the lease and actual registration of security interests; and creates an indisputable record of the parties' intentions should the interest fall into dispute.

The best way to ensure preservation of security interests is to seek professional advice. If we can provide assistance to landlords considering a fitout finance arrangement, or in matters of personal property security more broadly, don't hesitate to contact us.

Watson & Company Lawyers

PO Box 61, Mooloolaba QLD 4557
P: 0427 435 601 (Steve)
0487 985 114 (Tina & Claire)

Suite 503, "La Balsa"
45 Brisbane Road, Mooloolaba QLD 4557
www.watsonslegal.com.au
ABN: 41 787 677 943