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Statutory Rights

A financier's perspective

A definition

- Rights created by statutes, often for industry regulation –
- Security interests may be recorded in some jurisdictions but no procedure for exercise of mortgagee's rights in most legislation
 - Exception – recent water rights legislation in New South Wales, Queensland and Victoria– registration system akin to Land title system - SA, WA, and Tasmania record notification third party interests
- Reflected in the value of the business - obtaining security over other licences is variable between States
- Contributes to business goodwill
- Sometimes through a separate market

Some examples ...

- **water rights** –transition period
 - NSW, Queensland and Victoria in transition to Water titles mortgageable like land title – some years to complete transition
 - Other states allow third parties to notify Water authorities of their interest in water licences but no satisfactory system for enforcing those interests –
- **fishing licences** –some anomalies
- Lending against fishing licences much less secure than lending against land -subject to suspension or cancellation for breach of conditions or non-payment of fees or non-renewal of licences
 - in Tasmania you can register a third party interest in an Abalone Licence but not an Oyster Lease –different Acts –
- -Victoria – permits registration of third party interest but will register a transfer of licence free from it if holder does not reply within 21 days of letter from Registrar seeking approval to transfer.

liquor licensing comparisons

- **WESTERN AUSTRALIA** -does not record third party interests. Licences vest personally in the licensee -not capable of use as security for, any lien, charge or other adverse interest
- **NEW SOUTH WALES** – Informal Practice - records third party interest on request by letter to the Licensing Court of New South Wales, asking it to note interest
- **VICTORIA** – records third party interests similarly – by notifying Licensing Victoria of interest
- **QUEENSLAND** –owner lessee mortgagee and secured creditors must give particulars of interest on prescribed form to the Licensing Commission
- **SOUTH AUSTRALIA and TASMANIA** – do not record third party interests. Financier cannot notify either Licensing Board of its interest in the Licence.- Borrowers give Power of Attorney for financier to deal with it.

GAMING MACHINE LICENSING COMPARISONS

- QUEENSLAND --The Queensland Office of Gaming Regulation will not recognise a charge over a Gaming Licence - encumbrance to the extent that it is over an operating licence is of no effect
- SOUTH AUSTRALIA – asks applicants if there is a charge over the assets of their business which include gaming entitlements. If so, applicant is required to seek financier consent to sell. - Ministerial Exemption allows Credit Providers to sell entitlements
- WESTERN AUSTRALIA - does not allow gaming except at Casino
- VICTORIA – Gaming Machine suppliers keep property in gaming machines
- NEW SOUTH WALES – A [licence](#) confers no right of property and is incapable of being assigned or mortgaged, charged, leased or otherwise encumbered.
- TASMANIA - A licensed operator must not mortgage, charge or otherwise encumber or assign a casino licence or gaming operator's licence except with the prior approval of the Commission.

Taxi Licensing differences

- SOUTH AUSTRALIA - Security by assignment is endorsed on the licence.
- VICTORIA– Victorian Taxi directorate controls administration of taxi licences, and must approve security interest being taken.
- TASMANIA – two types – perpetual taxi licence, restricted taxi licence, -no established procedure to register a security interest.
- QUEENSLAND –application form for a taxi licence asks “will you be taking out a loan/mortgage to finance this licence?”
- NEW SOUTH WALES - A licence, unless sooner suspended or cancelled, remains in force for a period determined by the Director-General and specified in the licence. No specific mention of security interests
- WESTERN AUSTRALIA - Taxi plates - A vehicle may not be operated as a taxi within a control area unless that vehicle is operated using taxi plates – again no specific mention of security interests

- Those leaving the industry expect that the sale price will include the value of the licence
- Entrants to the industry need to finance the purchase price of the licence

Can entrants use the licence as collateral for a loan?

A licence as collateral security

- Lending depends on
 - Regulatory approval for transfer of licence
 - Proving ownership of the licence
 - Value of the licence (or property associated with use)
- There being a market for property for which licence is required
 - There would be no market if licences were not capable of association with real or personal property
 - some licences are defined as personal property in legislation – others are barred from use as security

The missing link ...A Registry ?

- Legal certainty concerning priority between
 - Successive credit providers
 - Don't know if licence has already been taken as collateral in an earlier transaction
 - Purchasers of the licence
 - Collateral is lost if the licence is transferred or granted to a third party or forfeited
 - Credit provider has a personal remedy against the former licensee – “for what that is worth !”

- It is not feasible to use ASIC charges register, for example
 - by placing the licence in a company and registering a company charge
 - licences are not among the property listed in Corporations Act 2001 section 262
 - also, some businesses are not incorporated and can't access the ASIC register

Possible remedy

- Create a priorities register for licences
- Registration of licence on register:
 - establishes priorities among competing security holders
 - security not extinguished on transfer of licence to a third party – unless with consent
- An example worth following is *Personal Property Security Act 1993* (s.2(1)(w) & (z)) (Saskatchewan)
 - which establishes licences as registrable property