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“Incorporation – What are the advantages and disadvantages for Small, Medium, and Large Firms?”



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“What has changed, and why?”

- *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (**‘Act’**) enables patent attorneys to incorporate from **15 April 2013**
- Ensuring right of privilege in respect of advice from patent attorney firms
- Must consider:
 - general considerations which apply to companies
 - specific obligations and rights imposed by the Act



“What are the potential benefits?”

- Limited liability for owners vs. unlimited joint and several liability of partnerships
- More widely understood structure - greater access to capital and debt funding
- Corporate vs. marginal personal tax rates
- Perpetual succession of the business entity
- Regulation under the Corporations Act
 - sets out more clearly how the company will be bound to contracts with third parties
- Ease of transferring interests by share transfer and reduced duty rates on the transfer of shares compared with transfer of business assets
- More easily aligning unforeseen exits with insurance payouts under business succession agreements



“What are the disadvantages or risks?”

- Impact of director duties vs. good faith obligations on partners
- Potential need for business succession agreements
- Costs of rolling over business into company structure
- More complex tax rules and potential loss of concessions
 - loss utilisation, value shifting, dividends and capital streaming rules, Personal Services Income rules
 - entry / exit for ‘no-goodwill’ practices
- Greater financial reporting / corporate governance requirements
- Potential loss of privacy
 - more stringent disclosure and reporting requirements



“What do we need to do?”

- Two steps
 - incorporation as a company under the *Corporations Act 2001*
 - meet criteria under the Act
- The Act requires
 - at least one patent attorney director
 - written notice of intention to incorporate to be given to Designated Manager
 - any requirements prescribed by the regulations (none currently)
- Steps include:
 - consult your accountant and legal advisor to finalise most appropriate legal and operating structures
 - register a company with ASIC and notify Designated Manager
 - execute a business sale agreement to transfer assets to the company
 - pay duty associated with the transfer



“What else?”

- Both the Patents Act and Trade Marks Act have been amended to extend privilege to clients of patent and trademark attorneys
- Insurance – requirement to have professional indemnity insurance
- Offences for failure of incorporated patent attorneys to adhere to the provision of the new Act
- ATO concerns over alienation of personal services income