

## Game Legal - Help Guide

### INCORPORATION

What's incorporation, and why you might consider it.

#### Deciding to Incorporate

The decision about incorporation is an important decision for start-ups and for smaller entities run as sole traders or partners. Incorporation has significant legal consequences, many of them are beneficial. However, incorporation also brings with it responsibilities to report to government, which comes with significant oversight and regulation (and costs).

#### What is incorporation?

Incorporation gives your business its own legal identity (the business becomes a 'separate legal entity' from its shareholders/members). The company can enter into contract, own property (real estate assets and IP), sign a lease, employ people, open a bank account(s), and sue and be sued in its own name, giving its owners a degree of protection. Many other people/entities you do business with, landlords, employees, and investors prefer to deal with incorporated structures.

Businesses are incorporated under law, which can be either state or federal - state for incorporated associations (common entity type for community groups and sporting clubs); federal for companies. Whichever way they incorporate, entities report to the regulator responsible for their type of structure, for example the Australian Securities and Investments Commission (ASIC) for companies.

Incorporated businesses follow a particular structure, with rules (or constitution), shareholders or members (under a shareholder agreement), and a governing body (often called a board or committee).

Being incorporated has consequences for people who are going to be on the board:

#### Director's Duties

The law says that directors (and other officeholders) must:

- always act in good faith in the best interests of the entity and for a proper purpose;
- exercise reasonable care, skill and diligence in carrying out their role. This includes making sure the entity can pay all of its debts on time and that it does not trade while insolvent;
- manage conflicts between personal interests and the entity's interests; and



interactive games & entertainment association

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- never take advantage of their position or information they have gained in the role for personal advantage.

**Characteristics of Incorporation** - as distinct from sole traders, partners, and trusts:

**Income Tax**

\*30% flat tax payable on profits of company. Dividends taxed to shareholders. Franked dividends pass on tax paid. Restrictions on loans to shareholders. Losses trapped in company. Limited splitting through classes of shares.

\*Base rate entities (aggregated turnover less than \$25 million, and 80% or less of their assessable income is base rate entity passive income) tax rate is 27.5% from 2017.

**Asset Protection**

Shareholders protected from company debts but value of their shares available to their creditors on bankruptcy as, if your business is incorporated, it has 'limited liability' and the entity protects the members from being personally liable for the entity's debts. Directors potentially liable if trading while insolvent.

**Regulation**

ASIC has significant oversight of companies and can bring claims against directors (and other officeholders) for breaches of the Corporations Act. The ATO regulates GST and other taxes.

**Succession**

Bound by constitution. Must act in interests of shareholders. Directors make most decisions. Can have single director control. Perpetual succession.

**Set-up and Running Costs**

Shareholders agreement recommended. Ongoing compliance & accounts. Super and payroll tax and workers compensation apply to payments to principals.

**Flexibility**

Anything, so long as the decision is taken in interests of shareholders.

The above is information only and does not constitute legal advice. To discuss your unique needs, contact a lawyer skilled in corporate governance, such as Game Legal.



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