

INCORPORATION – MATTERS FOR CONSIDERATION

Currently, RSL NSW sub-Branches are unincorporated associations which manage property through trustees. These trustees hold all assets of the sub-Branch on trust and in accordance with the RSL NSW Constitution.

In 2019 many sub-Branches requested that a right to incorporate be included in the RSL NSW Constitution. They requested this right because of the administrative burden of managing trusts, and the complexities associated with having to auspice grants.

An outcome of the 2019 Congress was to enable sub-Branches to reduce their administrative complexity by incorporating. This document provides information as to what incorporation means so that sub-Branches can begin to consider their circumstances and determine whether incorporation is an option for them.

Regardless of the model chosen by their sub-Branches, RSL NSW Members will continue to have the same rights that they have presently.

RSL NSW Members must note that this document does not constitute legal advice for sub-Branches and only provides information for them to consider when assessing their sub-Branch's circumstances.

1. How is incorporation different from the current structure?

Incorporation will provide sub-Branches with an alternative vehicle through which they can do business (including by owning property, entering contracts, employing people and conducting investment dealings). Sub-Branches which choose to incorporate will no longer operate with Trustees holding property on Trust for the sub-Branch.

2. Will incorporation mean that a sub-Branch becomes “independent” from ANZAC House and does not have to comply with the Constitution?

No. For as long as a sub-Branch is an RSL NSW sub-Branch the RSL NSW Constitution will govern sub-Branch decision making.

3. Should a sub-Branch Incorporate?

Sub-Branches do not have to incorporate and can keep their current structure. It is very important that a sub-Branch consider carefully whether it should incorporate. Relevant considerations include:

- whether the sub-Branch Executive are ready to accept legal duties personal to them that are additional to the obligations they have to the ACNC and under the RSL NSW constitution (acknowledging that Trustees already have legal duties under Trustee legislation and common law in relation to the management of sub-Branch property);
- the level of expertise in the sub-Branch to take on a new operating structure and ensure compliance with legal obligations under a number of Acts (members should consider the findings of the Bergin inquiry as they relate to governance, and director duties); and
- the cost of incorporation, including the initial set-up and ongoing compliance both in terms of financial costs and member's time.

4. Cost

The overall cost of setting up a company limited by guarantee ('CLG') will vary for each sub-Branch. The cost of registration is not in itself high, but professional fees associated with winding up the trust structure, transferring assets and advising on the new entity may be significant. Sub-Branches will need to get their information on this matter as every sub-Branch is different in terms of assets held.

On going compliance costs should be considered in comparison to current structure, when assessed against the charitable purpose being discharged by the sub-Branch; should volunteers' time and experience be better targeted at supporting veterans and their families, rather than administration of a company or association.

5. Advantages

The main advantage of incorporation is that a sub-Branch becomes a 'person' in the eyes of the law meaning that contracts are entered into by the incorporated entity as opposed to individuals at the sub-Branch. This also means that the entity continues when members of the sub-Branch change.

Under the CLG structure, the members have limited liability. This means the members only need to contribute a nominal amount (known as a 'guarantee') to the assets of the company if the company is wound up and is unable to pay its debts and other liabilities. However, the executive of the CLG will have additional duties which can attract personal liability as noted below.

6. Disadvantages

Managed properly the trust structure is a workable one and one that is familiar to sub-Branches. By incorporating sub-Branches will need to be clear on the legal obligations of the executive – currently only trustees have statutory duties additional to those held by sub-Branch charities under ACNC legislation. As a CLG, all of the sub-Branch executive will have directors obligations at law that are personal to them. The protections offered by limited liability (of CLGS) do not extend to breaches of these duties.

The CLG itself will also have different obligations than an unincorporated association. Some of the obligations vary depending on whether the company is a 'small company limited by guarantee' or a 'company limited by guarantee', as defined in the Corporations Act 2001 ('Corporations Act'). A CLG that is registered as a charity with the Australian Charities and Not-for-profits Commission ('ACNC') must comply with the requirements of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act) and the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (ACNC Regulations). These requirements apply in substitution for certain requirements under the Corporations Act to reduce the regulatory burden on registered charities. However, there are other laws that will still apply to a CLG – for example, laws dealing with occupational health and safety, workplace relations and tax.

In order to meet these obligations, a CLG may need to develop its own processes, procedures and run training sessions. What is required of each sub-Branch will depend on the operations and activities of that particular sub-Branch.

7. Does incorporation automatically mean limited liability?

Many sub-Branches have said that they believe incorporation will 'eliminate' the risk of personal liability for officeholders at their sub-Branch and that the risk of personal liability for trustees was a motivator for their considering incorporation. This belief is not entirely accurate. Directors will be personally liable if they do not meet the legal standards, they are held to under the respective acts governing incorporated entities. These include obligations:

- to act with reasonable care and diligence;
- to act honestly and fairly in the best interests of the charity and for its charitable purposes;
- not to misuse their position or information they gain as a responsible person;
- to disclose conflicts of interest;
- to ensure that the financial affairs of the charity are managed responsibly; and
- not to allow the charity to operate while it is insolvent.

If a person breaches a duty, a court may:

- order a person to pay a fine or to compensate the organisation (or both) for the amount of money the organisation lost as a result of the breach;
- disqualify a person from sitting on a committee in the future for a period of time;
- in extreme cases, if committee members are deliberately dishonest or reckless and the breach is significant, impose a criminal penalty; and
- in very extreme cases (for example where actions are deliberately fraudulent and the amount of money taken is considerable) order imprisonment.

The directors of a CLG will also need to obtain a director identification number from ASIC.

8. Does incorporation mean independence from ANZAC HOUSE?

No, all sub-Branches and RSL NSW Members will need to continue to meet their obligations under the RSL NSW Constitution and the expectations we have of each other as part of the RSL family.

9. Reporting and Audit Obligations

Audit and reporting obligations attached to sub-Branches are currently derived primarily from their status as registered charities (in which case they report to the ACNC, according to the ACNC's tiered system) and as holders of Charitable Fundraising Authorities (in which case they report to NSW Fair Trading).

If a sub-Branch incorporates, it will have some obligations to ASIC as the regulator of the CLG entity in addition to the ACNC obligations because of their registered charity status and Fair Trading obligations as a holder of a Charitable Fundraising Authority. The ACNC is working with ASIC and Fair Trading to try and streamline reporting and audit requirements so that charities reporting is conducted to ACNC only in relation to their non fundraising activities. The kind of reporting, who sub-Branches report to and whether accounts must be audited depend on the revenue generated by the sub-Branch and their nominated financial year.