

## **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.

Last year, 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 as a company limited by guarantee or as an incorporated association. 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.

Information about the differences between the models can be found [here](#).

***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, and if so, what model they choose. 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)
- the cost of incorporation, including possible stamp duty in relation to the transfer of property from Trustees to the incorporated entity.

#### **4. Cost**

The overall cost of setting up a CLG or becoming an incorporated association 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. There may also be stamp duty implications for those sub-Branches which own real property. Sub-Branches will need to get their information on this matter as every sub-Branch is different in terms of assets held. ANZAC House has sought advice on an exemption to stamp duty and is waiting for a response.

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. The entity continues even when members of the sub-Branch change.

#### **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. Under incorporation models all sub-Branch officers and executives will have directors and committee member obligations at law that are personal to them. The protections offered by limited liability (of CLGS and Incorporated Associations) do not extend to breaches of these duties.

#### **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 and Committee members 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:

- 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 (including making sure the entity can pay all of its debts on time and does not trade while insolvent);
- ensure conflicts of interests are properly managed;
- never take advantage of their position or information they have gained in the role for personal advantage.

#### **7. 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 NSW Fair Trading and ASIC as regulators of the respective incorporated structures (depending on the model they choose) 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.