

Incorporating

I recently met with Iain Smith at McGrigors LLP Solicitors to gain some more advice on whether SUS would be better placed to be incorporated. His advice and the procedural steps are detailed below.

This outlines the various procedural steps, and issues, which SUS would require to address on route to becoming a company limited by guarantee. The process is not unduly onerous but there are stages which require to be undertaken in a sequential order and in an approved manner. This said any work involved with our proposed incorporation would, Iain believes, provide SUS with a far more effective operating model than that of an unincorporated association, if for no other reason than the liability protection it would provide.

The 3 stages which are required to establish a new company limited by guarantee and have assets transferred to it from SUS and thereafter have SUS wound up are;

- Stage 1 - unless this has already been undertaken it would be sensible to inform SUS's membership of its intention to become incorporated to ascertain if there is any resistance to the proposal prior to undertaking any further work or accruing any costs;
- Stage 2 - on the assumption that there is no resistance, and there very rarely is, the next stage would be to call a general meeting in accordance with the SUS Constitution. At the meeting, I would suggest that the following three resolutions are put to the membership, namely (1) to establish a company limited by guarantee, (2) for SUS to transfer all its assets to the new company and (3) to wind up SUS (this would then be required to be referred to a Extraordinary General Meeting ("EGM") as per the SUS Constitution); and
- Stage 3 - incorporation of the new company, transfer all SUS's assets to the new company and the winding up of SUS.

The key documentation involved in Stages 2 and 3 are:

- Stage 2 - appropriately worded resolutions, and SUS minutes, to ensure full compliance with the SUS Constitution;
- Stage 3 - statutory forms to incorporate the new company require to be completed along with the drafting of articles of association. The articles of association are effectively the operating rules for the new company and as such they require detailed drafting to ensure they provide the necessary operational flexibility but still comply with statutory requirements; and
- Stage 3 - an asset transfer agreement. This agreement transfers all the assets of SUS, including staff, any contracts and potentially liabilities to the new company. This agreement needs to be signed by both SUS and the new company and as such SUS cannot be wound up prior to the agreement being completed.

Following the asset transfer agreement being signed it would then be the appropriate time for SUS to be wound up as an unincorporated association - as agreed at the earlier EGM. Prior to winding up most unincorporated associations undertake a 'winding up' financial review and thereafter report back any findings to the membership. This type of review is not a legal requirement but is generally regarded as good governance.

In addition to the above, consideration also needs to be given to Edinburgh University and its business relationship with SUS. This issue requires some more investigation but it may be that some form of service level agreement, or contract, should be drafted between the new company and Edinburgh University to ensure facilities, staffing and any other ancillary arrangements continue with the new company. However even if we ultimately decide not to pursue incorporation, Iain would still strongly advise that such an agreement should still be put in place between SUS and Edinburgh University. With regard to the asset transfer agreement it may, depending on the types of contracts you have in place, be necessary to obtain third party permission's to enable them to be transferred.

Finally, with regard to incorporation key third parties, such as SUS's bank and all grant-in-aid funders, need to be informed of the incorporation as technically their services and grant aid are to another body (albeit an unincorporated one) and as such we may need their permission. Such permission is normally provided automatically, however, it is better to be proactive with these organisations on these matters rather than wait for them to discover the new corporate vehicle when undertaking a financial review or grant aid audit.

With regard to costs Iain has spoken with the Head Partner of their Sports Team and they have agreed to cap our fee at £5,000 (exc VAT) for (1) incorporating a company limited by guarantee including fully bespoke drafting of the articles of association and all ancillary documentation, (2) drafting an asset transfer agreement and all other necessary agreements including any service level agreements, or the like, required with Edinburgh University and (3) the provision of all other supporting documentation including resolutions and minutes. They would also support SUS through the process of incorporation, asset transfer and winding up and provide introductory training on the management of the new company.

The above fee is capped but should it be less than £5,000 then they would only fee the actual amount due. If, however, the actual cost of the work was in excess of £5,000 they would not charge any more, in fact they would be more than happy for any fees which they have incurred in excess of £5,000 to be used as in-kind sponsorship in association with the Sportsmatch scheme. In effect this would mean that if the cost to McGrigors of this work was actually £8,000 then they would be more than happy to declare this fact and become a sponsor of SUS, by using this approach SUS could potentially, using the above example, gain £3,000 cash from Sportsmatch by using the McGrigors in-kind support to fund one of its projects.

SUS Executive is asked to:

Item
➤ Note advice on incorporation and offer any thoughts.