

Our ref: LIS\
Partner: Lisa Simmons
Direct line: +61 2 9258 6595
Email: lisa.simmons@ashurst.com

Ashurst Australia
Level 11
5 Martin Place
Sydney NSW 2000
Australia

16 July 2019

GPO Box 9938
Sydney NSW 2001
Australia

Tel +61 2 9258 6000
Fax +61 2 9258 6999
DX 388 Sydney
www.ashurst.com

The Service Members of RSL NSW

The logo for Ashurst, featuring the word "ashurst" in a lowercase, bold, sans-serif font.

Dear Members

We have been instructed by the Board of RSL NSW to review certain documents which have been provided to it, in connection with a proposal to obtain sufficient member support for the convening of an Extraordinary State Congress pursuant to clause 21.9(b) of the RSL NSW Constitution. The purpose of the state congress is to consider and if thought fit, pass motions (**Motions**) to, in summary:

1. remove all current elected, and/or appointed members of the Board of RSL NSW pursuant to sub-clause 15.4(f) of the RSL NSW Constitution;
2. approve amendments to the RSL NSW Constitution as set out in a document known generally as the "Rockdale Constitution", a copy of which can be viewed on www.fivedockRSL.org.au;
3. appoint a "caretaking committee" to manage the affairs of RSL NSW, its entities and subsidiaries and other bodies controlled by RSL NSW until a congressional election or extraordinary congressional election takes place and a new Board is elected to office;
4. appoint certain service members named in the relevant documentation as the "caretaking committee"; and
5. resolve that the caretaking committee be mandated to immediately pursue certain initiatives, including to make representations to the NSW Government to amend the *RSL NSW Act 2018*, to engage the necessary professional assistance to restore the ability for RSL NSW sub-branches to fundraise in their local community and to establish a State Branch Tribunal.

Specifically, the Board has asked us to review the Motions and the "Rockdale Constitution" which have been provided to RSL NSW prior to the date of this letter, and provide advice on whether the Motions could be passed as proposed, without amendment, having regard to the laws applicable to RSL NSW, the current RSL NSW constitution and its Board members.

Our advice

Our advice is that the Motions as proposed should not be proposed or made, and in particular, the Rockdale Constitution cannot be adopted without amendment, as the terms of the motions are not in our view consistent with the NSW RSL Act (NSW) 2018 for the reasons given below. Additionally, we have identified a number of more general issues with certain provisions of the proposed Rockdale Constitution, some of which are set out non-exhaustively below.

Reasons

Motion 1 – Removal of all current elected representatives of the Board of RSL NSW

- RSL NSW is a statutory corporation originally incorporated under *The Returned and Services League of Australia (NSW Branch) Incorporation Act 1935 (Original RSL NSW Act)*, and continued under the *RSL NSW Act 2018 No. 48 (RSL NSW Act)*, which commenced on 31 December 2018.
- Its governing documents include the RSL NSW Constitution, by-laws and governance regulations. The State Council was until 31 December 2018, the governing body of RSL NSW. The *RSL NSW Act* provides that RSL NSW is to have a Board of Directors¹. The RSL NSW Constitution may make provisions for or with respect to the directors (including terms of office and removal from office)².
- The State Council is, until:
 - (a) the terms of office of the existing State Council members expire, and
 - (b) the directors are elected under s. 5(3),
- taken to be the Board for the purposes of the Act and to exercise the functions of the Board³.
- The RSL NSW Act does not allow for removal by the members, of the elected members of State Council (now the Board) until new directors are elected by the service members. Further, the RSL NSW Act does not allow at all for removal of directors who have been appointed by the Board under the RSL NSW Act.
- Motion1 should not be put forward to members for resolution as the actions contemplated by that resolution are in our view inconsistent with the provisions of the RSL NSW Act.

Motion 2 – To resolve that the RSL NSW Constitution can be amended to maintain RSL NSW's entitlement to be registered as a charity, keep its charitable status and to comply with ongoing governance obligations and other requirements of the Australian Charities and Not-for-profit Commission

- The purpose of this motion appears to be to confirm whether as a matter of fact and law, that the RSL NSW Constitution can be amended in the manner stated. It appears to be a motion which is merely a precursor to Motion 3 (discussed below).

Motion 3 – To amend and replace the RSL NSW Constitution with the "Rockdale Constitution"

- We have reviewed the Rockdale Constitution to determine whether, if adopted in its present form, it would be consistent with the RSL NSW Act. In summary, in our view, the Rockdale Constitution is not consistent with the RSL NSW Act and it could not be adopted by the members of RSL NSW in that form.
- We have set out below examples of the inconsistency between the Rockdale Constitution and the RSL NSW Act. We have also set out examples of more general drafting issues in the Rockdale Constitution. These examples are not exhaustive.
- We note that some of the examples highlight instances where the existing RSL NSW Constitution needs to be amended to address changes to the governance structure of RSL NSW which have arisen from the RSL NSW Act. These do not arise from additions which

¹ s. 5(1) RSL NSW Act

² s. 5(6) RSL NSW Act

³ Part 2, Schedule 1, *RSL NSW Act 2018 (NSW)*

have been proposed by the Rockdale Constitution, but rather are additional matters which need to be addressed to align the RSL NSW Constitution with the RSL NSW Act.

Example 1 - Directions of State Congress

- The Rockdale Constitution contemplates at clause 17.1 that the Board has the authorities and powers listed out in that clause, subject to the law, any Standing Policy and any directions of State Congress.
- Section 6(1) of the *RSL NSW Act* provides that all decisions relating to the functions of RSL NSW are to be made by or under the authority of the Board.
- It follows that State Congress cannot be empowered under the RSL NSW Constitution to give directions to the Board.
- A similar issue arises in relation to proposed clause 17.14 of the Rockdale Constitution. It contemplates that the charitable status of RSL NSW will not be changed without approval of a motion to do so by the delegates at an annual congress or extraordinary congress. The *RSL NSW Act* provides that all decisions relating to the functions of RSL NSW are to be made by or under the authority of the Board.

Example 2 - Delegation

- Clause 18.7 contemplates that the State Executive has the powers and/or authority delegated to it by the Board. The *RSL NSW Act* contemplates delegation by RSL NSW at clause 11. RSL NSW may delegate the exercise of any of its functions to, among others, a director or a committee comprised of, a combination of directors and employees, or any other person. Clause 18.7 does not appear to be a delegation that is permitted by s. 11 of the *RSL NSW Act*.

Example 3 – Scope of duties

- Clause 49.1 states that a director of RSL NSW owes "fiduciary duties", with those duties being those which are contained in ACNC Governance Standard No.5 (contained in the Australian Charities and Not-for-profits Commission Regulation 2013 (**ACNC Regulation**)). However this standard applies to RSL NSW and not directly to the directors. Applying Governance Standard 5, clause 49 of the Rockdale Constitution would instead provide that RSL NSW must take reasonable steps to make sure that the duties set out in the regulation (paraphrased in clause 49.1) apply to Responsible Persons (which include its directors) and that they follow them.
- The ACNC Regulation, at subdivision 45-C, contains a series of 'protections' which operate as a defence for RSL NSW in such case. These protections have not been reflected in the Rockdale Constitution. It follows that the Rockdale Constitution does not reflect accurately ACNC Governance Standard No.5, in its inclusion of clause 49.1.

Example 4 - Declaring Conflicts of Interest

- Proposed Clause 50.2 of the Rockdale Constitution sets out a procedure for the Board to deal with and declare conflicts of interest.
- Section 12 of the RSL NSW Act prescribes a procedure for dealing with matters of potential conflict.
- The provisions in clause 50 are inconsistent with section 12 and on their terms, uncertain as to intent and operation. It is untenable to have a provision in the Constitution which is inconsistent with the legislation.

Example 5 – Application of legislation

The proposed Rockdale Constitution makes reference in various Clauses to legislation being applicable, either to RSL NSW or to other persons. Many of these references are not correct.

Clause 48.1 provides that the Directors of RSL NSW shall be bound by provisions of section 1101C of the Corporations Law in respect of the preservation and disposal of the State Branch's records. But section 1101C applies to a person who is required under Chapter 7 of the Corporations Act to maintain a record – Chapter 7 generally applies to persons who carry on financial services businesses, conduct financial markets and provide clearing and settlement services. This provision is not relevant in any way to RSL NSW or its directors.

Clauses 48.2 – 48.4 inclusive also appear to be a modified copy of the provisions of section 1101C(2) – (4). These obligations do not apply to RSL NSW and the clauses as modified do not provide what record or register is to be maintained. It follows that these Clauses are simply wrong and do not accurately reflect the law.

Similarly Clause 48.6 is also incorrect when it states that section 55-5 of the Australian Charities and Not-for-profits Commission Act 2012 (**ACNC Act**) binds RSL NSW, the Directors, State Branch Executives and sub-Branches in relation to the keeping of records. Section 55-5 of the ACNC Act binds those entities which are subject to it, that is, entities registered under the ACNC Act. The Directors and State Branch Executives are not subject to the ACNC Act. RSL NSW and the sub-Branches will be bound, as a matter of law, if they are registered entities – a matter that does not need to be specified in the Constitution.

By way of further example, Clause 51 provides that RSL NSW and all sub-Branches are subject to the provisions of the Privacy Act 1988 (Cth) (**Privacy Act**). While we cannot comment on the legal status of every single sub-Branch, we are aware that a number of them operate as unincorporated associations. They are not subject to the Commonwealth Privacy Act. Accordingly the Rockdale Constitution inaccurately purports to state that all sub-Branches are subject to the Privacy Act which is not the case.

Finally there are provisions that have been included in the Rockdale Constitution that refer to persons (primarily Directors) being liable to criminal action if matters referred to in the Constitution are not observed (for example, at Clause 49.1). Whether a person is liable to criminal prosecution is a matter of law. Nothing said in a Constitution about such matters will change the law which will ultimately dictate whether or not a person is taken to have committed an offence. Some of these provisions are misleading as they indicate that a criminal action may be brought when it would not be available in the circumstances stated. It is not appropriate that a Constitution be adopted which misleads as to the effect of the law.

Motion 4 – *To appoint a "caretaking committee" to manage the affairs of RSL NSW, its entities and subsidiaries and other bodies controlled by RSL NSW until a congressional election or extraordinary congressional election takes place and a new Board is elected to office*

Motion 5 – *To appoint certain service members named in the relevant documentation as the "caretaking committee"*

Motion 6 – *To resolve that the "caretaking committee" be mandated to immediately pursue certain initiatives, including to make representations to the NSW Government to amend the RSL NSW Act 2018, to engage the necessary professional assistance to restore the ability for RSL NSW sub-branches to fundraise in their local community and to establish a State Branch Tribunal*

- RSL NSW Act does not allow for a "caretaker committee" to direct and control the operation of RSL NSW. Nor does the current RSL NSW Constitution under which the purported ' caretaking committee' would be appointed.

- The *RSL NSW Act* provides that all decisions relating to the functions of RSL NSW are to be made by or under the authority of the Board⁴. The matters which motion 4 requires be undertaken by the "caretaker committee" include matters which are decisions relating to the functions of RSL NSW. It follows that the matters can only be done by or under the authority of the Board of RSL NSW.

It follows in our view that motions 4, 5 and 6 are not consistent with the *RSL NSW Act 2018*.

Yours faithfully



Ashurst

⁴ Section 6(1) *RSL NSW Act 2018 (NSW)*

