



Title Role of the Board of RSL NSW

Date 8 October 2020

1. Background

The current Board of RSL NSW has undertaken a detailed review as regards the duties, obligations and role of the RSL NSW Board and its members. This review included assistance that was provided by Clayton Utz lawyers.

A summary of the outcomes of the Board's review is set out below.

The complex and quite unique structure of RSL NSW means that the key duties and obligations of Board members are to be found in three primary areas being:

- In the Australian Charities and Not-for-profits Commission Act 2012 (Commonwealth) **ACNC Act**);
- Under the common law legal obligations that are imposed on all Board members; and
- Pursuant to the RSL NSW Act 2018 (NSW).

Other specific statutory duties can also arise for the Board and its members under specific legislation. A brief overview is set out below in relation to the duties that are imposed under the Workplace Health and Safety Act 2010 (NSW) and the Charitable Fundraising Act 1991 (NSW).

2. Duties under the ACNC Act

RSL NSW is a charity that is registered with the Australian Charities and Not-for-profits Commission. Because of this RSL NSW must comply with the legal obligations and duties that are imposed under the ACNC Act.¹

RSL NSW Board members under the ACNC Act are subject to, and must comply with the following statutory duties:

- (a) to exercise their powers as a Board member and to discharge their duties as a Board member with the degree of care and diligence that a reasonable individual would exercise if they were a Board member of RSL NSW;
- (b) to act in good faith in the best interests of RSL NSW and to seek to further the purposes of RSL NSW;
- (c) not to misuse the position held as a Board member of RSL NSW;
- (d) not to misuse any information obtained in the performance of their duties as a Board member of RSL NSW;
- (e) to disclose any perceived or actual material conflicts of interest;
- (f) to ensure that the financial affairs of RSL NSW are managed in a responsible manner; and
- (g) not to allow RSL NSW to operate while it is insolvent.²

Further, RSL NSW Board members are required to have regard to the common law duties and further statutory duties that are imposed under Australian law.³ These duties are outlined below.

¹ Australian Charities and Not - for - profits Commission Act 2012.

² ACNC Regulation 25.25(2).

³ See Notes 1 and 2 in ACNC Regulation 45.25(2).

3. Common law duties

Upon appointment, RSL NSW Board members will also personally assume a range of significant common law duties by virtue of holding what is called a fiduciary office. For individual Board members the overarching duties are:

- (a) to act in good faith and to exercise their discretion bona fide in what they consider to be in the interests of RSL NSW as a whole and not for a collateral purpose;
- (b) to act with reasonable care and diligence;
- (c) to ensure that they do not permit a conflict to arise between the duties that they owe to RSL NSW and their other interests;
- (d) to not permit the duty owed to RSL NSW to conflict with any duty that is owed to a third party; and
- (e) to not make improper use of the property of RSL NSW (including any information) or of opportunities that are open to RSL NSW.

To satisfy their duty to take reasonable care and diligence, RSL NSW Board members must take reasonable steps to place themselves in a position to guide and monitor the management of RSL NSW. As such they must become familiar with the business of RSL NSW and they will be under a continuing obligation to keep themselves informed about the activities and financial position of RSL NSW.

While RSL NSW Board members are not required to undertake a detailed inspection and monitoring of the day-to-day activities of RSL NSW, they do have to undertake general monitoring of the corporate affairs and the compliance with the policies of RSL NSW. Board members must also undertake a regular review of the financial statements of RSL NSW and they have a duty to act and make further inquiries that may arise from such a review.

All RSL Board members are expected to be capable of understanding the affairs of RSL NSW, at least to the extent of reaching a reasonably informed opinion about relevant matters, including the financial capacity of RSL NSW. Board members must also keep abreast of the affairs of RSL NSW and then act appropriately if there are reasonable grounds to expect that the interests of RSL NSW will be exposed to risk. Furthermore, RSL NSW Board members must bring an informed and independent personal judgment when they are considering the matters that come before the Board.

If facts come to the attention of a Board member that lead to a suspicion that something is amiss or if a suspicion of a prudent Board member would have been awakened, then they will have a duty to act and inquire further into the relevant matter(s). A Board member will not be excused from making his or her own inquiries by relying on the judgment of others.

A Board member's duty of care is not merely subjective or limited by the Board member's knowledge and experience or ignorance or inaction, but will vary according to the size and business of RSL NSW and by the experience or skills that the Board member held themselves out to have in support of their appointment to their office.

Board members will not be able to hide behind personal ignorance about the affairs of RSL NSW if that is of their own making or has been contributed to by a failure to make the necessary inquiries

The Board of RSL NSW, in its collective capacity, also has various duties including:

- (a) a duty to exercise its powers for a proper purpose; and
- (b) a duty to retain discretions and actively exercise them and to not disregard the interests of RSL NSW.

Board members should be aware that a breach of their fiduciary duties could give rise to a number of general law remedies. These include the obtaining of injunctions and declarations, damages and compensation, accounts of profits, rescission, tracing and the establishment in some cases of constructive trusts.

4. Duties under the RSL NSW Act 2018 (NSW)

RSL NSW Board members also have a clear statutory obligation to disclose any pecuniary interest in a matter that is being considered by the Board and which appears to raise a conflict with the proper performance of their duties

as a Board member in relation to the consideration of the relevant matter.⁴ This disclosure must occur as soon as possible after the Board member becomes aware of the relevant facts.

5. Role of the RSL NSW Board in relation to sub-Branches and subsidiary companies

There are several circumstances where RSL NSW or the Board thereof could become legally liable in connection with the actions or omissions of the sub-Branches.

The Constitution of RSL NSW and its Standard Operating Procedures establish substantial oversight mechanisms. This governance framework establishes a duty of oversight on behalf of RSL NSW and the Board over the sub-Branches.

If the Board has exercised systematic, regular and active involvement in the management and decision making of a particular sub-Branch, the Board and RSL NSW could potentially become liable for the actions of that sub-Branch. If the Board exercises their powers to make a direction to a sub-Branch about how they should act, or otherwise takes action which in effect makes them the decision maker in relation to a particular matter as regards a sub-Branch, then potentially there could be a risk of liability for any loss that results from the exercise of those powers.

The Board will also be required to monitor, investigate and pursue sub-Branches for any breach of any identified legal or regulatory obligations. This could include concerns about poor decisions that have been made within the sub-Branches. If the Board does not fulfill its obligations in this regard, then potentially, RSL NSW and potentially the Board members could become liable for the actions of that sub-Branch.

As RSL NSW holds all of the issued shares in RSL Custodian Pty Ltd and is also the sole member of RSL LifeCare Limited, a company limited by guarantee, it is from a legal point of view the holding company of both of these subsidiary companies. Again, this structure raises yet another layer of governance complexity for both RSL NSW and the Board.

6. Additional duties under the Workplace Health and Safety Act 2010 (NSW) (WHS Act)

In addition to the duties outlined above, RSL NSW and the Board have important workplace health and safety obligations under the WHS Act. The duties prescribed by the WHS Act apply to both RSL NSW and to the sub-Branches. Importantly, duties under the WHS Act cannot be transferred and more than one person or sub-Branch of RSL NSW can concurrently have the same duty. Each duty holder must:

- (a) comply with their obligations even if another duty holder has the same duty; and
- (b) discharge the person's duty to the extent that the person has the capacity to influence or control the relevant matter.⁵

7. Additional duties under the Charitable Fundraising Act 1991 (NSW) (CF Act)

RSL NSW and the Board also have obligations under the CF Act for fundraising activity conducted by RSL NSW, RSL NSW entities such as the Australian Forces and Overseas Fund and in some circumstances, sub-Branches. The CF Act states that where there is a breach of the Act or regulations, any person who is a director of a corporation, or who is concerned in the management of the corporation breaching the Act or regulations is also taken to have contravened the Act (or regulations) if that person knowingly authorised or permitted the breach⁶.

⁴ Section 12 of the *RSL NSW Act 2018* (NSW).

⁵ Section 16 of the *WHS Act 2011* (NSW)

⁶ Section 51 of the *CF Act 1991* (NSW)