community law
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Choosing the right legal structure for your group

What is an incorporated society?

Incorporated Societies Act 2022, s 11 and Schedule 1

New legislation about incorporated societies

New legislation about incorporated societies was introduced in 2022. Throughout this resource:

- the Incorporated Societies Act 1908 will be referred to as the "**1908 Act**", and
- the Incorporated Societies Act 2022 will be referred to as the "**2022 Act**".

An incorporated society is a membership-based non-profit organisation that is currently registered under the 1908 Act.

By registering under the Act, the society becomes an incorporated body with a legal identity of its own, separate from the identity of its members. This means the society continues to exist as a legal entity (called "perpetual succession") even though its membership may change. It also means the society's members are not personally responsible for debts and other obligations that the society takes on.

An incorporated society's management committee is in charge of the administration, management and control of the society.

The Incorporated Societies Act 1908 (the "**1908 Act**") previously set out the rules an incorporated society needed to follow, but under the new legislation introduced in 2022 (the "**2022 Act**") all incorporated societies have to apply to re-register with the Registrar of Incorporated Societies (the **Registrar**) by April 2026 if they want to continue to exist. If a society doesn't apply to re-register by April 2026, it will stop being an incorporated society ("cease to

exist").

Applications for re-registration will open in October 2023. More information about the application process will be set out in regulations that are due to be introduced later this year.

The 2022 Act creates changes to the registration process, and creates different requirements for incorporated societies. This means that:

- **if you are an existing incorporated society,** until you re-register, your society continues to operate under the old rules from the 1908 Act.
- **if you are an existing incorporated society,** until you re-register, your society continues to operate under the old rules from the 1908 Act.
- **if you are an unincorporated group looking to be incorporated before October 2023**, you will have to apply to register under the 1908 Act, and you will then have to re-register under the 2022 Act once applications open.
- **if you are a charitable trust already registered under the Charitable Trusts Act 1957**, you have the option of:
    - re-registering under the 2022 Act; or,
    - you can continue operating under the Charitable Trusts Act 1957. If it's a new registration, you'll have to apply under the rules of the 2022 Act. No new charitable trusts can register under the old legislation.

Key people in an Incorporated Society

- **Committee:** any society that incorporates or re-registers under the new Act has to have a governing body, which is referred to as the "committee" in the 2022 Act. There has to be at least 3 people on the committee. The 2022 Act refers to these people as "officers".
- **Officers:** A society's officers are the committee members. They are chosen by the society to manage, direct and supervise the society's activities. Other people can also be officers even if they're not part of the elected committee, if they hold a position which allows them to exercise significant influence over the management or administration of the society—for example, a CEO. Officers have specific duties, set out in the 2022 Act.
- **Members:** A society's members are people who have consented to being part of the

incorporated society, following the process set out in the society's constitution. Unlike officers, members don't have special duties under the 2022 Act.

Registering as an incorporated society

Key requirements for registering or re-registering under the 2022 Act

Incorporated Societies Act 2022, s 26

When your group applies to register or re-register under the 2022 Act, it will need to provide a proposed constitution to the Registrar, which meets the new requirements set out in the 2022 Act.

These requirements are a lot more detailed than what was set out in the 1908 Act. This means that most existing incorporated societies will have to amend their constitutions to meet the 2022 Act's requirements.

Tip: The Companies Office have created a resource called the Constitution Builder to help incorporated societies create a constitution in line with the 2022 Act. You can find this resource at the Companies Office website.

The Act sets out a checklist for what your society's proposed constitution must have. The key requirements are:

- **Name of society** *(ss 11; 26(1)(a))*—The constitution has to have the name of the society and the name has to meet certain criteria. For example, it can't be misleading about the society's purpose, it can't be offensive, and it needs to be different enough from existing society names so it's not confusing.
- **Purposes of society** *(ss 12, 23, 24, 26(1)(b))*—The constitution has to include the society's purposes, and these purposes can't be against the law.
- **Not for financial gain** *(ss 22-24)*—The society can't make a profit with the intention of passing it on to the members (in other words, the society can't "operate for financial gain"). Any profits have to be returned to the society to be used within the scope of its purposes. If a society breaches this rule with the permission or consent of an officer of the society, the officer can be fined up to $50,000. A society can recover a financial gain from a member, and the High Court can put a society into liquidation if it is carried on for the

financial gain of a member.

- **Membership rules** *(ss 8, 14, 26(1)(c), (d), (e), 76 and 79)*—The constitution has to have rules setting out how a person becomes, and stops becoming, a member of the society. For example, a person may consent to being a member by filling out a form. It's no longer possible for a person to become a member by default, for example, as a result of the suburb or street where they live.
    - Minimum membership – The society has to have at least 10 members (this is less than the minimum of 15 members required under the 1908 Act). However, a member that is a body corporate, such as another incorporated society, counts as three individual members.
    - Register of membership – Societies have to have a register of members and the constitution has to provide for arrangements for keeping the register up-to-date. The register must contain the name of each member, their last known contact details, the date on which each person became a member and any other information the regulations will require.

- **Committee rules** *(ss 26(1)(f); 45-46; 50)*—A society has to have a committee which is responsible for the society's management (this is different than the rules under the 1908 Act). The constitution has to set out the composition, roles, functions, powers and procedures of the society's committee. This includes how they are elected or appointed, and how they are removed (see: "**Key people in an incorporated society**" for more information).
    - A society's committee needs to have least 3 people, called officers. The majority of officers on the committee must be either members of the society, or representatives of body corporates that are members of the society.
    - By default, a committee will have all the powers necessary for managing, directing and supervising the management, operation and affairs of the society. The constitution can place limits on these powers.
    - The constitution has to set out how the chairperson (if there is one) will be elected or appointed and if they will have a casting vote. A casting vote is an extra vote given to a Chairperson when the votes on a matter are equally split.

- **Contact person** *(ss 26(1)(g); 113 – 116)*—A society has to have at least one contact person (but no more than three). The constitution has to set out how the contact person will be elected or appointed. The contact person has to be at least 18 and ordinarily resident in

NZ. They may hold other positions in the society in addition to being a contact person. If the contact person resigns, the position needs to be filled within 20 working days. If their details change, the society has to inform the Registrar within 20 working days.

- **Finances and recording** *(ss 26(1)(h); 99 – 109)*—The constitution has to set out how the society will control and manage its finances—for example, who can sign cheques, and who will collect money owed to the society. (For more information about financial reporting requirements, see: "**Financial accounts and statements**").

- **How rules are amended** *(ss 26(1)(i); 30-33)*—The constitution has to set out the method your group will follow to amend the constitution's rules:
    - General procedure – To make amendments to a constitution, the amendments have to be in writing, and either:
        - **approved at a general meeting of the society** — the constitution might outline the specific majority required to pass a resolution. If it's not specified in the constitution, the resolution must be passed by a simple majority of the members who are entitled to vote — or,
        - **if the constitution allows, amendments can be made by a resolution instead of a general meeting** — if this is allowed, then the amendment may be made by resolution approved by at least 75% of the members entitled to vote (or a higher percentage, if that's what is set out in the constitution).
    - Minor amendments – The society does not have to follow the same process for minor or technical changes. Instead, the amendment can be made by notifying every member of the amended text and informing them of the right to object, provided that no objection is received within 20 working days (or any longer timeframe provided for in the constitution). If a member objects, then the same procedure for other amendments must be followed.
    - Notifying the Registrar – Following any amendment to the Rules, the society has to give the Registrar a copy of the amendment and the amended constitution.

- **Dispute resolution** *(ss 26(1)(j), 38 – 44; Schedule 2, cl 2 – 8)*—The constitution has to provide procedures for dispute resolution, including how a complaint may be made. The procedures have to be consistent with the rules of natural justice (that is, procedural fairness). There is an optional dispute resolution procedure that a society's constitution may adopt (known as the "Safe Harbour" provisions). A dispute resolution process which adopts the "Safe Harbour" provisions will be deemed to comply with natural justice.

- **General meetings** *(ss 26(1)(k), 64 – 67; 84 – 93)*—The constitution has to set out arrangements and requirements for general meetings. A 'general meeting' is one where all members of a society are entitled to attend. This is different from a "committee" or "sub-committee" meeting, for example, where only officers attend. The constitution needs to include the following information about general meetings:
    - the interval between annual general meetings (AGMs), which have to be held once per year
    - information that must be presented at general meetings
    - when minutes must be kept
    - how general meetings must be called
    - if written resolutions may be passed in place of general meetings
    - the time within which meeting and motion notices must be notified
    - the quorum and procedure for general meetings including voting procedures
    - the arrangements and requirements for special general meetings.

- **Nomination of not-for-profit entities** *(s 26(1)(l); 26(3))*—If the society is liquidated or removed from the register, a society can't distribute surplus assets to its members. Instead, it has to distribute them to a not-for-profit entity. The constitution has to name the not-for-profit entity (or a category or description of potential entities) that will receive the surplus assets. This is a key change from the 1908 Act, under which a society could distribute surplus assets among members. This requirement does not apply to racing clubs.

Process for re-registering as an incorporated society

Incorporated Societies Act 2022, Schedule 1, cl 9, 10

Existing incorporated societies have two options for adopting a constitution that complies with the 2022 Act. They can:

- amend its existing constitution, or
- approve a new constitution altogether.

In both cases, the amendment or new rules need to be in writing and signed by at least two

members of the society. Depending on the rules set out in the constitution, this will either need to be:

- approved at a general meeting of the existing society by a majority of members who are entitled to vote, or
- approved following the rules for constitutional changes that is set out in the existing constitution.

If a society chooses to amend its existing constitution, it can set out whether the constitution will come into effect before or after re-registration.

Even if your society adopts a new constitution, your society remains the same legal entity.

The society's rules

Once your society is registered

Incorporated Societies Act 2022, ss 244 – 245

Once registered, the society has to has to operate within the scope of the purposes and rules set out in the constitution. If the society acts in a way that is outside the scope of a society's purposes or rules, these actions might be challenged (for example, by judicial review).

The Registrar is responsible for deciding whether a society or officer of a society is complying with the Act. They can require a person to hand over any registers, records or other documents to monitor whether the society is complying with the Act. A person who does not comply with the Registrar's requirements can be liable for a fine of up to $10,000 .

A society registered under the 2022 Act will have several reporting obligations:

- **Annual financial statement** *(ss 102 – 105)* – The society has to file an annual financial statement with the Registrar, including a statement of income and expenditure for the last financial year, a balance sheet of assets and liabilities, and a list of the securities affecting any of the society's property, in line with XRB accounting standards. The financial statement needs to be filed within 6 months of the end of the society's financial year. More information about which societies will need to be audited will be published under the regulations. Only a "small society" (see below) who is not registered as a charity is exempt from using XRB accounting standards.

- **Annual return** *(s 109)* **–** the society also needs to file an annual return with the Registrar (although the requirements for filing annual returns will be made clearer in the regulations once they are introduced).

Incorporated societies that are also charitable entities continue to have obligations under the Charities Act 2005 as well as the 2022 Act.

What counts as a small society?

Incorporated Societies Act 2022, s 103

A society is a small society if:

- in each of the two preceding accounting periods of the society, its total operating payments are less than $50,000;
- as at balance date in those two periods, the total current assets of the society are less than $50,000; and
- as at the balance date of the accounting period, the society is not a donee organisation.

Officers and management committee: Roles and responsibilities

Officers: Roles and responsibilities

An officer is either:

- a member of the committee, or
- a person is occupying a position in the society that allows them to exercise significant influence over the management or administration of the society (for example, a treasurer or chief executive).

An officer has to:

- be a natural person (not a body or group), and
- consent to be an officer, in writing.

Typically, a society's principal officers are its chairperson/co-chairs, treasurer and secretary:

- The chairperson/co-chairs preside over and regulate the society's meetings. Specific duties

may include acting as spokespeople for the society in the community.

- The treasurer controls income and spending, keeps the society's financial records, and prepares the annual accounts.
- The secretary is responsible for the overall administration of the society.

Who can, and can't, be an officer

Incorporated Societies Act 2022, ss 47-48

An officer has to be a natural person, and they have to consent to being an officer in writing (see: "Key people in an Incorporated Society" for more information). They have to certify that they are not disqualified from being an officer according to the rules below.

Disqualifying factors will prevent a person from being an officer unless the factor is waived by the Registrar upon application. Disqualifying factors include:

- being under 16
- being an undischarged bankrupt
- being prohibited from certain roles under the Companies Act 1993, Financial Markets Conduct Act 2013 or the Takeovers Act 1993
- being disqualified from being an officer of a charitable entity under the Charities Act 2005
- having been convicted and sentenced of specified offences within the last seven years (such as crimes involving dishonesty or money laundering)
- being subject to specific orders (such as a banning order)
- being subject to similar orders under another country.

A society's constitution can also set out further disqualifying factors—for example, if a person lives outside of New Zealand.

Duties of officers

Incorporated Societies Act 2022, ss 54-59, 61, 63, 64, 68, 73

Officers have a range of duties: These are:

- the duty to act in good faith and in the best interests of the society when acting as an

officer

- the duty to exercise power for proper purpose
- the duty to comply with the new Act and the society's constitution
- the duty to exercise powers or perform duties using the care and diligence that a reasonable person would, taking into account the nature of the society, the decision, and the officer's role and responsibilities
- the duty not to agree to activities or cause or allow activities that are likely to create a substantial risk of serious loss to the society's creditors
- the duty to not agree to an obligation on the society's behalf, unless the officer reasonably believes that the society will be able to perform the obligation when required to do so

These duties are owed to the society as opposed to members, meaning that the society alone has the ability to take action against an officer for breach of these duties.

The 2022 Act also has rules around conflicts of interest for officers:

- Officers have a duty to disclose any interests.
- The committee needs to keep and maintain an interests register for disclosures made by officers.
- Where a member or officer is conflicted, they can't vote or sign documents in relation to the conflict without permission from the committee. They may still take part in discussions of the committee and be present at the time of decision-making, and be counted for quorum purposes.
- If a society enters into a transaction where an officer has a conflict of interest, they may be able to cancel ("avoid") the transaction, unless:
    - it's been more than three months; and/or
- the society received fair value for the transaction (regardless of the conflict); and/or
- to do so would affect the title or interest of a third party who did not have knowledge about the circumstances of the transaction (s 68).

Payment of officers

Officers can be paid for their role in the society, and may be eligible for prizes.

If the society has tax-exempt status as a charity, members can be paid for services only if the payment is reasonable and is no more than would be paid to a non-member.

The rules should be very clear about any right of committee members and officers to receive an honorarium or to be reimbursed for out-of-pocket expenses.

Offences under the 2022 Act

Incorporated Societies Act 2022, ss 22, 154-160, 246

If someone commits an offence under the Act, they can be liable for a fine or imprisonment. The offences are:

- knowingly making false or misleading statements, which is punishable by up to 1 year in prison and/or a fine of up to $50,000,
- fraudulent use or destruction of property, which is punishable by up to 5 years in prison and/or a fine of up to $200,000,
- falsifying documents, which is punishable by up to 5 years in prison and/or a fine of up to $200,000,
- defrauding creditors, which is punishable by up to 5 years in prison and/or a fine of up to $200,000,
- improperly using the word “Incorporated” or the te reo word “manatōpu”, which is punishable by a maximum fine of $10,000,
- breaching a banning order, which is punishable by up to 1 year in prison and/or a fine of up to $50,000,
- obstructing a Registrar or person authorised by Registrar from exercising their powers of inspection, which is punishable by a fine of up to $10,000, and
- authorising, permitting or consenting to a society being carried on for the financial gain of any of its members, which is punishable by a fine of up to $50,000.

If a society breaches one of the infringement offences set out in the Act, the society will have to pay the infringement fee specified in regulations, or a fine not exceeding $3,000. This is different from where an individual is liable, as set out above. The offences are:

- failing to notify the Registrar of amendments to the constitution
- failing to notify Registrar of elections, appointments or other changes relating to officers

- failing to maintain a register of members
- failing to call annual general meeting
- failing to hold, and keep minutes of, annual general meetings
- failing to send copy of passed resolution in lieu of meeting to members, as required by the society's rules
- failing to meet the financial requirements around reporting, statements and returns
- failing to register an office
- failing to give the Registrar notice of change of contact person

Winding up an incorporated society

An incorporated society stops being incorporated if it is removed from the register or liquidated. These processes bring an incorporated society and its activities to an end. If the society is liquidated or removed from the register, a society can't distribute surplus assets to its members. Instead, it has to distribute them to a not-for-profit entity. The constitution has to name the not-for-profit entity (or a category or description of potential entities) that will receive the surplus assets. This is a key change from the 1908 Act, under which a society could distribute surplus assets among members. This requirement does not apply to racing clubs.

If the society has charitable status, any surplus assets have to be distributed to other charitable organisations within New Zealand that have similar aims. If a charity is deregistered, there will be a tax on its net assets (see "Charities and charitable status / Removal from the Charities Register").

The information below sets out the provisions for removal or liquidation under the 2022 Act.

Voluntary removal or liquidation

Incorporated Societies Act 2022, ss 175, 228-229

If a committee wants to being an incorporated society to an end, they have to give written notice to every member of the society to initiate the process of a society's removal from the register, the distribution of its surplus assets, or the appointment a liquidator. The notice must be given at least 20 working days before the general meeting at which the resolution is to be submitted, or within the timeframe set out in the constitution, if it is less or more than 20 working days.

The notice has to provide the time and place of the meeting, the nature of the business to be transacted at the meeting, and the text of the resolution to be submitted.

The resolution is only effective if it is approved by a simple majority (or, a higher majority, if this is set out in the rules).

Compulsory liquidation by the High Court

Incorporated Societies Act 2022, ss 175, 212

The High Court can put an incorporated society into liquidation if it believes the society is no longer operating; or if there has been a material breach of the society's duties or the Act – for example, if the society is unable to pay its debts, or its membership falls below 10, or the society is carried on for an illegal purpose or financial gain.

An application to the court to have a society put into liquidation may be made by the society itself, a member, a creditor of the society, or the Registrar.

Key questions to ask

To help your group work out what type of legal structure would best suit your needs, consider the following questions (see: "Table of legal entities").

How many people will be in your group?

The size of your group may be relevant to helping you choose the right legal structure. For example:

- An incorporated society has to have at least **15** named members (although that number will decrease to 10 for societies registered under the 2022 Act).
- A trust only needs **one** appointed or elected trustee, although usually there are at least two (the same applies to a charitable trust board based on a trust).
- A company only needs **one** shareholder and **one** director (this can be the same person).
- To incorporate as a charitable trust board, a charitable society or group has to have at least **five** members (although, as a result of the 2022 Act, it will no longer be possible to apply to be a charitable trust board from October 2023).
- Industrial and provident societies have to have at least **seven** members.

Will the number of members change over time?

If your group intends to start small but grow its membership over time, an incorporated society is likely to be a good option. An incorporated society has to have rules about how people join and leave the society. These rules can be written to meet the organisation's needs. For societies incorporated under the 2022 Act, members will need to actively consent to joining.

Charitable groups can have flexible membership rules, because changes to membership do not affect the way the trustees run the organisation. Incorporated societies need more specific rules for appointing or changing trustees. The group has to decide what these rules are, and include them in the trust deed.

Who will your group be accountable to?

If your group will be accountable to a wide number of people, it may be better to have a broad membership-based legal structure, such as an incorporated society. Trusts and charitable trust boards that are based on a trust aren't accountable to a membership in the same way as the managing group of an incorporated society.

Who do you want to make important decisions?

If the group of decision-makers in your organisation will be small, it may be best to set up a trust, charitable trust board or company. If larger numbers of people are included in decision-making, an incorporated society may be suitable.

How much money or property will your group have?

If your group has or may potentially have substantial money or property, a trust may be an appropriate way to manage and use it, particularly if you want to keep decision-making within a small number of people.

How will your group be funded?

Consider where the funds will come from to establish and maintain your organisation.

Will you have employees?

If your organisation will employ paid staff, it should be incorporated. This means the organisation will have its own legal identity with the power to, among other things, enter into employment contracts in its own name.

Will your group make a profit?

If your group is a commercial venture, then consider a profit-based structure, like an industrial and provident society, a partnership, or a company. Trusts and incorporated societies can make profits, but the profits of a charitable trust or an incorporated society can't go to members.

Is Māori-owned land involved?

If it is, you may need to consider establishing a trust under Te Ture Whenua Act 1993 / the Māori Land Act 1993.

For more information about Māori Land trusts, see the "Māori Land" chapter in the Community Law Manual.

Charitable company

A charitable company is an ordinary limited liability company that has been registered as a charity on the Department of Internal Affairs Charities Register under the Charities Act 2005, and is eligible to receive a tax exemption.

In order to be registered as a charitable company on the Charities Register, the company has to have exclusively charitable purposes. These charitable purposes have to be set out in the company's constitution.

How to become a charitable company

First, apply to the Companies Office for incorporation as a limited liability company. The steps are as follows:

- Check that the proposed name of the company is not currently reserved or registered on the Companies Office website, and the trade mark register on the Intellectual Property Office of New Zealand website.

- Reserve the proposed company name by filling out a name reservation form on the Companies Office website. The Registrar of Companies will then issue a notice of reservation, and the name will be reserved for 20 working days after the date the notice of reservation is issued.
- Prepare an application for company registration. The application for registration has to contain
    - the full name of the company
    - the company's registered officer and address for service
    - the full name and residential address of each director and shareholder, and
    - the number of shares to be issued to each shareholder.
- Provide consent forms and certificates of eligibility for each director.
- Provide consent forms for each shareholder.
- Submit the company's constitution, which must set out the company's charitable purposes, alongside the application for registration.
- File all the documents (notice reserving company name, application for registration, consents and certificates, and the company's constitution) with the Companies Office. It costs $10 to reserve a name and $105 to apply to register the company.

Once the company is incorporated with the Companies Office, you can apply to the Department of Internal Affairs Charities Services for registration as a charitable company. The process is set out at the Charities' website, here (or go to: www.charities.govt.nz and click on "Applying for registration?").

Charitable companies may be suitable for groups that:

- want the liability of shareholders to be limited
- want more flexibility in decision-making (as decisions do not need to be made by all members as with an incorporated society), and
- have some trading purpose

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- **Not for financial gain** *(ss 22-24)*—The society can't make a profit with the intention of passing it on to the members (in other words, the society can't "operate for financial gain"). Any profits have to be returned to the society to be used within the scope of its purposes. If a society breaches this rule with the permission or consent of an officer of the society, the officer can be fined up to $50,000. A society can recover a financial gain from a member, and the High Court can put a society into liquidation if it is carried on for the financial gain of a member.
- **Membership rules** *(ss 8, 14, 26(1)(c), (d), (e), 76 and 79)*—The constitution has to have rules setting out how a person becomes, and stops becoming, a member of the society. For example, a person may consent to being a member by filling out a form. It's no longer possible for a person to become a member by default, for example, as a result of the

suburb or street where they live.
    - Minimum membership – The society has to have at least 10 members (this is less than the minimum of 15 members required under the 1908 Act). However, a member that is a body corporate, such as another incorporated society, counts as three individual members.
    - Register of membership – Societies have to have a register of members and the constitution has to provide for arrangements for keeping the register up-to-date. The register must contain the name of each member, their last known contact details, the date on which each person became a member and any other information the regulations will require.

- **Committee rules** *(ss 26(1)(f); 45-46; 50)*—A society has to have a committee which is responsible for the society's management (this is different than the rules under the 1908 Act). The constitution has to set out the composition, roles, functions, powers and procedures of the society's committee. This includes how they are elected or appointed, and how they are removed (see: "**Key people in an incorporated society**" for more information).
    - A society's committee needs to have least 3 people, called officers. The majority of officers on the committee must be either members of the society, or representatives of body corporates that are members of the society.
    - By default, a committee will have all the powers necessary for managing, directing and supervising the management, operation and affairs of the society. The constitution can place limits on these powers.
    - The constitution has to set out how the chairperson (if there is one) will be elected or appointed and if they will have a casting vote. A casting vote is an extra vote given to a Chairperson when the votes on a matter are equally split.

- **Contact person** *(ss 26(1)(g); 113 – 116)*—A society has to have at least one contact person (but no more than three). The constitution has to set out how the contact person will be elected or appointed. The contact person has to be at least 18 and ordinarily resident in NZ. They may hold other positions in the society in addition to being a contact person. If the contact person resigns, the position needs to be filled within 20 working days. If their details change, the society has to inform the Registrar within 20 working days.
- **Finances and recording** *(ss 26(1)(h); 99 – 109)*—The constitution has to set out how the society will control and manage its finances—for example, who can sign cheques, and who

will collect money owed to the society. (For more information about financial reporting requirements, see: "**Financial accounts and statements**").

- **How rules are amended** *(ss 26(1)(i); 30-33)*—The constitution has to set out the method your group will follow to amend the constitution's rules:
    - General procedure – To make amendments to a constitution, the amendments have to be in writing, and either:
        - **approved at a general meeting of the society** — the constitution might outline the specific majority required to pass a resolution. If it's not specified in the constitution, the resolution must be passed by a simple majority of the members who are entitled to vote — or,
        - **if the constitution allows, amendments can be made by a resolution instead of a general meeting** — if this is allowed, then the amendment may be made by resolution approved by at least 75% of the members entitled to vote (or a higher percentage, if that's what is set out in the constitution).
    - Minor amendments – The society does not have to follow the same process for minor or technical changes. Instead, the amendment can be made by notifying every member of the amended text and informing them of the right to object, provided that no objection is received within 20 working days (or any longer timeframe provided for in the constitution). If a member objects, then the same procedure for other amendments must be followed.
    - Notifying the Registrar – Following any amendment to the Rules, the society has to give the Registrar a copy of the amendment and the amended constitution.

- **Dispute resolution** *(ss 26(1)(j), 38 – 44; Schedule 2, cl 2 – 8)*—The constitution has to provide procedures for dispute resolution, including how a complaint may be made. The procedures have to be consistent with the rules of natural justice (that is, procedural fairness). There is an optional dispute resolution procedure that a society's constitution may adopt (known as the "Safe Harbour" provisions). A dispute resolution process which adopts the "Safe Harbour" provisions will be deemed to comply with natural justice.

- **General meetings** *(ss 26(1)(k), 64 – 67; 84 – 93)*—The constitution has to set out arrangements and requirements for general meetings. A 'general meeting' is one where all members of a society are entitled to attend. This is different from a "committee" or "sub-committee" meeting, for example, where only officers attend. The constitution needs to

include the following information about general meetings:
    - the interval between annual general meetings (AGMs), which have to be held once per year
    - information that must be presented at general meetings
    - when minutes must be kept
    - how general meetings must be called
    - if written resolutions may be passed in place of general meetings
    - the time within which meeting and motion notices must be notified
    - the quorum and procedure for general meetings including voting procedures
    - the arrangements and requirements for special general meetings.

- **Nomination of not-for-profit entities** *(s 26(1)(l); 26(3))*—If the society is liquidated or removed from the register, a society can't distribute surplus assets to its members. Instead, it has to distribute them to a not-for-profit entity. The constitution has to name the not-for-profit entity (or a category or description of potential entities) that will receive the surplus assets. This is a key change from the 1908 Act, under which a society could distribute surplus assets among members. This requirement does not apply to racing clubs.

Process for re-registering as an incorporated society

Incorporated Societies Act 2022, Schedule 1, cl 9, 10

Existing incorporated societies have two options for adopting a constitution that complies with the 2022 Act. They can:

- amend its existing constitution, or
- approve a new constitution altogether.

In both cases, the amendment or new rules need to be in writing and signed by at least two members of the society. Depending on the rules set out in the constitution, this will either need to be:

- approved at a general meeting of the existing society by a majority of members who are

entitled to vote, or

- approved following the rules for constitutional changes that is set out in the existing constitution.

If a society chooses to amend its existing constitution, it can set out whether the constitution will come into effect before or after re-registration.

Even if your society adopts a new constitution, your society remains the same legal entity.

The society's rules

Once your society is registered

Incorporated Societies Act 2022, ss 244 – 245

Once registered, the society has to has to operate within the scope of the purposes and rules set out in the constitution. If the society acts in a way that is outside the scope of a society's purposes or rules, these actions might be challenged (for example, by judicial review).

The Registrar is responsible for deciding whether a society or officer of a society is complying with the Act. They can require a person to hand over any registers, records or other documents to monitor whether the society is complying with the Act. A person who does not comply with the Registrar's requirements can be liable for a fine of up to $10,000 .

A society registered under the 2022 Act will have several reporting obligations:

- **Annual financial statement** *(ss 102 – 105)* – The society has to file an annual financial statement with the Registrar, including a statement of income and expenditure for the last financial year, a balance sheet of assets and liabilities, and a list of the securities affecting any of the society's property, in line with XRB accounting standards. The financial statement needs to be filed within 6 months of the end of the society's financial year. More information about which societies will need to be audited will be published under the regulations. Only a "small society" (see below) who is not registered as a charity is exempt from using XRB accounting standards.

- **Annual return** *(s 109)* **–** the society also needs to file an annual return with the Registrar (although the requirements for filing annual returns will be made clearer in the regulations once they are introduced).

Incorporated societies that are also charitable entities continue to have obligations under the Charities Act 2005 as well as the 2022 Act.

What counts as a small society?

Incorporated Societies Act 2022, s 103

A society is a small society if:

- in each of the two preceding accounting periods of the society, its total operating payments are less than $50,000;
- as at balance date in those two periods, the total current assets of the society are less than $50,000; and
- as at the balance date of the accounting period, the society is not a donee organisation.

Officers and management committee: Roles and responsibilities

Officers: Roles and responsibilities

An officer is either:

- a member of the committee, or
- a person is occupying a position in the society that allows them to exercise significant influence over the management or administration of the society (for example, a treasurer or chief executive).

An officer has to:

- be a natural person (not a body or group), and
- consent to be an officer, in writing.

Typically, a society's principal officers are its chairperson/co-chairs, treasurer and secretary:

- The chairperson/co-chairs preside over and regulate the society's meetings. Specific duties may include acting as spokespeople for the society in the community.
- The treasurer controls income and spending, keeps the society's financial records, and prepares the annual accounts.

- The secretary is responsible for the overall administration of the society.

Who can, and can't, be an officer

Incorporated Societies Act 2022, ss 47-48

An officer has to be a natural person, and they have to consent to being an officer in writing (see: "Key people in an Incorporated Society" for more information). They have to certify that they are not disqualified from being an officer according to the rules below.

Disqualifying factors will prevent a person from being an officer unless the factor is waived by the Registrar upon application. Disqualifying factors include:

- being under 16
- being an undischarged bankrupt
- being prohibited from certain roles under the Companies Act 1993, Financial Markets Conduct Act 2013 or the Takeovers Act 1993
- being disqualified from being an officer of a charitable entity under the Charities Act 2005
- having been convicted and sentenced of specified offences within the last seven years (such as crimes involving dishonesty or money laundering)
- being subject to specific orders (such as a banning order)
- being subject to similar orders under another country.

A society's constitution can also set out further disqualifying factors—for example, if a person lives outside of New Zealand.

Duties of officers

Incorporated Societies Act 2022, ss 54-59, 61, 63, 64, 68, 73

Officers have a range of duties: These are:

- the duty to act in good faith and in the best interests of the society when acting as an officer
- the duty to exercise power for proper purpose
- the duty to comply with the new Act and the society's constitution

- the duty to exercise powers or perform duties using the care and diligence that a reasonable person would, taking into account the nature of the society, the decision, and the officer's role and responsibilities
- the duty not to agree to activities or cause or allow activities that are likely to create a substantial risk of serious loss to the society's creditors
- the duty to not agree to an obligation on the society's behalf, unless the officer reasonably believes that the society will be able to perform the obligation when required to do so

These duties are owed to the society as opposed to members, meaning that the society alone has the ability to take action against an officer for breach of these duties.

The 2022 Act also has rules around conflicts of interest for officers:

- Officers have a duty to disclose any interests.
- The committee needs to keep and maintain an interests register for disclosures made by officers.
- Where a member or officer is conflicted, they can't vote or sign documents in relation to the conflict without permission from the committee. They may still take part in discussions of the committee and be present at the time of decision-making, and be counted for quorum purposes.
- If a society enters into a transaction where an officer has a conflict of interest, they may be able to cancel ("avoid") the transaction, unless:
    - it's been more than three months; and/or
- the society received fair value for the transaction (regardless of the conflict); and/or
- to do so would affect the title or interest of a third party who did not have knowledge about the circumstances of the transaction (s 68).

Payment of officers

Officers can be paid for their role in the society, and may be eligible for prizes.

If the society has tax-exempt status as a charity, members can be paid for services only if the payment is reasonable and is no more than would be paid to a non-member.

The rules should be very clear about any right of committee members and officers to receive an

honorarium or to be reimbursed for out-of-pocket expenses.

Offences under the 2022 Act

Incorporated Societies Act 2022, ss 22, 154-160, 246

If someone commits an offence under the Act, they can be liable for a fine or imprisonment. The offences are:

- knowingly making false or misleading statements, which is punishable by up to 1 year in prison and/or a fine of up to $50,000,
- fraudulent use or destruction of property, which is punishable by up to 5 years in prison and/or a fine of up to $200,000,
- falsifying documents, which is punishable by up to 5 years in prison and/or a fine of up to $200,000,
- defrauding creditors, which is punishable by up to 5 years in prison and/or a fine of up to $200,000,
- improperly using the word “Incorporated” or the te reo word “manatōpu”, which is punishable by a maximum fine of $10,000,
- breaching a banning order, which is punishable by up to 1 year in prison and/or a fine of up to $50,000,
- obstructing a Registrar or person authorised by Registrar from exercising their powers of inspection, which is punishable by a fine of up to $10,000, and
- authorising, permitting or consenting to a society being carried on for the financial gain of any of its members, which is punishable by a fine of up to $50,000.

If a society breaches one of the infringement offences set out in the Act, the society will have to pay the infringement fee specified in regulations, or a fine not exceeding $3,000. This is different from where an individual is liable, as set out above. The offences are:

- failing to notify the Registrar of amendments to the constitution
- failing to notify Registrar of elections, appointments or other changes relating to officers
- failing to maintain a register of members
- failing to call annual general meeting

- failing to hold, and keep minutes of, annual general meetings
- failing to send copy of passed resolution in lieu of meeting to members, as required by the society's rules
- failing to meet the financial requirements around reporting, statements and returns
- failing to register an office
- failing to give the Registrar notice of change of contact person

Winding up an incorporated society

An incorporated society stops being incorporated if it is removed from the register or liquidated. These processes bring an incorporated society and its activities to an end. If the society is liquidated or removed from the register, a society can't distribute surplus assets to its members. Instead, it has to distribute them to a not-for-profit entity. The constitution has to name the not-for-profit entity (or a category or description of potential entities) that will receive the surplus assets. This is a key change from the 1908 Act, under which a society could distribute surplus assets among members. This requirement does not apply to racing clubs.

If the society has charitable status, any surplus assets have to be distributed to other charitable organisations within New Zealand that have similar aims. If a charity is deregistered, there will be a tax on its net assets (see "Charities and charitable status / Removal from the Charities Register").

The information below sets out the provisions for removal or liquidation under the 2022 Act.

Voluntary removal or liquidation

Incorporated Societies Act 2022, ss 175, 228-229

If a committee wants to being an incorporated society to an end, they have to give written notice to every member of the society to initiate the process of a society's removal from the register, the distribution of its surplus assets, or the appointment a liquidator. The notice must be given at least 20 working days before the general meeting at which the resolution is to be submitted, or within the timeframe set out in the constitution, if it is less or more than 20 working days.

The notice has to provide the time and place of the meeting, the nature of the business to be transacted at the meeting, and the text of the resolution to be submitted.

The resolution is only effective if it is approved by a simple majority (or, a higher majority, if this is set out in the rules).

Compulsory liquidation by the High Court

Incorporated Societies Act 2022, ss 175, 212

The High Court can put an incorporated society into liquidation if it believes the society is no longer operating; or if there has been a material breach of the society's duties or the Act – for example, if the society is unable to pay its debts, or its membership falls below 10, or the society is carried on for an illegal purpose or financial gain.

An application to the court to have a society put into liquidation may be made by the society itself, a member, a creditor of the society, or the Registrar.

Unincorporated groups

Many community groups will not need to incorporate – for example, if your group will only exist for a short period of time (perhaps because it's been formed to organise a particular event, or to respond to a particular time-limited issue), or if you don't intend to seek funding from funding agencies (who often require applicants for funding to be incorporated). In those cases, it may not be worth taking on the cost and obligations of becoming formally incorporated.

However, it's important to understand the limitations of remaining unincorporated – for example, the risk that individual members will be held personally responsible for obligations the group takes on.

Benefits and limitations

Benefits of being unincorporated

- **No incorporation process** – You won't need to follow the administrative process required for incorporated societies. For example, you won't need to provide an application and supporting documents to show you meet the relevant requirements.
- **Fewer ongoing requirements** – You won't need to take on ongoing reporting requirements. For example, you won't need to maintain a register of members or file annual financial statements with the Registrar of Incorporated Societies.
- **Fewer costs** – You'll likely have fewer administrative and legal costs as an unincorporated

society.

- **Flexibility** – By remaining unincorporated, your organisation is free to organise its structure and operations as it chooses. For example, it won't be necessary for its rules to meet all the requirements of the 1908 Act or the 2022 Act.

Limitations of being unincorporated

- **Membership status is uncertain** – The relationship between members in unincorporated groups is often uncertain. There may be doubts about membership rights and obligations, including how people become or resign as members, how complaints and disputes are to be dealt with, and when and how members may be disciplined or expelled.
- **Unclear rules and rights** – Unlike incorporated groups, unincorporated groups do not have to have rules. This may make it difficult to resolve disputes. Even when an unincorporated group does have rules, it may still be difficult to prove how the rules were adopted, whether more recent members agreed to them, and whether the rules are binding on members.
- **No perpetual existence, no legal standing** – Unincorporated groups are not separate legal entities. They do not have a continuing existence independent of their members, and they have no legal standing to own property or borrow money in their own name. Because of this it can be difficult to obtain funding.
- **Personal liability** – The members of the group's committee, and possibly all members, may be personally responsible ("liable") for any obligations the group takes on, and for any judgment made against the group by the courts.

Committee members are likely to be personally responsible for the group's debts and for debts incurred by an employee of the group, particularly if the committee members knew the debt was being incurred or they agreed in some way to the transaction. They are also likely to be personally responsible to a person who suffers damage as a result of the negligence of an employee or other person involved in the group – for example, failing to organise an event properly.

Individuals who are liable (either the person responsible for the wrong, or the committee) may have the right to be indemnified (paid back) out of any property the group members hold individually, if the group's rules provide for this.

Rules for unincorporated groups

Why have written rules

The rules of unincorporated groups will derive from an agreement between the members, or an implied agreement based on past practice, or both.

To operate smoothly, an unincorporated group should record its rules and processes for managing the group's affairs and making decisions. Having detailed written rules helps to determine what is right and wrong if disputes arise.

What should the rules cover?

It's good practice to have written rules stating:

- the group's name
- the group's objects or purpose
- how a person becomes and stops being a member, and any obligations that members have
- how the group will resolve disputes between members
- how general meetings will be convened
- the method of voting at general meetings
- what officers (such as chairperson and treasurer) will be appointed to any committee, and how they will be appointed
- the control of finances and financial accounts
- how the group's rules can be changed
- how to dissolve the group.

Decision-making and management

Decision-making processes

The group's rules should clearly state its decision-making processes, including:

- which decisions need to be approved by the ordinary members

- if voting is to be used, who can vote
- the procedures for voting (for example, a show of hands) and whether members can vote by proxy, post, email or secret ballot
- how many people must agree in order for there to be a valid decision (for example, a simple majority)
- specific decision-making for groups using Te Tiriti informed processes
- The approach for achieving consensus if this is the preferred decision making process.

Managing the group's affairs

Most unincorporated groups are managed by a committee of members.

If the rules require a management committee to be appointed, the committee has no authority to bind ordinary members, unless the rules state otherwise.

It's useful for the group's rules to deal with financial controls and investment of the group's funds. It will help the group operate smoothly if the rules clearly state who is responsible for keeping proper accounts and the procedures for receiving and withdrawing funds (for example, a requirement for the signatures of two committee members).

Umbrella organisations and unincorporated groups

If your group does not want to incorporate, it could instead become part of an existing umbrella organisation that is incorporated. This would allow your group to get on with its work without the costs and responsibilities of being incorporated itself (see: "Choosing the right legal structure for your group / National bodies and local organisations".)

There should be a written agreement between the group and the umbrella organisation to make sure the relationship is clear. Both sides should get legal advice before signing any agreement.

An umbrella organisation can receive and pass on any money to groups within its structure, and can charge a handling or administration fee for its services.

Trusts

What is a trust?

A trust may be an appropriate form for your group if it has, or could potentially have, significant money or property and you want to keep decision-making in relatively few hands.

The key feature of any trust – whether a private "family" trust, or a trust with charitable status or some other community-based trust – is that the people appointed to be the legal owners of the trust's property (the "trustees") have a special duty to hold and manage that property for the benefit of others – either the people or classes of people (the "beneficiaries") who are named in the trust deed, or the sections of the community who will benefit from a specific charitable purpose stated in the deed.

Although the trustees are the legal owners of the property, their duty to the beneficiaries means the beneficiaries still have a legally recognised interest in the property, which is called a "beneficial" or "equitable" interest.

Note: This section isn't concerned with trusts for private purposes, such as "family trusts", or with Māori land trusts. It deals only with trusts that have charitable status and other community-based trusts.

Trusts have no separate identity

A trust is not an incorporated body and therefore does not have a separate legal identity.

See: "Charitable trust boards" for an explanation of how a trust could choose to become incorporated by becoming a charitable trust board. This option is only available until October 2023 due to changes brought in by the Incorporated Societies Act 2022.

Creating a trust

How is a trust created?

Trusts Act 2019, s 15

The person who creates the trust – the "settlor" – does so by transferring property (a fund of money for example) on trust to one or more people – called "trustees" – or by declaring that the settlor now holds the property on trust (in which case the settlor is also a trustee).

A special document – the trust deed – is needed to create the trust. This records the key information about the trust: it identifies the trust property, appoints the trustees, and identifies the beneficiaries or the relevant charitable purpose.

Requirements for a valid trust

Under the common law (law made by the courts), a trust must meet the following requirements to be valid:

- The person creating the trust (the settlor) must show a clear intention to create the trust.
- The trust deed must clearly identify the money or property that is to be held in trust (known as the initial trust fund).
- The trust deed must identify specific people or classes of people as beneficiaries of the trust, or identify a charitable purpose.
- The trust deed must be signed or sealed by the settlor and by every trustee appointed under the deed. The trust deed must be executed in "proper form", which means it must be in writing and must be witnessed by someone who records his or her address and occupation on the deed.
- Trusts for charitable purposes are not required to have an end date. Other trusts, however, including community-based trusts that don't qualify as "charitable", are required to specify an end date in the trust deed.

How many trustees do there have to be?

Trusts Act 2019, s 14

A trust can be created with just one trustee, except where they are also the sole beneficiary of the trust. It's usual for there to be at least two. The law does not specify a minimum number of trustees, so this depends on the wording of the trust deed.

Ownership of the trust property

Charitable Trusts Act 1957, ss 3-5

Most trust deeds will require some form of documentation of the new trustees' legal ownership of the trust property.

However, this documentation isn't necessary if the trust is for a charitable purpose under the

Charitable Trusts Act 1957. Instead, the Act specifies that, at any given time, the trustees at that time are the owners of the trust's property.

Trustees: Their powers, duties and liabilities

Powers of trustees

Trustees have the following powers under the Trustee Act 1956:

- to invest the trust's funds *(ss 58, 59)*
- to determine whether the return on investment is income or capital *(ss 60, 61)*
- to apply trust property for a beneficiary's welfare in various ways *(ss 62 – 65)*
- to delegate their powers to another person (by a deed granting a power of attorney) if the trustee is, or is going to be, out of the country or physically incapable of being trustee for a period (if going into hospital for example) *(ss 67, 70)*
- to apply insurance money for loss or damage of trust property *(s 77)*
- for trust property engaged in an activity that the trustee is empowered or authorised to carry on as a portfolio investment entity, to adjust beneficiaries' interests in the property for compliance with the Income Tax Act 2007 *(s 78)*

Other powers that are often granted by trust deeds include:

- to buy, lease or hire any land or personal property
- to borrow money on terms that the trustees think are appropriate
- to enter into contracts or other arrangements with any individual or body
- to pay expenses (to themselves or to others) that they've incurred in setting up and running the trust
- to change the powers and rules of the trust – however, if the trust has a charitable purpose, the changes must not detract from that purpose.

If there's a conflict between the Trustee Act 2019 and what's stated in the trust deed, the Act overrides the deed.

Duties of trustees

The Trusts Act 2019 imposes the following mandatory duties on trustees which can't be modified or excluded by the trust deed:

- to know the terms of the trust *(s 23)*
- to act in accordance with the terms of the trust *(s 24)*
- to act honestly and in good faith *(s 25)*
- to hold or deal with trust property and otherwise act for the benefit of the beneficiaries in accordance with the terms of the trust *(s 26)*
- for trusts with a permitted purpose (like charitable purposes), to further the permitted purpose in accordance with the terms of the trust *(s 26)*
- to exercise the trustee's powers for a proper purpose *(s 27).*

The Trusts Act 2019 also imposes some default duties that apply to trustees unless the trust deed modifies or excludes them:

- to exercise the care and skill that is reasonable in the circumstances when administering a trust *(s 29)*
- to invest prudently *(s 30)*
- to not exercise a power for the trustee's own benefit *(s 31)*
- to consider actively and regularly whether the trustee should be exercising one or more of their powers *(s 32)*
- to not bind or commit trustees to future exercise or non-exercise of a discretion *(s 33)*
- to avoid a conflict between the interests of the trustee and the interests of the beneficiaries *(s 34)*
- to act impartially in relation to the beneficiaries (although this does not require a trustee to treat all beneficiaries equally) *(s 35)*
- to not make a profit from the trusteeship of a trust *(s 36)*
- to not take any reward for acting as a trustee (although trustees still have a right to be reimbursed for their legitimate expenses and disbursements in acting as a trustee) *(s 37)*
- to act unanimously *(s 38).*

Charitable trust boards

What is a charitable trust board?

Charitable Trusts Act 1957, s 2 (definition of "charitable purpose"); ss 7, 8

A charitable trust board is a type of incorporated body registered under the Charitable Trusts Act 1957. This means that the trustees, or the society's members, agree to hold money or assets and carry out activities for charitable purposes.

As of October 2023, it will no longer be possible to register as a charitable trust board under the Charitable Trusts Act 1957.

Existing charitable trust boards can choose to:

- re-register under the Incorporated Societies Act 2022 (in which case this Act will start applying to them) or
- continue operating indefinitely under the Charitable Trusts Act.

This section sets out the position for trusts already registered under the Charitable Trusts Act.

What qualifies as a "charitable purpose" is explained elsewhere in this chapter (see: "Charities and charitable status / Who can register as a charity"). However, in the case of charitable trust boards, a "charitable purpose" also includes any religious or educational purpose, even if it wouldn't otherwise qualify as "charitable" under New Zealand law.

Sometimes a charitable society will take an additional, intermediate step and establish a trust, so that the trustees appointed can then be incorporated as a charitable trust board. In those cases, the membership of the charitable trust board consists of the trustees, rather than all the members of the society that set up the trust.

To be able to register as a charitable trust board, the trustees or the society must not be registered under any other Act.

The Charitable Trusts Act is administered by the Registrar of Incorporated Societies.

Registering as a charitable trust board (no longer possible from October 2023)

Charitable Trusts Act 1957, ss 13, 14, 19, Schedule 2

To register and incorporate as a charitable trust board, your trust or group must apply to the Registrar of Incorporated Societies (part of the Companies Office). The application must be in the form shown in the Charitable Trusts Act 1957 (Schedule 2).

Once they are registered and incorporated, the trustees or society members become a body corporate under the name of the charitable trust board. This means the board takes on a separate legal identity distinct from those individuals. The board also enjoys "perpetual succession", which means it continues to exist despite changes to its membership (until it's wound up), and it also has its own "common seal" (official stamp).

When a board is registered, all property held by the trustees or society members is vested in the board for the same purposes as before. The board's liability is limited to the assets of the trust or society (although board members can be personally liable in some cases – for example, if they've been negligent or acted illegally). The board is liable for any transactions that are entered into in the board's name and that the board is authorised to enter into by the trust deed or constitution.

Board's powers and duties

The powers of a charitable trust board will be the powers set out in the constitution of the society or the trust deed of the trust.

Board members must comply with the requirements of the Charitable Trusts Act. If they're also trustees, they're also bound by the general duties applying to trustees under the common law and the Trustee Act 1956 (see above, "Trusts / Trustees: Their powers, duties and liabilities").

Choosing an appropriate management structure for a charitable trust board

What management structure is appropriate will depend on whether a charitable trust board is based on a society or a trust:

- **Society-based charitable trust boards** – If a charitable society incorporates as a board

under the Charitable Trusts Act, best practice suggests that a committee consisting of a few of the members should be responsible for managing the board. In effect, this should be no different from the way in which the society managed itself before it became a charitable trust board, or if it had been registered under the Incorporated Societies Act 1908 (see: "Choosing the right legal structure for your group / Incorporated societies").

- **Trust-based charitable trust boards** – A board consisting of the trustees may not need to have a management committee, because all the trustees will be required or entitled to participate in decision-making.

Duties and liabilities of trustees / officers

The Charitable Trusts Act does not impose any general duties on the trustees or officers of a charitable trust board. The trustees or officers are in a similar position to company directors, and owe duties to the charitable trust board in the same way as directors owe duties to the company (see: "Companies"). These duties are to:

- act in good faith and according to the rules of the board
- exercise their powers for a proper purpose and with reasonable care
- not cause or allow the board's affairs to be carried out in a way that creates a substantial risk of loss to the board's creditors
- not agree to the board taking on an obligation unless it's reasonable to believe the board will be able to perform it
- not obtain any unauthorised personal financial gain from their position as officer of the board or make any unauthorised use of confidential information.

Reporting requirements

There's no requirement for charitable trust boards to file annual financial statements with the Registrar of Incorporated Societies. However, a number of reporting requirements will apply if the board is also registered on the Charities Register, which is a precondition for having charitable status for tax purposes (see: "Charities and charitable status / Administrative responsibilities of registered charities").

Winding up a charitable trust board (Liquidation)

Charitable Trusts Act 1957, ss 24-27

In some cases, a charitable trust board may be wound up (liquidated) by the courts – for example, if it can't pay its debts.

When a board is based on a charitable society, rather than on a trust, the board can also be wound up voluntarily by the board itself. For most trust-based boards, the trust deed will also give the trustees (that is, the board) the power to wind up the trust.

The liquidation provisions in the Companies Act 1993 (Parts 16 and 17) apply to a liquidation of the board as if the board were a company.

The board's debts must be paid from its funds or assets. If there's any surplus, this must be distributed to another charitable organisation in New Zealand. A charitable trust board must specify in its trust deed or constitution that any surplus assets will go to a charity with similar aims to its own. If a charity is deregistered, there will be a tax on its net assets (see "Charities and charitable status / Removal from the Charities Register").

Under the Companies Act, officers of a charitable trust board may be personally responsible (liable):

- if they've misapplied money or property belonging to the board
- if they've been negligent or breached a duty or trust, or
- if proper accounting records haven't been kept.

Companies

This section explains the key features of companies and why a community group might want to adopt this particular legal form.

Key features of companies

Companies Act 1993, ss 10, 15, 97

- **Minimum requirements** – A company must have a name, one or more shares, one or more shareholders, and one or more directors.

- **Separate legal identity** – By registering and incorporating under the Companies Act 1993, a company becomes a body corporate under the name of the company, and therefore it has a separate legal identity distinct from its shareholders and directors. Until it's liquidated, the company has a continuing existence even if the shareholders or directors change.
- **Limited liability** – Unless its constitution states otherwise, a company is a "limited liability" entity. This means a shareholder isn't personally liable, beyond the value of their shareholding, for any of the company's contracts, debts or other obligations, unless the shareholder has given a personal guarantee.

Why choose to become a company?

Although most community groups don't choose the company form, it may be appropriate if you want:

- to keep control and decision-making in the hands of just a few people
- to provide those people with limited liability
- to make it easy to transfer ownership of some or all of the group's property.

Registering and incorporating as a company

Companies Act 1993, ss 10, 12

To register and incorporate as a company you'll need to apply to the Registrar of Companies at the Companies Office. Your company will need to have:

- a name
- one or more shares
- one or more shareholders
- one or more directors.

(For information about how to apply, visit the Companies Office website at: Companies Register (companiesoffice.govt.nz)

Constitutions

Companies Act 1993, ss 26-34

Although it's not a requirement, it's always a good idea for a company to have a specially drafted constitution that meets the company's particular needs.

In general, a company's constitution can't contradict the rules contained in the Companies Act 1993 and a provision in a constitution that tries to do this will be legally invalid. Some provisions in the Companies Act, however, state explicitly that they can be varied by the constitution.

A company can adopt a new constitution, or change or revoke its current one, only by a special resolution passed by 75 percent of the shareholders.

Shareholder meetings

Companies Act 1993, ss 120, 121

A company must hold an annual meeting of shareholders within 18 months after it's incorporated. Annual meetings must be held within six months after the company's balance date and within 15 months after the last annual meeting.

A special meeting of shareholders can be called at any time by the board of directors or by someone authorised by the constitution.

Directors: Their role, powers and duties

Companies Act 1993, ss 128-138, 161

The board of directors is responsible for the day-to-day management of the company. The directors must comply with the Companies Act and the company's constitution.

Directors can delegate their powers to individuals or committees, but they continue to be responsible for their duties and must make sure there's a monitoring system for those delegated duties.

Directors must:

- act in good faith and in the company's best interests at all times

- exercise their powers for a proper purpose
- exercise the care, diligence and skill that a reasonable director would exercise in the circumstances
- keep records of the basis on which important decisions are made – this will help establish that their decisions were reasonable if this is questioned later.

Directors must not:

- act, or agree to the company acting, in a way that contravenes the Companies Act or the company's constitution
- agree to the company taking on obligations that the company can't meet or that would create serious loss to the company's creditors
- cause or allow the company's business to be carried out in a way that's likely to create a substantial risk of serious loss to the company's creditors
- release or make use of any confidential information about the company.

Directors can be paid a fair amount for their role.

Companies Act 1993, ss 138A, 156, 164

Directors who breach their statutory duties can be removed from office by the company's shareholders. The company, or any other director or shareholder, can also apply to the courts for an injunction to stop a director breaching his or her duties. There are also heavy criminal penalties if a director acts in bad faith, knowing that their conduct isn't in the company's best interests and that it will cause the company serious loss. In those cases, the director can be jailed for up to five years or fined up to $200,000.

Records, reports and financial accounts

Companies Act 1993, ss 189, 194, 195, 208-214A; Financial Reporting Act 1993

- **Records and registers** – A company is generally required to keep a number of records at its registered office, including its constitution and minutes of all meetings and resolutions of shareholders and directors over the past seven years.
- **Annual reports and returns** –A company must prepare an annual report each year within five months of its balance date; this must be sent to all shareholders before the

AGM. A company must also file an annual return with the Registrar of Companies every year, except for the calendar year in which it's registered. Companies that register as charities also have some specific reporting requirements (see: "Charities and charitable status / Administrative responsibilities of registered charities" in this chapter).

- **Accounts** – Some companies may be required to prepare annual financial statements and, in some cases, to file those statements with the Companies Office (for information, visit: The Companies Register (companiesoffice.govt.nz)).

Dividends: Payments to shareholders

Companies Act 1993, ss 52, 53

A dividend is a payment made by the company to a shareholder in proportion to his or her particular shareholding. The board of directors can authorise the payment of dividends only once the company has satisfied the "solvency test" set out in the Companies Act. Alternatively, the shareholders can unanimously authorise a dividend.

Contracts and transactions with other people and organisations

Companies Act 1993, s 129

A company can enter into a contract with another person or entity. The appropriate way of doing this will depend on the particular kind of contract (see: "Contracts").

A special shareholders' resolution is required before a company can enter into a "major transaction", which is where the value of the assets or obligations involved is more than half of the value of the company's assets.

Liquidation and receivership

Companies Act 1993, Part 16; Receiverships Act 1993

"Liquidation" (or "winding up") of a company is when it stops trading or becomes "insolvent" (this means when it's unable to pay its debts or when it doesn't have enough assets to meet its liabilities). The company's assets are sold and the proceeds are paid to the company's creditors according to what the company owes them and the priorities between those creditors themselves. Any surplus money will be distributed proportionately among the shareholders.

A company can be put into liquidation voluntarily or by the courts. Liquidation begins when a liquidator is appointed.

“Receivership” is when a creditor of the company or the courts appoint a “receiver” to take control of and manage the assets of a company that’s in financial difficulty. A receiver can be appointed by or on behalf of a secured creditor to protect and take control of the assets over which the security has been granted. Debentures creating a security over the company’s property often give the debenture holder the right to appoint a receiver.

National bodies and local organisations

How relationships between national and local bodies are determined

Local or regional organisations in the New Zealand community sector are often part of a larger national parent organisation, which is usually an incorporated body.

The relationships between the national and local components, and the rights and powers of each component, will depend on the rules of the national body and of each local group, and on whether the local organisations are separately incorporated.

The rules of the different bodies will determine how much control the national body has over its local components and how much autonomy the local organisations will have.

The rules will also determine the extent to which the local groups can control the national body. If the local organisations are members or shareholders of the national body, the local organisations will have an inherent right to participate in managing the national body.

The Incorporated Societies Amendment Act 1920 sets out the rules for incorporating branches of societies and their relationship with the parent organisation. It will no longer be possible for branches to be incorporated under this Act from October 2023 (as a result of the 2022 Act). However, the existing rules governing the relationship between the branch and the parent organisation continue to apply until the Registrar receives a notice from the parent society and the branch (see the 2022 Act, Schedule 1, clause 17).

Presumably, parent societies and their branches will only notify the Registrar when they have re-registered under the 2022 Act and worked out how their respective constitutions will provide for their relationship.

Until then, the information below remains relevant.

Incorporation of local organisations

Incorporated Societies Amendment Act 1920, ss 2-4

In some national structures each local organisation is separately incorporated, giving it a different legal status and some additional rights and powers, such as the power to own property and enter into contracts in its own name. In other structures, there is an incorporated parent body with one or more unincorporated groups or committees operating locally.

There is a specific procedure under the incorporated societies legislation for incorporating a local component ("branch") of a parent incorporated society.

There is no provision under the Charitable Trusts Act 1957 for incorporating the local societies or groups of a charitable trust board.

Note: For a clear understanding of the relationships between the different components of particular bodies, you should read the rules or constitutions of each body. The Incorporated Societies Register website provides access to the rules or constitutions of all incorporated societies.

Management in national structures

National structures with incorporated local groups

Incorporated Societies Amendment Act 1920, s 5

- **National control over local groups** – In national structures where the local organisations are separately incorporated, the management committee of the national body does not have an automatic right to be involved in managing the local organisations. If the purpose of the national body is to be a regulator of the local groups, then the rules or constitutions of the local organisations should allow the national body to give directions to them.
- **Management and administration at local level** – The rules applying to the incorporated local branches of incorporated societies are mostly the same as the rules applying to incorporated societies generally (see "**Choosing the right legal structure for your group / Incorporated societies**").

- **Local control over national body** – The management committee of an incorporated local group can exercise some limited control over its national body if it's also a member and shareholder of the national body. Otherwise the local group does not have an automatic right to be involved in managing the national body. To achieve this, the national body's management committee should consist of representatives of each of the local groups.

National structures where local groups are not incorporated

Unincorporated local organisations are usually constituted under the rules of their national body. The extent to which the rules of national bodies govern the management and procedures of the local groups will vary:

- **Management and administration at local level** – A local group can have its own rules for the management of the group and its procedures, so long as those rules don't conflict with the parent body's rules.
- **National control over local groups** – The rules of a local organisation can prevent the national body having managerial oversight over it only if the national body's rules don't conflict with this. If the national body's rules cover the management and procedures of the local groups, a local group can't override those rules by making different rules of its own. Given the extent to which a national body can be bound by and held responsible for the actions of its unincorporated local groups, it's best practice for the rules of the national body to explicitly state that it has the right of managerial oversight of the local groups.

Civil and criminal liability in national structures

Liability in national structures with incorporated local groups

An incorporated local organisation is not legally responsible ("liable") for any civil or criminal penalties that the courts award against the national body unless:

- the local group acted jointly with the national body in the acts or omissions that resulted in the penalty, or
- the local group has agreed to indemnify the national body, or the local group's rules require it to do this, or
- the local group later ratifies (formally confirms) the relevant act or omission of the national body.

The same rule applies to the national body's liability for civil or criminal penalties awarded against a local group.

Liability in national structures with unincorporated local groups

A parent body will generally be liable (usually jointly with the members of the local group) for any wrongful acts that the local group does on the national body's behalf.

A parent body may be able to exclude or limit its liability for civil penalties (such as damages for negligence) resulting from a local group's actions, by including an exclusion or limitation of liability clause in the national body's rules. However, these clauses may not always be legally valid, particularly when the person committing the wrong and the person claiming the protection of these clauses are part of the same organisational structure.

A national body should make sure it properly monitors the actions of its local groups, to reduce the risk of it incurring civil or criminal liability.

Contracts

Capacity to enter into contracts

National bodies are usually incorporated and are therefore able to enter into contracts in their own right.

A local organisation that is separately incorporated will also be able to enter into contracts in its own name. Unincorporated groups can't do this and must instead enter into contracts in the names of their members.

Power to hold property

National bodies

A national body is usually incorporated and can therefore hold property in its own right. Any property that is transferred or left to the national body in a will can be dealt with as the body chooses, according to its rules and any relevant legislation.

Each local organisation will have influence over property owned by the national body only to the extent that it can exercise management rights over the parent body. Unless the national body holds the property on trust, the property will be available to be distributed to creditors if

the national body is liquidated.

Incorporated local groups

If a local organisation is incorporated it can hold property in its own right. Any property that's transferred to the group, or left to it in a will, can be dealt with as the group decides, so long as it complies with the rules of the group, the Incorporated Societies Act, and the terms on which the property was transferred or gifted to the group.

The national body has influence over the property only to the extent that it has management rights over the local group. Unless the local group holds the property on trust, the property will be available to be distributed to creditors if the local group is liquidated.

Unincorporated local groups

When a local group is not incorporated, any property transferred or left to it in a will, will be owned by the people who are the members of the group at the time. The property will then be dealt with according to the group's rules.

This poses a risk for the national body if the local group isn't subject to any formal rules, or if the group's rules can be changed without the national body's agreement. The local group members could potentially deal with the property for their own benefit and neglect the purposes of the larger organisation. To prevent this happening:

- ownership of the organisation's property should be restricted, as far as possible, to incorporated bodies that are controlled by the national body
- the amount of property held by local groups should be kept to a minimum
- any local group holding property should be subject to a rule that the property can only be dealt with to further the purposes of the organisation.

Industrial and provident societies

Key features

Industrial and Provident Societies Act 1908, ss 5, 7, 9(a), 9(m); Statutes Amendment Act 1939, s 33

A society that's been formed to carry on an industry, business or trade (except banking) can register and incorporate under the Industrial and Provident Societies Act 1908.

Although there are relatively few of them today, the industrial and provident society remains a sound and workable structure, suitable for groups wanting to work together co-operatively and make a profit that may be paid out to members. Typically an industrial and provident society will consist of the owners of small businesses who, while continuing to operate independently, become part of this larger entity for mutual benefit – a co-operative taxi society for example. An industrial and provident society must be a genuine co-operative, or must provide a benefit to the community in some way. It must have at least seven members and have a formal set of rules. Annual audited accounts and an annual return are required by the Companies Office.

Table of legal entities

	Unincorporated group	Incorporated society	Trust	Charitable trust board	Company	Industrial and provident society	Māori land trust
Best suited for	One-off situations Informal and emerging groups with no staff	Not-for-profit membership-based groups	Using property or funds for charitable or community purpose but keeping control in few hands	Not-for-profit bodies operating for charitable purpose (education, religion, relief of poverty, or other community benefit)	Keeping control in few hands, but enjoying limited liability and ease of transferring all or part of ownership	Not-for-profit organisation for the purpose of industry, business or trade	Only for Māori land owners or shareholders of incorporations
Relevant legislation		Incorporated Societies Act 1908 **Incorporated Societies Act 2022**	Trustees Act 1956 Charitable Trusts Acts 1957 (Part 1)	Charitable Trusts Acts 1957 (Part 2)	Companies Act 1993	Industrial and Provident Societies Act 1908	Te Ture Whenua Māori Act 1993 (Māori Land Act)
Operates for benefit of…	Members and/or community	Members and/or community	Charitable purpose (education, religion, relief of poverty, or other community benefit) or community issue	Charitable purpose (education, religion, relief of poverty, or other community benefit)	Shareholders	Members and/or community	Landowners and their descendants
Minimum number of people required	2 individuals	**10 (However, a member that is a body corporate, such as another incorporated society, counts as three individual members.)**	1 trustee (but usual to have 2)	If based on a charitable trust: 1 trustee (but usual to have 2) If based on a charitable society: 5 members	1 shareholder, 1 director (can be same person)	7 individual members	1 trustee (trustees are appointed by Māori Land Court)
Tax status	Income not taxed if group has charitable status with DIA Charities and IRD Can also operate under a range of exemptions from IRD	Income not taxed if group has charitable status with DIA Charities and IRD Can also operate under a range of exemptions from IRD	Income not taxed if group has charitable status with DIA Charities and IRD Can also operate under a range of exemptions from IRD	Income not taxed if group has charitable status with DIA Charities and IRD Can also operate under a range of exemptions from IRD	Charitable status possible	Tax paid on profits over wages and expenses	Charitable status possible
Decision-making	By members at general meetings and/or by the management committee	Usually by members at general meetings and/or by management committee – but will depend on society's rules, which may grant different voting rights to different levels of membership	By trustees	By trustees (if the board is based on a trust) or By members and/or management committee (if the board is based on a charitable society)	By directors generally By shareholders at AGM in proportion to shares held	Usually by members at general meetings and/or by the management committee – but will depend on society's rules, which may grant different voting rights to different levels of membership	By trustees
Members	Made up of members with spoken or written agreement between members	Membership rules around joining or leaving the organisation	No members – has trustees appointed under trust deed	Boards can be based on either a trust or a society; the board members will be either the trustees or the members of the society	No members, just shareholders	Membership rules around joining or leaving the organisation	No members – has trustees appointed by Māori Land Court
Liability of management committee/trustees	Personal individual and joint liability for debts, torts, and statutory obligations and offences	Limited liability if decision-makers act legally, prudently, within society's objects, and not for personal gain	Trustees will be personally liable, but usually the trust deed will grant them the right to be indemnified out of the trust property	Likely to be limited liability if decision-makers act legally, prudently, within board's objects, and not for personal gain	Limited liability if directors act legally, prudently, within company's objects, and not for personal gain Also specific legislation provisions for directors	Limited liability if decision-makers act legally, prudently, within society's objects, and not for personal gain	Limited liability if decision-makers act legally, prudently, within society's objects, and not for personal gain Also specific legislative provisions for trustees
Reporting requirements	None, unless the group has charitable status (reporting to DIA Charities)	Annual financial statement, register of members, change of rules and office – to Registrar of Incorporated Societies Additional requirements if charitable status – to DIA Charities	None, unless the trust has charitable status (reporting to DIA Charities)	Changes of rules, name or office; changes in board members (if land is owned) – to Registrar of Incorporated Societies	Change of constitution, name or office; list of directors; and (for some companies) annual accounts – to Companies Office Additional requirements if charitable status – to DIA Charities	Annual financial return to Registrar of Industrial and Provident Societies	Annual financial statements to Registrar of Māori Land Court
Assets on winding up (liquidation)	Surplus assets will be disposed of according to the group's rules or as agreed by the members, unless the group has charitable status	**If the society is liquidated or removed from the register, a society can't distribute surplus assets to its members. Instead, it has to distribute them to a not-for-profit entity.**	Assets disposed of as provided in the trust deed; assets usually distributed to another trust or organisation with similar charitable purposes	All surplus assets (after costs, debts and liabilities have been paid) are disposed of as provided in the trust deed or society rules, or as ordered by the courts	Surplus assets are distributed among shareholders, unless the company has charitable status	Surplus assets can be distributed among members, unless the society has charitable status	As the courts direct or to beneficial owners or successors

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Note: As of October 2023, it will no longer be possible to register as a charitable trust board under the Charitable Trusts Act 1957.