

3. FACT SHEET ON INCORPORATED SOCIETIES



This fact sheet deals with incorporated societies. These are organisations that have at least 15 members and are registered under the Incorporated Societies Act 1908. Members associate together for a mutual lawful interest other than the pursuit of profit.

KEY FEATURES OF INCORPORATED SOCIETIES

- Once the society is registered, all current and subsequent members are collectively considered to be a body corporate under the name of the society.
- The incorporated society takes on a separate legal identity distinct from its members.
- The incorporated society has a continuing existence (“perpetual succession”) until it is wound up. Its existence is independent of changes to its membership.
- Incorporated societies are also limited liability entities, unless their rules provide otherwise. This means that their members are not liable for obligations the society incurs.
- The society’s activities are limited by the Incorporated Societies Act and the rules the society adopts for itself.
- A member that is a body corporate, such as another incorporated society, counts as three individual members.

KEY REQUIREMENTS FOR INCORPORATED SOCIETIES

Incorporated societies must have rules

An incorporated society must have a set of rules that is registered with the Registrar of Incorporated Societies. The rules must be consistent with the Incorporated Societies Act and the general law. The Act requires the rules of a society to state or provide for the following matters:

- The name of the society, with “incorporated” as the last word in that name
- The society’s objects
- The methods by which a person becomes and ceases to be a member
- The ways in which the rules of the society may be altered, added to or cancelled
- The mode of summoning and holding general

- meetings, and of voting at these meetings
- The appointment of officers of the society to make up a committee. The rules may also provide for the committee’s responsibilities to be divided up among several subcommittees
- The control and use of the society’s common seal (official stamp)
- The control and investment of the society’s funds
- The powers (if any) of the society to borrow money
- What happens to the society’s property if the society is put into liquidation (wound up).

Incorporated societies must associate for lawful purposes and activities

The purpose for which an incorporated society has come together must be lawful.

The society’s activities must also be lawful. It must not do anything that breaches the Incorporated Societies Act or any other law – such as not meeting tax obligations, not complying with any applicable requirements of a government agency, or undertaking criminal activities.

Incorporated societies must not operate for pecuniary gain

- An incorporated society must operate for a purpose other than pecuniary gain. Pecuniary gain means making a profit with the intention of passing it on to some or all of its members.
- A society may make a profit as long as it is returned to the society for the purposes of the society and for the benefit of those in the community whom the group serves. The profit must not be distributed to the society’s members.
- Members may be paid as employees or officers of the society, or, if a member provides a service to the society, that member is entitled to receive reasonable payment (that is, open market value) from the society.

- Members may compete with each other for trophies and for prizes, as long as they are not monetary ones.
- A society that promotes the interests of a profession, trade or industry is not considered to be incorporated for profit.
- If the society does not have charitable status, it is allowed to divide its property among its members when the society winds up.

Incorporated societies must be registered

To become incorporated and gain the protections of being an incorporated society, a society must meet the requirements of the Incorporated Societies Act and register with the Registrar of Incorporated Societies.

An application requires:

- a copy of the society's rules
- an application for incorporation signed by at least 15 members
- a certificate by an officer of the society or by a lawyer stating that a majority of members have consented to applying to be incorporated and that the attached copy of the rules are in fact the society's rules.

Incorporated societies must act within their objects

The objects of a society must be stated in its rules. A society must operate within the scope of these objects. Whenever a society is considering any major activity, it must ensure that this activity is consistent with its objects – for example, a society incorporated solely for the purpose of administering a tennis club cannot invest in an office building to lease to commercial tenants.

Because an incorporated society is not allowed to do anything beyond its objects or contrary to its rules, the rules should include very wide general objects.

If a society acts outside its objects, the Registrar may give the society written notice stating that breaches may result in every officer of the society being liable for a penalty for every day that the breach continues.

If a society enters into a transaction outside its objects, the transaction could be invalid and not enforceable by or against the society. If the transaction is not enforceable against the society, the officers of the

society who caused the transaction to be entered into may be personally liable.

If a society makes a rule or does something affecting its members that is outside the society's objects, members may be able to get an injunction against the rule or action.

RULES AND PROCESSES FOR GOVERNANCE OF INCORPORATED SOCIETIES

How people become members and cease to be members

The way people become and cease to be members of an incorporated society is a basic requirement of the rules. Membership that isn't authorised by the rules is invalid. The rules should specify:

- the administrative steps involved in a person becoming a member, how applications are made (if they are required), who makes the decision to admit the applicant to membership (if it's not automatically conferred after an application), and the subscription fee (if any)
- when the society can refuse to admit a person as a member – for example, if they were previously expelled
- different classes of membership, such as honorary members or active or associate members, and the voting rights of each class.

For ceasing to be a member, the rules should specify:

- the resignation process required (for example, written or oral)
- how the society can end the membership of a member – that is, who has the authority to do this and in what situations (non-payment of subscriptions or fees, for example)
- a procedure for disciplining and expelling members that observes procedural fairness and natural justice (such as a right to appeal a decision to expel a member).

Electing the committee

The rules should specify how the committee is elected. Often rules state that they are to be elected at the annual general meeting. At a minimum, members should appoint a chairperson, treasurer and secretary (the principal officers of the society) at the annual general meeting.

Holding meetings

The rules must set out how general meetings are summoned and conducted. The rules should provide for:

- the ability to call special meetings in addition to annual meetings
- the notice required for calling annual general meetings and special meetings, and for issuing the agendas for these meetings
- the quorum required for a meeting
- procedures for adjourning meetings
- appointment of a chairperson, and whether they can have a casting vote
- appointment of corporate representatives for meetings
- keeping proper and accurate records of all meetings.

Decision-making

The rules must set out the procedure for making decisions. This usually includes directions about who can vote, the voting procedures (for example, a show of hands), whether members can vote by proxy, post or email, and how many people must agree for a valid decision to be made (for example, a simple majority).

Controlling, borrowing or investing money

The rules must specify how the society's funds will be managed (for example, who can sign cheques and who will collect the money that is owed to the society). The rules must also specify the types of investments that are permitted when a society has surplus funds. The control and investment of a society's funds are usually entrusted to the committee.

If there is a possibility that the society will borrow money, a rule about how money can be borrowed should be included. The power of a society's committee to borrow is limited and most commonly requires the authority of a general meeting of members.

The rules should also require that income and property can be applied only to further the society's objects, and that there can be no pecuniary gain by members.

Financial accounts and statements

Although the Incorporated Societies Act doesn't require it, it's good practice for the rules to deal with accounting processes and statements, including who

is responsible for keeping proper accounts. This is important because the Act imposes obligations on a society to keep proper accounts and provide financial statements.

Changing the rules

The rules must prescribe how they may be changed. It is usual for all members to have an opportunity to meet and debate any proposed change to the rules. The threshold for approving a rule change is often higher (for example, two thirds of all members) than for other decisions (where a consensus of those present or a straight majority is all that is required).

Any alteration to the rules must be signed by at least three members and filed in duplicate with the Registrar of Incorporated Societies. A statutory declaration by an officer of the society or a lawyer is also necessary, stating that the alteration has been made in accordance with the society's rules. Only after registration with the Registrar do the changed rules take effect. No change to the rules may affect any creditor of the society.

ROLES AND RESPONSIBILITIES OF MEMBERS AND OFFICERS

The functions and powers of members

The functions and powers of members usually relate to important decisions involving the society's direction, purpose or structure, or large amounts of the society's funds. Decisions such as these should require approval by members at general meetings.

The rules should clarify the functions and powers of different classes of membership – for example, financial members may be given the right to attend meetings, speak and vote.

Role and powers of officers

In most cases, the committee and other officers deal with the administration, management and control of the society. This will vary according to the size and nature of the society. Officers are directly accountable, mainly through general meetings, to the members of the society.

Officers must act in accordance with the functions allocated to them and the powers vested in them by the rules. Officers have no powers other than those set out in the rules. They also have no power to do anything that the body appointing them cannot do.

Duties and liabilities of officers

The Incorporated Societies Act does not set out any general officers' duties. However, under this Act, officers of incorporated societies are exposed to potential financial penalties if the society's affairs are conducted in breach of the Act. For example, each officer can be fined up to \$1,000 for failing to deliver any document requested by the Registrar for inspection.

In general, all officers of a society have a duty to:

- act in good faith and in the society's best interests
- exercise their powers for a proper purpose
- act in accordance with the society's rules and objects
- ensure the society's affairs are carried out in a way that does not create a substantial risk of loss to the society's creditors
- ensure that the society does not incur an obligation that it can't fulfil
- take reasonable care in exercising their duties
- ensure that they do not personally profit from their position of trust.

The society's rules can provide for officers to be indemnified for costs and liabilities that they incur through committing wrongful acts in good faith while properly serving the society.

Apart from the usual potential liability of an officer committing any crime, such as theft, officers may also be personally liable to third parties for breaches of trust or fiduciary duty, where they act outside the society's rules and objects, and for property conversion.

The chairperson, treasurer and secretary

The main responsibility of the **chairperson** is to preside over and regulate meetings of the society. Specific duties may include acting as a spokesperson for the society in the community.

The role of the **treasurer** is to control income and spending, to maintain the society's financial records, and to prepare the annual accounts.

The role of the **secretary** is to be responsible for the overall administration of the society.

The committee

The committee is appointed by the society's members at the annual general meeting. The functions of the

committee are to:

- carry out any policy set at general meetings
- initiate any policy
- keep proper accounts and handle the society's finances
- keep a register of members
- control the common seal
- call general meetings.

Payment for services

Members may be paid as officers of a society and may be eligible for prizes. If the society seeks 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 if the society was dealing with a third party at arm's length.

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

It is good practice for officers who take up paid employment with the society to resign from their position as an officer of the society to avoid any conflict of interest. Alternatively, they should not vote or participate in discussions on any matter concerning their salary, terms of employment, or any contract in which they may be interested.

ADMINISTRATIVE REQUIREMENTS FOR INCORPORATED SOCIETIES

A registered office

When it incorporates, the society must register its physical address with the Registrar of Incorporated Societies and notify the Registrar of any changes to this.

Register of members

An incorporated society must maintain a register of members containing their names and addresses and the dates on which they joined.

Annual financial statement

An incorporated society must file an annual financial statement with the Registrar. This includes 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.

The financial statements must be approved by the members at a general meeting, and an officer must certify that the members have approved it. This certificate must be submitted with the financial statements when these are filed with the Registrar. The financial statements does not have to be audited, unless the society's rules require this. A sample financial statement is available from the societies website www.societies.govt.nz.

Reporting requirements for registered charitable incorporated societies

Charitable incorporated societies that are registered with the Charities Commission do not have to file an annual financial statement to the Registrar of Incorporated Societies. They will instead have to file an "Annual Return" with the Charities Commission (see *Fact Sheet 7: Charities Commission*).

There may also be reporting requirements for non-profit entities as a result of the review of the Financial Reporting Act 1993. However, if new laws are passed as a result of this review, they are not expected to come into affect until 2010.

Filing changes to the rules

Any alteration to the rules must be signed in duplicate by at least three members and filed with the Registrar of Incorporated Societies. A statutory declaration made by a member or lawyer must confirm that the alteration has been made in accordance with the society's rules.

Registrar's powers of inspection

The Registrar may require the society to hand over any registers, records, accounts, books or papers kept by the society, so that the Registrar can monitor whether the society is complying with the Incorporated Societies Act.

CHARITABLE STATUS

Incorporated societies that exist for charitable purposes may qualify for an income-tax exemption. Registration with the Charities Commission is required for any organisation to be tax-exempt, but the final decision on tax exemption will still be made by Inland Revenue.

The society will need to provide the Commission with evidence that it is established and maintained exclusively for charitable purposes and not for the

private pecuniary profit of any individual.

See *Fact sheet 7: Charities Commission and Fact sheet 8: Taxation*.

WINDING UP (LIQUIDATION)

What is "liquidation"?

Liquidation is the process that brings a society's activities to an end. Its purpose is to collect and distribute the proceeds of the society's assets to its members unless the rules provide otherwise. If the incorporated society has charitable status, any surplus assets must be directed to other charitable organisations within New Zealand that have similar aims.

Voluntary liquidation

The members of an incorporated society may voluntarily put the society into liquidation by resolving at a general meeting (by simple majority) to put the society into liquidation and appointing a liquidator.

A second general meeting must be held no earlier than 30 days after the meeting at which the initial resolution was passed. A resolution must be passed by simple majority confirming the previous resolution. At this second general meeting, the members decide the distribution of any surplus assets to an approved charitable organisation (if the organisation is required to distribute its surplus assets to other charitable organisations) and the liquidation commences.

Compulsory liquidation by the High Court

There are various situations in which a society will be put into liquidation by the High Court – for example, the society may be unable to pay its debts. An application to the High Court to have an incorporated society put into liquidation may be made by the society itself, a member, a creditor of the society, or the Registrar.

RESOURCES

Fact sheets

Fact sheet 7: Charities Commission

Websites

www.charities.govt.nz

The Charities Commission is responsible for registering charities. The website provides more detailed fact sheets on the registration process.

www.community.net.nz

The “How-to Guides” section has a community development resource kit covering all aspects of establishing and running an organisation.

www.creativenz.govt.nz

Creative New Zealand has information on effective governance.

www.dia.govt.nz

The Department of Internal Affairs has information about administering lottery grants and community grants schemes.

www.ird.govt.nz

Inland Revenue’s website has information on not-for-profit groups. Download a copy of the brochure *Smart business – An introductory guide for businesses and non-profit organisations* (IR320).

www.lawaccess.lsa.govt.nz

This website offers a catalogue of law-related information resources, with over 140 New Zealand organisations listing their resources on the site.

www.lsa.govt.nz

The Legal Services Agency has information on community law centres throughout New Zealand.

www.societies.govt.nz

Societies and Trusts Online provides an information library with forms and fact sheets. It enables incorporated societies to maintain organisational details and provides access to a register of

incorporated societies and charitable trusts.

www.tpk.govt.nz

Te Puni Kōkiri’s website has information on effective governance.

Publications

Von Dadelszen, M – *Law of Societies in New Zealand* (2000, Wellington, Butterworths)

Von Dadelszen, M – *Members’ Meetings in New Zealand*, 2nd ed (2004, Wellington, LexisNexis)

