

Important Information

This information is intended as a guide for Companies and their Directors to the principal filing requirements of the Companies Act 1993. It is not a complete statement of the obligations of companies or their directors, nor is it intended as legal advice. Therefore, the omission of any information will not relieve a company or its directors from any penalty that may be incurred through failure to comply with the Act.

What is a company?

Persons engaged in business have a choice as to how they will establish their business. Options include carrying on business as a sole trader, in partnership or as a company. A company is essentially a mechanism to create a separate legal entity to carry on business.

Every company has certain basic elements:

- a name which has been reserved by the Registrar of Companies
- at least one share, one shareholder and one director
- addresses for the registered office and for service (the Registrar also requests an address for communication)

A company may have **limited** (most common) or **unlimited liability** – refer to the section below headed *Why Form a Company* for more information about these liability types.

A company comes into existence after it is incorporated under the Companies Act 1993. Once incorporated it is recognised in law as an independent legal entity (a Body Corporate). This means it is treated as being a separate "person" from its directors and shareholders. It can therefore do many of the same things as a natural person – e.g. hold property in its own name, enter contracts, sue and be sued, etc.

Why form a company?

There are a number of reasons why people choose to incorporate a company rather than one of the other business types.

Limited Liability – The primary reason is the protection that limited liability affords to shareholders. All companies are **limited liability companies** unless the particular company's constitution provides otherwise (Note: this is very rare). Although it is common to speak of a "limited liability company", it is in fact the liability of the shareholders that is limited. The company is liable in full for all obligations that it incurs.

This concept of limited liability becomes important if the company is unable to pay its debts, and a liquidator is appointed. Shareholders of a limited liability company are not liable for the business debts of the company (subject to any personal guarantees given) – they are only liable (to the liquidator) for any unpaid money owing on their shares. If they have fully paid for their shares prior to the company being placed in liquidation, they will have no further liability to the company's creditors.

By contrast a sole trader, or a person trading in partnership, will be personally liable for business debts that cannot be met by business funds.

Some other reasons for incorporating a company include:

- **Continuity of existence** – a company will continue until it is removed from the register. It can often survive many changes in ownership or management. With a partnership, the retirement or death of a partner usually brings that partnership to an end.
- **Transferability of shares** – shareholders may sell or otherwise dispose of their shares at any time (subject to any restriction imposed in the company's constitution). A partnership interest, on the other hand, is generally not able to be assigned or transferred.
- **Control by shareholders** – if the shares held by a shareholder are voting shares, that shareholder may participate in the election and removal of directors. Accordingly, shareholders, with their collective right to elect the directors, have the ultimate control of the company without being concerned in its day-to-day affairs.

Updating the Register

Interaction with the Companies Office is predominantly through our online services. This is because it is quick, easy and often cheaper, than filing paper forms. In the few instances where there is no online service available, there are paper forms available for updating the Companies Register. In this guide we have included some notes about the most common updates for companies.

File Online - Visit www.companies.govt.nz and select the service you require. Enter the required information (Note: certain information is mandatory - this is denoted by a red asterisk *. You must complete these mandatory fields to submit information through the website).

For some services you must also enter the company key. This 7-character company key is a type of password that is used to authenticate online transactions. The company key for your company is included with the Certificate of Incorporation. If you lose or forget your company key, use our secure automated online service to retrieve it.

Paper forms - Download copies of forms from our website or by calling our Contact Centre on 0508 266 726. Once completed forms should be mailed, along with the appropriate fee, to:

Companies Office
National Processing Centre
Private Bag 92061
Auckland Mail Centre
Auckland

Payment Options

Payment for online services can be made by credit card (Visa, Mastercard, Amex or Diners) or by direct debit - you choose.

A 'Pay Now' screen will identify services that have an associated fee, so you can decide whether or not to proceed.

Direct Debit - Your organisation (or its Branches) will receive an invoice by email. Alternatively you can pick up a copy of your invoice directly from the **My Tools** section of our website. The invoice amount will be direct debited approximately 20 days after you have been invoiced. If your organisation does not already have a direct debit facility set up with the Companies Office, visit the Companies Office website and select the **Get User ID** option. We will email you a direct debit form to complete, sign and return. Any fees incurred can be paid by credit card until your direct debit facility is activated.

Credit Card - Credit card transactions are processed using 128-bit encryption technology. Your credit card details are transferred in such a way that the Ministry of Economic Development does not see or store them. Your transaction is validated in "real time".

When filing paper forms you also have the option to pay by cheque.

Annual Meeting

Every company must hold an annual meeting of shareholders once in each calendar year. Generally the meeting must be no later than 6 months after the company's balance date and no later than 15 months after the previous annual meeting.

A company does not have to hold its first annual meeting in the calendar year of its incorporation, but must hold that meeting within 18 months of incorporating.

Annual Return

All companies are required to file an annual return in a designated month. Complete this online free of charge or file a paper form and pay a \$30 filing fee. An annual return reminder is sent to the company's address for communication in the month before their return is due to be filed.

A company is not required to file an annual return in the calendar year of its incorporation (i.e. a company incorporated in 2006 will file its first annual return in 2007).

Company Names

The Registrar of Companies is responsible for the approval and reservation of company names.

A New Zealand company (or an overseas company intending to carry on business in New Zealand) cannot be registered under a name unless that name has been approved and reserved by the Registrar (Sections 20 and 333(1) Companies Act 1993).

A company may choose to change its name. It must first apply to the Registrar of Companies to reserve the name it has chosen. After the company has been notified that the new name has been reserved, the director(s) must pass a resolution to change the name and then notify the Registrar of the change. There is a \$10 fee for reserving a company name online (\$25 if you apply using a paper form) but there is no fee for changing a company name.

Registration of a company name only provides limited name protection - that is, it will prevent another company being incorporated under an identical or almost identical name.

Company Addresses

Every company must have a registered office and address for service in New Zealand.

The registered office and address for service need not be at the company's place of business, nor in the same place. However they must be at a physical location not a postal centre or document exchange. The Registrar also seeks an address for communication. This can be a postal address and for online applications the applicant for incorporation must supply an email address. These addresses are first notified to the Registrar on the application for incorporation.

If a company wishes to change its registered office or address for service, the change, and the date upon which it is to take effect, must be notified to the Registrar. The notice must be registered at least 5 working days before the change takes effect and changes can be notified either online using the company key or by using a paper form.

Directors and Shareholders

It is very important to recognise the distinction between shareholders and directors.

Shareholders are investors in the company. They pay money into the company in return for shares. The amount shareholders pay for shares is determined by agreement with the company. They do not participate in the management of the company, other than by voting on the appointment and removal of directors.

Directors are responsible for managing the company's day-to-day business. In doing so, directors owe duties to the company, to its shareholders, and to others dealing with the company. Directors must act honestly in what they believe to be the best interests of the company and with such care as may reasonably be expected of them in all the circumstances.

Directors must not carry on the business in a manner likely to create a substantial risk of serious loss to the company's creditors (so-called "reckless trading").

A person cannot be a director of a company if he/she is:

- under 18 years of age; or
- an undischarged bankrupt; or
- prohibited from directing/promoting/participating in the management of a company under any statutory provisions; or
- subject to a property order made under sections 30 or 31 of the Protection of Personal and Property Rights Act 1988; or
- not qualified pursuant to the constitution of a particular company.

Any changes in the director(s) of a company or information relating to the director(s) must be notified to the Registrar and can be notified either online using the company key or by using a paper form.

New director appointments or resignations must be notified within 20 working days of an appointment being made or a resignation taking effect. The other changes (e.g. new director's address) must be notified within 20 working days of the company first becoming aware of the change or event. It is an offence under the Companies Act if these requirements are not complied with (Section 159).

A new director must consent to act as a director and certify that he or she is not disqualified from being appointed or holding office as a director.

Issue of Shares

After incorporation a company must issue to any person named in the application as a shareholder, the number of shares that the application says the shareholder will receive. After the first issue of shares, the board of a company may issue shares at any time, to any person, and in any quantity it sees fit. This power is subject to the provisions of the Companies Act 1993 and any provisions in a company's constitution that may modify its right to issue shares. The Registrar must receive notice of the share issue either online, using the company key, or on a paper form filed with the Companies Office within 10 working days of the issue.

Distributions to Shareholders

The board of a company may authorise a distribution by the company at any time, and of any amount, and to any shareholders it sees fit. But before doing so it must:

- be satisfied that the company will be able to satisfy the solvency test immediately after the distribution; and
- ensure that it does not breach section 53 of the Act, or any provision in its constitution relating to distributions.

Directors who vote in favour of a distribution must sign a certificate stating that the company can satisfy the solvency test and give the grounds for that opinion. A company satisfies the solvency test if:

- it is able to pay its debts as they become due in the normal course of business; and
- the value of the company's assets is greater than the value of its liabilities including contingent liabilities.

Books and Registers

The Companies Act 1993 requires every company to keep and maintain certain records:

1. Company records [described in section 189]
2. Share register [described in section 87]
3. Accounting records [described in section 194]

These requirements are described in detail below.

1. Company Records

[Section 189 Companies Act 1993]

A company must keep a variety of documents at its registered office including the constitution (if it has one), minutes of shareholders and directors meetings, financial statements and accounting records and the share register.

Note: The records may be kept at another location in New Zealand provided that location is notified to the Registrar with 10 working days advance notice of the change.

2. Share Register

[Sections 87–94 Companies Act 1993]

A company must maintain a share register that records the shares issued by the company and states:

- whether there are any restrictions or limitations on their transfer; and
- where any document that contains the restrictions or limitations may be inspected.

The share register must also record an alphabetical list of the:

- name(s)
- last known address, and
- number of shares held

for each shareholder (Note: includes both current shareholders and those who have been shareholders within the last 10 years).

The register must also show the date of share issues, repurchases or redemptions and share transfers.

An agent (such as a professional share registry) may maintain the share register of any company.

Subject to a company's constitution, a share register may be divided into 2 or more registers and kept in different locations. A notice of the location of each register must be delivered to the Registrar within 10 working days after the share register is divided. The share register, if undivided, is the company's principal register and must be kept at its registered office. If divided, the share registers may be kept elsewhere.

3. Accounting Records and Appointment of Auditors

[Sections 194 and 196 Companies Act 1993]

Every company must prepare financial statements annually. These must be audited unless all shareholders in the company agree otherwise (Auditor Resolution). If an auditor is to be appointed, the appointment is made at each annual meeting. There are some companies that must always appoint an auditor (ie. those that are required to file financial statements under the Financial Reporting Act 1993).

The board of a company must ensure that the company keeps accounting records. These records must:

- Correctly record and explain the company's transactions;
- At any time enable the financial position of the company to be determined with reasonable accuracy;
- Enable the directors to ensure that the company's financial statements comply with the Financial Reporting Act 1993; and
- Enable the company's financial statements to be readily and properly audited.

Financial Reporting Act 1993

There are three entities that are required to file financial statements under the Financial Reporting Act 1993 (FRA). The Companies Office has identified those three entities as being:

- Overseas Companies
- Companies with 25% overseas shareholding
- Issuers and listed companies

All of these entities must file a full set of financial statements with the Registrar along with the filing fee \$100. An additional late filing fee of \$100 applies if the financial statements are filed out of time (i.e. later than 5 months and 20 working days after the balance date). Section 10 of the FRA requires that two directors must sign and date the financial statements (except where a company has one director then that director must sign).

Accompanying audit reports must comply with section 16 of the FRA.

To help clients meet their filing requirements under the Financial Reporting Act, the Companies Office provide a Fast Track Filing Form. This form contains a checklist to help clients meet the filing requirements under the FRA.

Full details of the filing requirements for each type of entity, fast track filing form and other support materials are all available on our website.

Security Interests

Historically companies were required to maintain a register of charges. This provision was removed with the introduction of the Personal Property Securities Act 1999 – although it would be considered good practice for companies to maintain details of their security interests.

Security interests over personal property (e.g. secured loans, leases or hire purchases) can be registered and searched on the Personal Property Securities Register (PPSR) www.ppsr.govt.nz.

A search of the PPSR for any registered security interests in respect of a specific company can also be conducted via the Companies Office website at www.companies.govt.nz.

Adopt, Alter or Revoke a Constitution

The shareholders of a company without a constitution may adopt one by special resolution. Shareholders may also alter or revoke a constitution by special resolution. The board of a company must ensure that notice of an adoption, alteration or revocation is filed with the Registrar within 10 working days of the event taking place. There is no fee to adopt, alter or revoke a constitution.

Further Information

Contact us for more information about companies.

Online – visit our website www.companies.govt.nz where we have a wide range of resources to help you run your company or use the Companies Office services. You will find answers to common questions, forms, fee schedules and guides that step you through our services – and if you can not find the answer you are looking for, ask us a question using our online **Contact Us** option.

Call us – during business hours (8.30am–5pm weekdays) on **Freephone 0508 COMPANIES (0508 266 726)**. Overseas callers call +64 3 962 2602.

Subscribe – to the Business Update, our regular online newsletter, and keep up to date with news and developments for the Companies Office and other business units. Sign up online to receive your copy of the Business Update at <http://news.business.govt.nz/>.

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