

## Memo

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To: Don Robertson, CEO

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From: Steven Moe / Rebecca Carruthers

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Date: 2 November 2023

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Client: Amateur Radio Emergency Communications

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Subject: Structure Options

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### 1. Background

Thank you for your instruction to provide a legal opinion on Amateur Radio Emergency Communications' ("AREC") current legal structure.

As part of your structure review process, you seek our advice as to New Zealand Association of Radio Transmitters Incorporated's ("NZART") current liability in relation to AREC (which is its service arm) and whether restructuring AREC could reduce that liability.

In this memo, we outline legal structure options for AREC going forward. We have kept in mind our recent discussions as well as the background of NZART.

We have structured this memo as follows:

1. Current Structure
2. Future Structure Options Summary
3. Future Structure Options Detail
  - a. Option 1 - Status Quo (AREC As Sub-Group)
  - b. Option 2 - Partially Owned Limited Liability For Profit Company
  - c. Option 3 - Wholly Owned Limited Liability Charitable Company
  - d. Option 4 - Charitable Trust
  - e. Option 5 - Incorporated Society
4. Next Steps

The subsequent discussion in the following paragraphs will cover the different options you should consider. We understand option 3 is your preference, and as such, we have focused our attention on this option, however, have presented all the options available. We understand NZART is a not for profit organisation and AREC is NZART's service arm. Therefore, it is unlikely you will go with option 2, so we have touched on this option briefly.

We would be happy to arrange a meeting with yourself or the council and officers to go over what is covered in this memo in more detail and if you choose a particular option, we are happy

to explore this further - or what a combination of options might look like. This memo is intended to start the thinking and show the possibilities.

We are mindful that we can provide the legal input but there are other considerations as well - this includes financial considerations, regulatory compliance, tax status, community and stakeholder perceptions and employee incentivisation.

In addition to our legal input, we suggest that you seek insurance, tax and accounting advice as there may be implications of the options we propose that they would have comments on. With a combination of legal, insurance, tax and accounting input we think you will be best placed to decide on how to proceed with setting up in New Zealand.

In due course, there may be other due diligence to be done - for example, employment, insurance etc., - if there is a transition between entities, so that it is done smoothly.

Please advise if any of the facts, as we understand them, are incorrect as this may affect your legal position.

Whichever option is chosen there will be a few high level points to remember:

- **Communications:** whenever there is any change it will need to be communicated well and there may be an unclear signal to stakeholders if they are used to the current structure and they are surprised by a change. We suggest engaging with all who are associated with AREC and explaining changes. Having a communications plan will be critical for this.
- **Tax status:** With options 3, 4 and 5 set out here, the new entity can be registered as a charity so will have the same tax status - it is just a process to do so. There may also be perception issues if you choose a charitable company (more on this later).
- **Reinvigorating your organisation:** Whatever option is chosen, this could also become a good reason to reach out to those who are supporters and ask them to recommit, or approach new people to support that have not yet been involved.

## 2. Current Structure

We understand that NZART is an incorporated society incorporated on 31 January 1934 (incorporation number 476480) as well as a registered charity (registration number CC54596) registered on 16 June 2017. It is a not for profit organisation with the object of the promoting and providing education in relation to amateur radio services in New Zealand.

Its head office is in Upper Hutt and the national body ("**Executive Council**") is elected nationally every two years by its members via NZART branches.

NZART membership is open to all who have an interest in radio communication and gives its members a voice in the governance of amateur radio in New Zealand.

AREC is a sub-group of NZART established by NZART's constitution as its service arm. Its purpose is to provide skilled volunteers enabling essential communications to support Search and Rescue, disaster relief, and the community. It is under the control of the Chief Executive Officer ("**CEO**")

of AREC and is governed by the regulations (“**AREC Rules**”) approved by the Executive Council on 7 September 2021. It is not currently a legal entity and as a result, its liabilities become that of NZART, the Executive Council and its officers. Staff are employed by NZART to run AREC. Forty seven AREC groups have been established and each group is attached to one or more NZART branches (which are their own legal entities). The AREC groups are governed by the AREC Rules and officers consist of a group leader, and such deputies and assistants as the group leader chooses. We also understand that one of NZART’s objects is to provide emergency and other communication services for search and rescue, civil defence, and other parties as needed and it had been agreed between the New Zealand Search and Rescue Council (“**NZSAR**”) and NZART to establish a charitable trust to hold contributions and make grants. This charitable trust is the NZART AREC Emergency Funds Charitable Trust (“**AREC Trust**”) (registration number CC55656) which was registered on 17 August 2018. We understand its trustees are the President of NZART, two non-national management AREC members, an independent trustee and a Search and Rescue sector representative who is nominated by NZSAR. AREC Trust’s purpose is to foster the provision of radio communications for emergency purposes, including search and rescue operations, and to receive and distribute funds to effect this.

We understand, currently,:

- AREC Trust does not have any employees;
- AREC Trust does not hold any property / assets; and
- Grants are made to AREC Trust who distributes funds to AREC as required.

### 3. Future Structure Options: Summary

We have set out the five structure options we think are available to you, so you can understand all the possibilities available as you move forward. To aid you in understanding our recommendations, we have provided simple diagrams as visual explanations of how these options might work, along with the positive and negatives of each option for NZART and AREC (we also briefly mention NZART branches, AREC Trust and AREC groups).

In summary, maintaining the status quo has the least work and cost involved. However, this structure is confusing to external stakeholders and as AREC is not a separate legal entity:

- NZART has been having to employ staff to run AREC (and there are risks in doing so);
- NZART and its branches are not protected against creditors and litigants of AREC as there is no ring fencing of liability; and
- AREC cannot enter into legal contracts, which you have advised is causing complications for AREC management and operations.
- AREC groups must be established and attached to an NZART branch. However, members of AREC groups must be financial members of NZART - you have advised that there is a membership sustainability risk with aging reducing membership and not being able to bring new members to AREC groups.

One option (option 2) is a partially owned for profit company, which could apply any income or capital to NZART, in proportion to NZART’s shareholding (i.e. if the charitable trust holds 45% of

the company's shares, 45% of the company's profit could be applied to the charitable trust). In summary:

- As a company, liability would be ring-fenced - mitigates operational risks associated with AREC;
- Staff and assets can be held by the company;
- The company could raise capital by issuing shares to investors, or to employees (as minority shareholders or via an ESOP / vesting);
- The company would not be a charitable company, so would not be income tax exempt.

However, we do not think this option would achieve AREC's outcomes as it is not embracing fully the "not for profit" aspect of NZART.

A third option is a wholly owned charitable company (and have AREC Trust merged into the company), which we understand is your preference. In summary:

- Charitable companies are like for-profit companies in their structure, and can undertake profit making activities if the profits go to the charitable purpose(s);
- Governance is straightforward and they are relatively easy to set up;
- Financial statements can be consolidated with NZART (if the balance dates are the same) to streamline financial reporting;
- As a company, liability would be ring-fenced - mitigates operational risks associated with AREC;
- As a charitable company, it would have charitable tax status and can give tax deductible receipts to donors;
- As it is its own legal entity, staff and assets can be held by the company and it can enter into contracts;
- Those involved can be paid market rate salaries.

A drawback is that charitable companies are not well understood as a structure used for purpose led organisations, being often confused with the typical for-profit company, so you may have greater demand from a public relations perspective.

To merge AREC Trust with the AREC entity (whether it be a company, charitable trust or incorporated society), you will have to novate or assign existing contracts to the new entity - you have mentioned that AREC Trust has contracts with the Government. Another point to consider when deciding whether to merge AREC Trust with the AREC entity is whether AREC Trust is likely to receive any bequests (more on this **below**).

A fourth option is a charitable trust. Charitable trusts are well understood in New Zealand, being the preferred structure for charities.

In summary:

- Governance is straightforward and they are relatively easy to set up;
- Somewhat mitigates operational risks associated with AREC - NZART will not be liable, however, trustees of AREC could be personally liable;
- It would have charitable tax status and can give tax deductible receipts to donors;
- Staff and assets can be held by the charitable trust / trustees on behalf of the charitable trust and it can enter into contracts;
- Those involved can be paid market rate salaries.

A drawback is that NZART would have less control of a wholly owned company. You would want to set out in AREC trust deed how AREC as a charitable trust relates with NZART, and NZART could build in Kaitiaki clauses, so that NZART would be the conscience of AREC (for example, appointments and removals of AREC trustees must be approved by NZART as the Kaitiaki). A fifth option is an incorporated society that is registered as a charity. To maintain control, you could have the same officers on both AREC and NZART committees or include a clause in its constitution about its relationship to NZART.

In summary:

- An incorporated society mitigates operational risks - NZART will not be liable, and members of incorporated society will not be personally liable if acting honestly, prudently, within the society's charitable purposes, and not for personal gain;
- It would have charitable tax status and can give tax deductible receipts to donors;
- Staff and assets can be held by the incorporated society and it can enter into contracts.

However, it is a relatively complex structure, members have significant rights, it is a membership based structure (which may not be fit for purposes), governance can become politicised as an incorporated society has democratic purposes and there is a less flexibility for the future (more on this **below**).

You did raise the possibility of an incorporated society for non-NZART members. However, you should ask yourself:

- Who would the members be? Will they be AREC volunteers - if so, why not any of options 2 to 4?
- How many members would there be?
- Who would the council be?
- Who will be funding the incorporated society?
- Is this the best structure as incorporated societies are relatively complex structure (more discussion **below**).

#### 4. Overview Of Each Structure Option

In this part we have set out more detail about each of the options which are summarised in the last section. Turning to these:

##### (a) *Option 1 - Status Quo (AREC As Sub-Group)*

As the current structure is working, you could consider sticking to the status quo. There is something to be said for staying as you are.

The downside to this, as you have already outlined, is that AREC is not a separate legal entity, so NZART has been having to employ staff to run AREC, and NZART and its branches are not protected against creditors and litigants of AREC.

This is a simple visual diagram of NZART and AREC, currently, as we understand:

New Zealand Association of  
Radio Transmitters -  
Incorporated Society



(i) NZART

Positive	Negative
<ul style="list-style-type: none"> <li>• Same structure which makes it somewhat easy to understand</li> <li>• No work involved and not costly as no entities to set up</li> <li>• NZART has control as AREC Rules must be approved by Executive Council, and per NZART’s constitution, members of AREC must be members of NZART</li> <li>• Less financial reporting obligations</li> </ul>	<ul style="list-style-type: none"> <li>• Currently complex structure (with AREC not being a separate legal entity and AREC groups having to be attached to NZART branches)</li> <li>• AREC is not a separate legal entity, so cannot enter into legal contracts - you have advised that this is causing complications for AREC management and operations</li> <li>• No ring-fencing of liability, so it and NZART branches are not protected against creditors and litigants of AREC</li> <li>• NZART employs staff to run AREC, so any personal grievances would be raised with NZART, it is NZART who owes health and safety obligations to the AREC employees etc.</li> <li>• Funds, property and assets for AREC purposes must be held by NZART or a branch of NZART or by AREC Trust - this may be confusing to external stakeholders</li> </ul>

(ii) NZART Branches

Positive	Negative
	<ul style="list-style-type: none"> <li>• You have advised that AREC uses NZART branches, which are not necessarily aligned with where AREC services are needed, and not all NZART branches want AREC groups attached to them</li> <li>• Not protected against creditors and litigants of AREC if, for example, a branch is entering into contracts of behalf of AREC</li> </ul>

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	<ul style="list-style-type: none"> <li>Funds, property and assets for AREC purposes must be held by NZART or a branch of NZART or by AREC Trust - this may be confusing to external stakeholders</li> </ul>
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## (iii) AREC Trust

Positive	Negative
	<ul style="list-style-type: none"> <li>Control of funds between AREC, NZART and AREC Trust indirect and not as transparent,</li> <li>Financial reporting is complex</li> <li>Funds, property and assets for AREC purposes must be held by NZART or a branch of NZART or by AREC Trust - see above</li> <li>Governance is confusing - AREC groups must be attached to NZART branches - AREC Trust has no control</li> </ul>

## (iv) AREC

Positive	Negative
<ul style="list-style-type: none"> <li>Same structure which makes it easy to understand and governance is straightforward</li> <li>No work involved and not costly as no entities to set up</li> <li>Less financial reporting obligations</li> </ul>	<ul style="list-style-type: none"> <li>AREC is not a separate legal entity, so cannot enter into legal contracts and purchase property - see above</li> <li>Control of funds between AREC, NZART and AREC Trust indirect and not as transparent</li> <li>Funds, property and assets for AREC purposes must be held by NZART or a branch of NZART or by AREC Trust - see above</li> <li>AREC does not have complete autonomy over its own affairs - however, this may be a positive for NZART</li> <li>AREC groups must be attached and responsible to NZART branches - this may be confusing to external stakeholders</li> </ul>

We understand that it is your preference that, whichever option you go with, the AREC groups which have been established, stay with their NZART branches.

With options 2 and 3, you could have AREC groups which are subsidiaries of branches of the new AREC entity. With options 4 and 5, you could establish AREC groups under the trust deed / constitution. The positive of this is that people who are not financial members of NZART can volunteer for AREC and AREC groups which are subsidiaries of branches of the new AREC entity (if a company) or established under the trust deed / constitution of the new AREC entity (if a charitable trust or incorporated society).

You have advised that there is a membership sustainability risk with aging reducing membership and not being able to bring new members to AREC as they must be financial members of NZART. This is a barrier to volunteer recruitment (as people may (1) not want to have to pay a fee and (2) may not want to be associated with NZART), which you can overcome with any of options 2 to 5.

(b) *Option 2 - Partially Owned Limited Liability For Profit Company*

The second option is to set up a for profit limited liability company. This is the easiest option to set up.

Companies are a well understood entity, they offer a lot of flexibility and have straightforward governance. The company will at a minimum be required to have one director and one shareholder and the directors would make decisions on behalf of a company.

With this option, NZART would partially own the shares of the company. Therefore, the company would not become a charitable company. As such:

- In the future, the company could raise capital by issuing shares to investors, or to employees (as minority shareholders or via an ESOP / vesting).
- The company would not have charitable tax status (so would not be income tax exempt).
- The company would not have to be registered with Charities Services and adopt a new constitution.

The company could apply any income or capital to NZART, in proportion to NZART's shareholding (i.e. if the charitable trust holds 45% of the company's shares, 45% of the company's profit could be applied to the charitable trust).

We do not think this option would achieve your outcomes as it is not embracing fully the "not for profit" aspect of NZART, but wanted to touch on it briefly.

Most directors' duties are owed to the company, and not the shareholders as such. Directors do, however, owe duties to shareholders in relation to financial reporting, such as to prepare financial statements (as set out in sections 196 - 207ZB of the Companies Act 1993) and disclosure by making available an annual report on the affairs of the company (as set out in sections 208 - 211 of the Companies Act 1993).

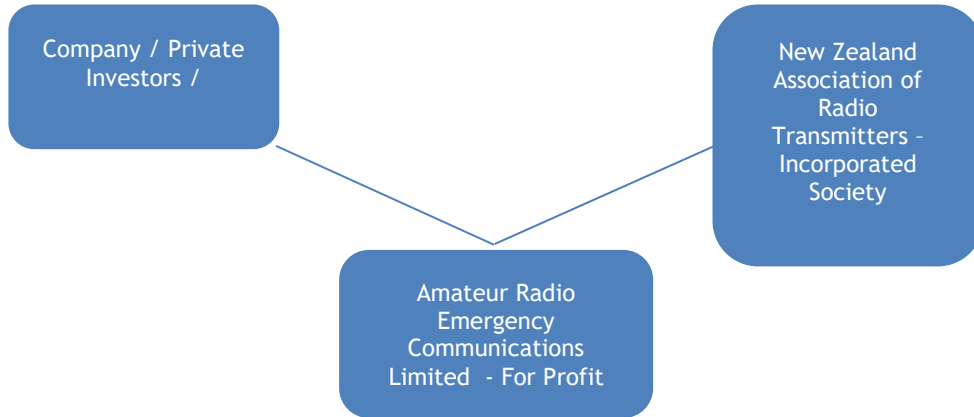
Food for thought:

- Under AREC's constitution, you could reserve directors' powers to NZART as shareholder (which it could exercise at an annual general meeting (or other meeting of shareholder(s)) or by a resolution in lieu of a meeting).



- You could have a clause in AREC’s constitution whereby AREC must prepare a draft budget and business plan for the upcoming accounting period, which must be approved in writing by NZART as shareholder.

This is a simple visual diagram of this legal structure:



(i) **NZART**

Positive	Negative
<ul style="list-style-type: none"> <li>Profits proportional to shareholding (if any) would go to NZART</li> <li>Ringfences NZART’s liability - staff and assets become company’s - mitigates operational risks associated with AREC</li> <li>NZART Council could appoint directors to the board of AREC</li> </ul>	<ul style="list-style-type: none"> <li>NZART would not have much control of to wholly owned charitable company</li> <li>Would have to transfer the NZART employees to the new entity - a consultation process would be needed (as with any transfer to a new legal entity)</li> <li>Assignment of assets etc., from NZART (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> </ul>

(ii) **NZART Branches**

Positive	Negative
<ul style="list-style-type: none"> <li>Ringfences NZART branches’ liability - assets become company’s and mitigates operational risks associated with AREC</li> </ul>	<ul style="list-style-type: none"> <li>Assignment of assets etc., from NZART branches (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> </ul>

(iii) **AREC**

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Positive	Negative
<ul style="list-style-type: none"> <li>• Well understood structure</li> <li>• Governance straightforward</li> <li>• Relatively simple process for set-up</li> <li>• Governed by its own constitution of regulations which must be approved by Executive Council</li> <li>• Staff and assets will be held by company</li> <li>• AREC would become a separate legal entity, which can enter into contracts</li> <li>• Company would not have to register with charities service and adopt a new constitution</li> <li>• Flexibility - company can raise capital and employees can own stock in the company</li> <li>• People who are not NZART members may be able to volunteer cf status quo in which AREC members must be financial members of NZART - you have advised that there is a membership sustainability risk with aging reducing membership and not being able to bring new members to AREC <ul style="list-style-type: none"> <li>○ We would advise that you have the volunteer sign a volunteer agreement to make clear that they are not an employee of the entity</li> </ul> </li> <li>• Have the option of AREC groups being branches or subsidiaries of new entity - governance more straightforward</li> </ul>	<ul style="list-style-type: none"> <li>• Some work and cost involved to set up</li> <li>• May be harder to secure funding from grant-makers or donations as profits do not have to be applied to charitable purposes</li> <li>• AREC would not be income tax exempt</li> <li>• Could be confusion as to who the owners are</li> </ul>

(c) *Option 3 - Wholly Owned Limited Liability Charitable Company*

The third option is for AREC to form a limited liability charitable company.

We understand that if you were to go with this option, you also wish to have AREC Trust merged into the company.

Charitable companies are like for-profit companies in their structure, in that they have directors and shareholders. The difference with a charitable company is that they exist for charitable purposes, not to generate profits for private shareholders. A charitable company can exist to advance charitable purposes pursuant to its constitution and/or can exist to generate profits.

It is possible for either a charitable company or a charitable trust to undertake profit making activities - the key is that the profits go to the charitable purpose(s).

With any charitable entity which is controlled by another charity (so option 3, and maybe options 4 and 5 if NZART did have “control” over the other entity [as defined in the reporting standards](#)), you would be able to apply to the Charities Service to consolidate as a group, so you can submit consolidated performance reports and annual returns. For more, go [here](#). However, we

understand that NZART has a balance date of 31 December and AREC Trust (which you might merge with AREC) has a balance date of 30 June (to align AREC with the Government funding year). To consolidate as a group, all the members of the group must have the same balance date. We would advise you align the balance dates to streamline your financial reporting. If you decide to change NZART's balance date, you will need to change it both with Charities Services and on the Incorporated Societies Register.

The Charitable Trusts Act 1957 and Charities Act 2005 do not impose any duties on directors of charitable companies. Therefore, as with directors of for-profit companies, they must act in good faith and in accordance with the rules, exercise their powers for a proper purpose and with reasonable care, diligence and skill, not cause or allow the business to be carried out in a way that creates a substantial risk of loss etc.

As the charitable trust would hold 100% of the shares of the company, the company would become a (limited liability) charitable company, must register with Charities Services and may have to adopt a new constitution (with its charitable purposes).

The one drawback with charitable companies is that they are not well understood as a structure used for purpose led organisations, being often confused with the typical for-profit company. We can provide more detailed observations on this if it would help as we cover it in our book, [Social Enterprises in New Zealand: A Legal Handbook](#). Therefore, you may have greater demand from a public relations perspective, when communicating to funders or when bidding for government contracts that this entity is, in fact, a charity.

There is a move politically to question whether companies should be charities - if you choose this structure you might get caught in that crossfire.

Another point to consider when deciding whether to merge AREC Trust with the charitable company is whether AREC Trust is likely to receive any bequests.

Some wills provide for a situation where a charity has changed its name or entity type. However, there is a danger that a bequest left to "NZART AREC Emergency Funds Charitable Trust" with its specific registration number would fail as no such organisation will exist if you wind up the society.

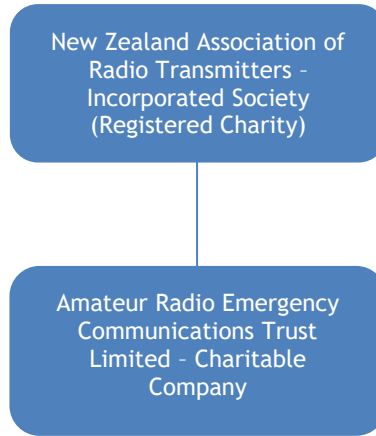
Even with a background section at the beginning of the charitable company's constitution and supporting documents showing the relationship with the trust, we cannot say for certain that the new charitable company will receive all bequests meant for AREC Trust.

If you are concerned about missing out on a bequest, one option is to set up the charitable company and move your main operations over to it, leaving the charitable trust as a "shell" that receives bequests and passes them on to the charitable company.

On a practical note, one thing you can do is contact your supporters to let them know that AREC Trust is changing to a charitable company, and note the wording that should be included in their will. It could even be a good excuse to ramp up such efforts and collect more bequests.

See above our comments in option 2 in relation to directors' duties to shareholders.

This is a simple visual diagram of this legal structure:



(i) **NZART**

Positive	Negative
<ul style="list-style-type: none"> <li>• Ringfences liability</li> <li>• AREC Trust can be merged with the charitable company - more straightforward to govern</li> <li>• Executive Council does not have to approve regulations that govern AREC - not as administratively burdensome</li> <li>• NZART Council could appoint directors to the board of AREC</li> <li>• Can consolidate performance reports and annual returns</li> <li>• If charitable company becomes problematic, it can be wound up</li> </ul>	<ul style="list-style-type: none"> <li>• Work and cost involved in having to restructure AREC Trust - would have to wind up as a trust and possibly novate or assign existing contracts to the new entity - could be very administratively burdensome</li> <li>• With restructure of AREC Trust, need to be aware of bequests as could impact those</li> <li>• Would have to transfer the NZART employees to the new entity - see above</li> <li>• Assignment of assets etc., from NZART (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> </ul>

(ii) **NZART Branches**

Positive	Negative
<ul style="list-style-type: none"> <li>• Ringfences NZART branches' liability - assets become new entity's and mitigates operational risks associated with AREC</li> </ul>	<ul style="list-style-type: none"> <li>• Assignment of assets etc., from NZART branches (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> </ul>

(iii) **AREC**

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Positive	Negative
<ul style="list-style-type: none"> <li>• Governance straightforward</li> <li>• Relatively simple process to set-up a charitable company</li> <li>• Company will be exempt from income tax (but will have to pay GST on certain types of income)</li> <li>• Charitable company’s profits can be applied to the charitable trust’s purposes</li> <li>• AREC Trust can be merged with company</li> <li>• Governed by its own constitution of regulations approved by Executive Council</li> <li>• Staff and assets held by company</li> <li>• Those involved can be paid market rate salaries - rates should be confirmed by independent market evidence</li> <li>• People who are not NZART members may be able to volunteer - see above</li> <li>• Have the option of AREC groups being branches or subsidiaries of new entity - governance more straightforward</li> </ul>	<ul style="list-style-type: none"> <li>• Not a well understood structure and can be confused with a for-profit company - however, it is a somewhat straightforward and easy structure to explain</li> <li>• May make applying for funding and grants difficult</li> <li>• Work and cost involved to set up</li> <li>• No individuals / entities are entitled to receive private dividend - however, this may be a positive</li> <li>• Company will be wholly owned by charitable trust, so will be charitable company and cannot raise capital via issuing shares</li> <li>• Public perceptions of charities - however, this could be a positive</li> </ul>

(d) *Option 4 - Charitable Trust*

The fourth option is to set AREC up as a charitable trust, which would sit alongside NZART. AREC Trust could be merged with this charitable trust - see our comments in option 3 regarding merging.

Charitable trusts are well understood in New Zealand, being the preferred structure for charities. They offer a flexible structure that is designed for achieving charitable purposes. As a registered charity, the New Zealand entity would be exempt from tax and could give tax deductible receipts to donors. The charitable trust could, like the charitable company, enter into agreements with and apply 25% of its funds for charitable purposes to NZART. However, no individuals can gain personally, so AREC must be purely purpose driven. Trustees of the charitable trust must perform their duties having regard to the context and objectives of the trust. The law regarding trustee duties is attached as Schedule 1.

This is a simple visual diagram of this legal structure:



Positive	Negative
<ul style="list-style-type: none"> <li>• Liability ringfenced</li> </ul>	<ul style="list-style-type: none"> <li>• NZART would have less control cf to a charitable company - would want to</li> </ul>

<ul style="list-style-type: none"> <li>• AREC’s assets and staff under new charitable trust governed by trustees</li> <li>• No work involved in having to restructure AREC Trust</li> <li>• Can consolidate performance reports and annual returns</li> </ul>	<p>set out in AREC trust deed how AREC charitable trust relates with NZART - NZART could build in Kaitiaki clauses - NZART would be the Kaitiaki as the conscience of AREC - for example, appointments and removals of AREC trustees must be approved by NZART as the Kaitiaki</p> <ul style="list-style-type: none"> <li>• Assignment of assets etc., from NZART (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> <li>• Would have to transfer the NZART employees to the new entity - see above</li> </ul>
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(ii) NZART Branches

Positive	Negative
<ul style="list-style-type: none"> <li>• Ringfences NZART branches’ liability - assets become new entity’s and mitigates operational risks associated with AREC</li> </ul>	<ul style="list-style-type: none"> <li>• Assignment of assets etc., from NZART branches (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> </ul>

(iii) AREC

Positive	Negative
<ul style="list-style-type: none"> <li>• Well understood structure for purpose led organisations</li> <li>• Governance straightforward (cf to incorporated societies, which have democratic processes)</li> <li>• Relatively easy process to set up</li> <li>• Charitable trust will be exempt from income tax (but will have to pay GST on certain types of income)</li> <li>• Charitable trust can give tax deductible receipts to donors</li> <li>• AREC becomes its own entity, so can enter into contracts</li> <li>• Can employ staff</li> <li>• Property and assets can be held by charitable trust / by trustees on behalf of the charitable trust</li> </ul>	<ul style="list-style-type: none"> <li>• NZART would not have as much control cf to wholly owned charitable company</li> <li>• Cannot raise capital via issuing shares cf to a partially owned company</li> <li>• Would need to set out in its trust deed how it relates with NZART and existing AREC Trust</li> <li>• Public perceptions of charities - however, could be a positive</li> <li>• Trustees can be personally liable cf a limited liability company, which does have that separation</li> </ul>

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<ul style="list-style-type: none"> <li>• Those involved can be paid market rate salaries - rates should be confirmed by independent market evidence</li> <li>• People who are not NZART members may be able to volunteer - see above</li> <li>• AREC groups could be established by trust deed - governance more straightforward</li> </ul>	
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(e) *Option 5 - Incorporated Society*

The fifth option is to have AREC become an incorporated society (with charitable status). AREC Trust could be merged with this incorporated society - see our comments in option 3 regarding merging.

With an incorporated society, you could have the same officers on both AREC and NZART committees or include a clause in its constitution about its relationship to NZART.

As you will be aware, an incorporated society is a membership based structure with requirements for governance, even more so with the introduction of the Incorporated Societies Act 2022.

A fundamental question you should be asking is this: does the organisation need to be a membership based volunteer led organisation going forward? It is important to ask what would be the best structure to suit the important work that is done by AREC and this may not be a legal entity type which is a volunteer led, member driven organisation, which an incorporated society is.

In our experience, there are some other key factors that need to be considered when you are thinking about incorporated societies:

- **Elections:** Having yearly elections introduces complexity because the process of choosing governance can become politicised. Members are given significant rights through elections to provide ongoing input to those in governance. However, we have heard of an entity which had many new members the day before an AGM - those new members then voted out the old executive, brought in new people and changed the direction for that entity. So, there are dangers that can result from democracy of this type.
- **Flexibility for future:** Because of the election cycle and change of governance there may be less long term planning or ability to implement strategy with this structure, when compared to other more stable entity types like charitable trusts. As a general rule then, another entity type may provide more flexibility in the future than an incorporated society structure does today.

NZART branches could become members of the AREC incorporated society, so there is that relationship between AREC and the AREC groups which were established and are attached to NZART branches - funds may be able to move more freely between the entities.

This is a simple visual diagram of this legal structure:



## (i) NZART

Positive	Negative
<ul style="list-style-type: none"> <li>• Familiar structure</li> <li>• Liability ringfenced</li> </ul>	<ul style="list-style-type: none"> <li>• Less control over AREC</li> <li>• Relationship between NZART and AREC difficult to formalise cf to NZART owning a charitable company</li> <li>• Assignment of assets etc., from NZART (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> <li>• Would have to transfer the NZART employees to the new entity - see above</li> </ul>

## (ii) NZART Branches

Positive	Negative
<ul style="list-style-type: none"> <li>• Ringfences NZART branches' liability - assets become company's and mitigates operational risks associated with AREC</li> </ul>	<ul style="list-style-type: none"> <li>• Assignment of assets etc., from NZART branches (held on behalf of AREC) to the new entity could have potential GST and taxation consequences as would have monetary value</li> </ul>

## (iii) AREC

Positive	Negative
<ul style="list-style-type: none"> <li>• AREC becomes a separate legal entity</li> <li>• Members given significant rights - can be both a positive and negative</li> <li>• Separate legal status (if members act honestly, prudently, within the society's charitable purposes, and not for personal gain) cf a charitable trust where trustees can be personally liable</li> <li>• Can have charitable tax status and give tax deductible receipts to donors (if registered as a charity)</li> </ul>	<ul style="list-style-type: none"> <li>• Relatively complex structure</li> <li>• Members have significant rights</li> <li>• Membership based structure - which may not be fit for purpose</li> <li>• Less flexibility for future</li> <li>• Governance can become politicised as an incorporated society has democratic purposes</li> </ul>



<ul style="list-style-type: none"> <li>• AREC groups could be established by constitution - governance more straightforward</li> </ul>	
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## 5. Next Steps

The different options outlined above each carry their own advantages and disadvantages. You may choose one option or alternatively pursue an amalgamated option (e.g., a company owned by a charitable trust) which brings together the attractive features from the different options we have presented.

With options 2, 3, 4 and 5 options, there will be a transition between entities, and as such there will be due diligence to be done - for example, tax, employment, insurance etc - so that it is done smoothly. These four options ringfence NZART's liability as they will be separate legal entities. The principle of separate legal personality is enshrined in legislation and is a principle to be respected (*Lewis Holdings Ltd v Steel & Tube Holdings Ltd* [2014] NZHC 3311). However, it is important to note there are exceptions to this principle.

If you would like to discuss our comments on the proposed options in more detail, we would be happy to arrange another meeting. Alternatively, if you have comments or questions, you would like us to address in this memo that we have not covered, we would be happy to update the memo to cover those points. Once you are ready to proceed after further consultation, we can also assist with setting up either of the above presented structures.

Part of our core work is to help our clients set up legal structures to facilitate their work and mission, so we would also be very happy to help in implementing any of the structures we discussed above by preparing the necessary documents and agreements.

### Limitations On Memo

Parry Field Lawyers accepts no duty of care or other liability in respect of this memo to any person other than the addressee, nor in respect to any matter outside our scope or the limitations set out in this memo.

The fact that we have made an assumption in this memo does not imply that we have made any enquiry to verify any assumption. Unless otherwise stated in this memo, the persons involved in the production of this memo are not aware of any circumstance which would affect the correctness of any assumption.

We have not considered any commercial, technical, environmental, financial or operational matters the financial impact or taxation consequences of any proposed transaction, nor formed any view as to its prudence, because these matters are outside our specialist expertise and other advisors have been assigned responsibility for them.

Parry Field Lawyers is under no obligation to update this memo for any circumstances, matters or things arising or occurring after the date of this memo, however, we would be pleased to update this memo based on information obtained after the date of this memo / following any discussions you may have, if requested to do so.

This memo is based on, and deals only with, the laws of New Zealand as at 12.00pm (New Zealand time) on the date of this memo.

Any opinions expressed with respect to agreements or transactions that may be subject to or governed by the laws of any other jurisdiction will need to be verified and confirmed by solicitors competent to advise in those jurisdictions.

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## Schedule 1

The Trusts Act 2019 set out mandatory duties in sections 23 to 27 and default duties in sections 29 to 38.

A trustee must perform such duties having regard to the context and objectives of the trust.<sup>1</sup>

Trustees' mandatory duties are as follows:

- (a) The duty to know the terms of the trust;
- (b) The duty to act in accordance with the terms of the trust;
- (c) The duty to act honestly and in good faith;
- (d) The duty to act for the benefit of beneficiaries or to further the permitted purpose of the trust; and
- (e) The duty to exercise their powers for a proper purpose.

Trustees' default duties are as follows, however, they can be modified or excluded by the terms of the trust (and we do so in our format we use for charitable trusts):

- (a) The general duty of care to exercise the care and skill that is reasonable in the circumstances;
- (b) The duty to invest prudently;
- (c) The duty not to exercise power for own benefit;
- (d) The duty to actively and regularly consider exercise of power;
- (e) The duty not to bind or commit trustees to future exercise of discretion;
- (f) The duty to avoid conflict of interest;
- (g) The duty of impartiality;
- (h) The duty not to profit;
- (i) The duty to act for no reward; and
- (j) The duty to act unanimously.

The Trusts Act 2019 sets out the documents that the trustees must hold in section 45, which are as follows:

- (a) Records of trust property, identifying the assets and liabilities of the trust, together with income and expenses;
- (b) Record of trustee decisions;

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<sup>1</sup> Trusts Act 2019, s 21.

- (c) Any written contracts entered into by the trustees;
- (d) Any accounting records and financial statements prepared for the trust;
- (e) Any documents which make changes to the trustees;
- (f) Any letter or memorandum of wishes from the settlor; and
- (g) Any other documents necessary for the administration of the trust.

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