Parry Field Lawyers

Parry Field Lawyers Limited
Level 1, 60 Cashel Street, Christchurch 8013
PO Box 744, Christchurch 8140
New Zealand

T: +64 3 348 8480
F: +64 3 348 6305
W: parryfield.com

Summary

To:	Don Robertson, CEO
From:	Steven Moe / Rebecca Carruthers
Date:	2 November 2023
Client	Amateur Radio Emergency Communications
Subject:	Structure Options

DRAFT

1. Future Structure Options: Summary

In our memo, 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.

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 in the memo).

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 cf to 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 in the memo).

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 in the memo).