

Creating and running a business

“Screw it, let’s do it!”

Richard Branson

In his own direct and inimitable way, Sir Richard Branson spurred on thousands (if not millions) of entrepreneurs with these famous words, which also became the title of his bestselling book on life, business and entrepreneurship. If you’re thinking about setting up your own business too, you’ve no doubt had your own “let’s do it” moment, and you’re ready to get stuck in and make it happen.

However, if you’re like many entrepreneurs, you may be wondering where to start. We’ve prepared this brief guide to offer you some background information on the *legal* considerations of starting your own business. Whether you’re creating your own construction company, selling homemade knitted goods, or building software that will change the world, it’s good to have your ducks in a row with the legal stuff in order to move forward from the best possible starting point.

Do I need a company?

Let’s say you’ve got a great idea or business plan and you’re working towards getting it off the ground as a business. You may even have customers and some money coming in. Then someone casually asks you if you’ve incorporated a company yet and you panic, wondering: “Wait, do I *need* to incorporate a company?” Or perhaps, “What does incorporating a company even mean?” “If I have a business, doesn’t that mean I have a company?”

Firstly, having a business is not the same as having a company. In New Zealand, incorporating a company means creating an entirely new legal structure. A company is run by directors and has shareholders, who own a stake of the company. There are formal rules about creating a company and you must go about it the right way, registering it with the Companies Office of New Zealand and keeping up with ongoing compliance requirements.

From a legal perspective, you do not *have to* incorporate a company in order to run a business. Creating a company is one option, and if you go down this path, your business will be run under the legal structure of a company. However, other options include running your business as a sole trader, or creating a partnership from which you can run your business. Here’s a bit more information on each option.

Sole Trader

If you run your business as a sole trader, you will be simply operating a business as yourself. This means that your business affairs will not be too separate from your personal affairs. If you woke up one day and started a business, without doing anything else, you would most likely be operating as a sole trader.

- The **benefit** to this arrangement is that you don't have to go through any formalities (read: heaps of paperwork), which explains why a lot of businesses start out as sole traders. It is inexpensive, low administration and is a relatively straightforward way to start a business. As the founder, you're also in sole control of the business and all of your profits are yours to take.
- The **downside**, however, is that when your personal and business affairs are so intertwined, you will be personally vulnerable to debts and liabilities that arise as part of operating the business. For example, you can be sued by a customer if they aren't happy with your work. This structure also means that it can be harder to expand and attract investment one day.

Partnership

Another option is to run your business as a partnership, meaning that you partner up with others and make an agreement to share the profits and losses of the business. Partnerships aren't like companies, you don't formally register them and they are less of a separate legal entity, more of a legal arrangement. They are relatively common when there are people who want to share resources, or offer a range of services. Law firms and accountancy firms are often partnerships, for example.

- Some of the **benefits** of a partnership include that you are able to share responsibility and costs of the business with your partners. It may also allow for specialisation between different partners and therefore a broadening of expertise that is offered.
- The **downside** is that, as a partner, you have unlimited liability which can be risky for your personal assets. Related to this is the issue that, if one of your partners defaults (i.e., they can't pay their fair share), you will be responsible for picking up the slack and covering their debt. We should note that there is the possibility of creating a limited liability partnership, which gets around some of these downsides, but can be complicated in its structure and roles.

Company

Although we said that a company is not *necessary* or *required* to run a business, in reality, a company is the most common choice made by entrepreneurs and business owners in New Zealand. Why's that, you ask? Here are a few of the top reasons (although, there may be many more depending on your circumstances).

- **Separate entity:** By creating a company, you can register an entirely separate legal entity from your personal self. This can be more efficient if you would like to avoid mixing your money, assets and liabilities in with those of the company and, in the long run, means that your business may live on even when you step away from it.
- **Limited liability:** It is generally agreed that the biggest benefit of company is that this separate entity that you create is a "limited liability" entity, which offers a certain degree of personal protection for you as a shareholder and founder. By creating an entirely separate legal structure, the liability of each shareholder is limited to the value of their shares, rather than extending out to their personal assets.

- **Shareholders:** You're able to share ownership of the company with others in an efficient way, which is through the division of shares.
- **Cheap and easy:** Creating a company in New Zealand is a relatively cheap and easy process due to the fact that the Companies Office has embraced an online system.
- **Credibility and investment opportunities:** Having a company can add credibility and professionalism to your business for customers, potential employees and other people you deal with. Importantly, if you're looking to attract investment, having a company be a safer bet for potential investors as they like to see a clear shareholding structure and the protection of a limited liability regime.

For all of these benefits, however, it is important to point out that a company isn't the right option for everyone. There are also downsides that you need to know about, including, for example, that you'll be required to comply with the law contained in the Companies Act 1993 (we'll call this the Companies Act from now on), which involves various administrative duties like providing regular updates to the Companies Office and keeping your public records accurate. There are also an extra set of responsibilities and duties you must comply with if you're a director of a company. These are significantly greater than if you were operating as a sole trader or in a partnership.

Which one do I choose?

Working out which structure is best for you really depends on your circumstances, the nature and size of your business and your goals going forward. It's worth talking to your lawyer about each option, and in particular, gathering information about the practical consequences of each one on a day-to-day basis, including, for example, how tax and liability works and what your ongoing administrative and other duties are.

Setting Up Your Very Own Company

Because companies are the most common structure we help clients with, and because they involve a bit of administration to get off the ground, here's a little information on the process of creating your own company. We should point out here that, although it is entirely possible for you to incorporate a company by yourself, your lawyer can help you work through the process if you would like advice specific to your situation. In particular, seeing a lawyer will help you structure your business affairs from a big picture perspective and help get you started on the right foot. In any case, whether it's you or your lawyer that actually incorporates the company, here are the steps that it takes.

Step One: Reserve your company name	<p>This is your first consideration with setting up a company. What would you like it to be called? Once you know, it's a good idea to go to the Companies Office website and search that name to see if anyone else has already taken it. There are also some restrictions on which names you can use, for example, you can't choose a name that is offensive or contain certain prohibited words.</p> <p>Once you've decided on a name, you or your lawyer can apply online to the Registrar of Companies for this name by paying a fee of \$10.22 and</p>
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	submitting the name. The Companies Office will process your application and let you know whether it was successful or not.
Step Two: Apply for incorporation	<p>Once the Registrar has approved your name and provided you with a name reservation number, you have 20 working days to incorporate a company using this name. (In some circumstances, you can apply to have this deadline extended if you're running behind.)</p> <p>To incorporate the company, you or your lawyer will need to apply online and provide the following information:</p> <ul style="list-style-type: none"> • Name of the company and the name reservation number (provided to you with confirmation that your name reservation was accepted) • Your full legal name and residential address • Full name and residential address of each director and each shareholder <p>The company must have at least one director who lives in New Zealand (or lives in Australia and is a director of an Australian company). To qualify as a director, you can't be under 18 years old, an undischarged bankrupt or prohibited from being a director under any legal provisions.</p> <p>For each director, you must provide their full legal name, date and place of birth and residential address.</p> <p>For each shareholder, you must provide their full legal name and residential address. Shareholders can also be New Zealand or overseas companies.</p> <ul style="list-style-type: none"> • The number of shares to be issued to each shareholder <p>The company must have at least one share and one shareholder.</p> <ul style="list-style-type: none"> • The company's registered office, address for service and an address for communication <p>The registered office and address for service must be physical addresses, that is, they can't be PO Box numbers. However, the address for communication can be a PO Box if you like.</p>
	<ul style="list-style-type: none"> • A constitution <p>You can incorporate a company with or without a constitution, which is basically a document that sets out the rules of how the</p>

	company will be run. If you don't upload your own constitution, the company will be run according to the laws in the Companies Act. If you would like to have your own constitution, we highly recommend talking to your lawyer about this and getting them to help you prepare it.
Step Three: Tax information	The application process allows you to register for IRD and GST numbers for the company, if you like. At the same time, you can also register to be an employer if this is relevant to your circumstances. Before making this decision, however, it's worth finding out a bit more information from your accountant or lawyer and getting their advice on what you should be applying for.
Step Four: Provide consents	The shareholders and directors of a company must give their written consent to these roles by signing documents and uploading them to the Companies Office.
Step Five: Pay Fee	In order to submit your application, you must pay a fee to the Companies Office. An application to incorporate a company costs \$150.
Step Six: Provide extra information	In certain cases, the Companies Office will ask for further information before processing the application. For example, the Companies Office may require proof that the directors live in New Zealand.
Step Seven: Confirmation	When the Companies Office is happy that the documents are in order, the company will be incorporated! You'll receive a certificate that confirms this for you.

The Companies Office website is a really useful resource for information on this process. You can access further information on each step of the incorporation journey at business.govt.nz/companies.

You have a company! What now?

Documents and admin

It's all too common that companies are incorporated and then forgotten. However, after incorporation occurs, you're required to understand, and get your head around, the ongoing commitments that keep your company legal and well organised. Between the legal requirements of the Companies Act and administrative good practice, here's a list of documents/registers that you should keep readily accessible and up to date:

Key documents	<ul style="list-style-type: none"> • Certificate of incorporation from the Companies Office • Constitution (if you have one) • Shareholders' Agreement (if you have one) setting out how the shareholders agree to work together and deal with their shares • Consent forms of directors and shareholders when company was
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	incorporated
Shares	<ul style="list-style-type: none"> Comprehensive share register, which is detailed list of every shareholder, their contact details, the type and number of shares that they have in the company and all relevant dates like the date they acquired the shares and the date they disposed of them. This should also include information on any restrictions that limit shareholders from transferring their shares. (Note that your share register is separate to the shareholder information on the Companies Office website, although that must be kept up to date as well)
Directors	<ul style="list-style-type: none"> Comprehensive register of the directors, together with their contact details and relevant dates (like the date they became a director and the date they stopped being a director).
Meetings and communications	<ul style="list-style-type: none"> Written record (referred to as a “minute”) of every meeting of the directors and every meeting of shareholders. These minutes should record the date, the topics covered in the meeting and who was present. Copies of all communications between the company and the shareholders must be kept by the company.
Decisions	<ul style="list-style-type: none"> Written record (referred to as a “resolution”) of every decision that the directors have made, and every decision that the shareholders have made. Each resolution must be signed by all directors/shareholders that voted in favour of that particular decision.
Financial Statements	<ul style="list-style-type: none"> Copies of the financial statements for the company (these must comply with the requirements in the Companies Act). Copies of the accounting records for the company (these must also comply with the requirements contained in the Companies Act).
Other	<ul style="list-style-type: none"> The Companies Act also makes companies to keep various other registers for specific matters. For example, there must be a Directors’ interests register, which records any interests that the Directors may have that could affect their ability to act in the best interests of the company (e.g., a director having shares in other companies in the same industry). It’s a good idea to get advice from your lawyer about all of your ongoing requirements and how they affect you and your administration of the company. This will help avoid any complications or difficulties that down the road.

Keeping the Companies Office in the loop

On top of the documents you need to hold and keep organised, you also have an ongoing obligation to file certain information with the Companies Office. Your filing requirements will depend on your company so we recommend getting advice from your lawyer on what you need to do. However, some general requirements include the following:

- **Updates:** You'll need to update the Companies Office if there are changes to the company's information, such as a change in the company's address, any changes to the company's constitution or any changes to the information held for the directors, like their address or legal name.
- **Annual return:** You need to file a document called an annual return every year that your company is incorporated, except the first year. Helpfully, the Companies Office will remind you when this is coming up and it's a good idea to file it on time. If you don't, the company risks being removed from the register, which is a pain. Although it sounds a little like a financial document, an annual return actually just asks you to confirm certain information about the company such as shareholdings, director information, shareholder information and company addresses. It's relatively easy to file this online and it costs \$45.00 to register it each year with the Companies Office.

Directors: Stay compliant

Directors are the people who effectively manage the day-to-day business of the company and make many of the tough decisions. In making decisions, however, the law imposes legal duties on directors to act in a certain way for the benefit of the company and for the benefit of the people who own shares in the company. This is a very important part of running a company and it's crucial that you talk to your lawyer about your duties when you sign up to be a director of a company as any breach of your duties can have serious consequences for the director, personally, and the company.

Expand Your Team

As your business grows, you may think about bringing on employees or consultants to work for you and support the goals of the business. If you're at this stage, we recommend that you see your lawyer so they can help you prepare suitable agreements for future employees and contractors. Whether you hire employees or engage contractors, you'll have a number of very important legal responsibilities to comply with - from dealing correctly with ACC and Kiwisaver requirements, to the way you hire and fire staff. It's worth your time and money to get professional advice on this one so you don't run into problems. For your own reading and background, we also suggest taking a look through the materials available at: www.employment.govt.nz

As an employer and business owner, you will also be subject to important health and safety laws that require you to provide a safe workplace to your employees and people who visit your workplace. The legal regime that governs this aspect of running a business is a detailed one that imposes a number of different responsibilities (and big consequences if those responsibilities are breached). We suggest that you ask your lawyer about your responsibilities and do a bit of your own reading by looking at the resources available at: www.business.govt.nz/worksafe.

Tax and Finances (Ugh)

An important consideration for any business is its tax obligations and financial recording. We recommend chatting to the experts, once again, about your tax position, which can be a minefield if it gets out of hand. Talk to your accountant about the best ways to record your finances, which software and systems to use for bookkeeping and accounting, how to manage your company's tax obligations, and, most importantly, how to stay on top of all of your tax filing

requirements. Because every business will be slightly different, when it comes to tax, individualised advice really is the way to go to make sure that you're ticking all the right boxes.

If you're looking to read a bit more about this aspect of running a business, the Inland Revenue Department has some good resources over at their Businesses and Employers page: www.ird.govt.nz/businesses.

You'll also want to think about having a chat to your bank about signing up for a company bank account (and perhaps credit cards and/or internet banking).

Protect your Intellectual Property

After doing all the hard work to come up with a business idea, you want to make sure that this and the other creative products of your business are protected so that others can't steal them or use them to their advantage. We use the phrase "intellectual property" to refer to this very important aspect of your business, and it basically covers your ideas, services, products, inventions, designs, branding, name, logo and creative works (among other things). For any new business, it's wise to think about protecting your intellectual property right from the start.

Certain intellectual property can be registered with the Intellectual Property Office of New Zealand, including:

- **Registered trademarks** (e.g., a brand name or logo): You can distinguish your goods or services by using a trademark.
- **Designs** (e.g., a product with a distinctive appearance): Any visual design can be protected if it is a new or original design.
- **Patents** (e.g., a new product, process or material that appears to be a new invention): A patent gives you the legal right to stop others from using, making or selling something you invented.
- **Plant variety types** (e.g., developing a new type of apple): You can protect your exclusive right to produce and sell this variety.

Other types of intellectual property rights can't be registered but that doesn't mean that they aren't protected by the law. For example, copyright protects your original creative work without the need for registration.

Because of its importance for your business, we recommend that you consider protecting your intellectual property as soon as possible with the help of your lawyer, who can help you go through the various options available to you. New Zealand's Intellectual Property office is also a great source of background information: www.iponz.govt.nz

Safety and authorisations

Depending on the type of business you're running, you may need to think about going through the right steps to lock in all of the authorisations, licences and/or permits that allow you to do your business. For example, if you're setting up an insurance business, you'll need to make sure that you've organised and locked in a licence to provide insurance services to the public from the Reserve Bank. There's a great tool to help you with this component of running a business at: www.business.govt.nz/compliancematters.

Other Stuff

Although we've covered many of the main *legal* components of setting up a business, there are many other things that are useful to consider when setting up a business - and, guess what, they all depend on what type of business you're running! However, here's a few brief bullet points for your consideration:

<ul style="list-style-type: none">• Money: Funding, grants, investors	<ul style="list-style-type: none">• Suppliers: Organising and entering into contracts with suppliers
<ul style="list-style-type: none">• Payments: Infrastructure like EFTPOS facilities, invoicing, receipts	<ul style="list-style-type: none">• Online presence: Website, social media, accounts
<ul style="list-style-type: none">• Networks: Joining professional organisations	<ul style="list-style-type: none">• Nuts and bolts: Stationary, office supplies, furniture
<ul style="list-style-type: none">• Premises: See our guide to Leases)	<ul style="list-style-type: none">• Marketing: Branding, business cards, advertising
<ul style="list-style-type: none">• Insurance	<ul style="list-style-type: none">• Professional advisors

A few notes to end with ...

We put together this guide as a very general overview to the process of setting up a business, and, because we're lawyers, we've come at this from a legal perspective. We acknowledge that setting up a business involves much more than just understanding the legal components, but we do believe that all new businesses will benefit greatly from having a stable and solid legal understanding and foundation.

Even within this realm, however, there are innumerable factors that may become relevant or crop up in any given situation that weren't covered here. We can't talk about them all in one guide, so, for the very best guidance and support, we recommend you give us a call so we can work together to make sure you're looked after, taking into account all of the specific circumstances of your new business.

Have a question about setting up your own business? Or perhaps you just fancy a chat about how this information applies to your situation? If so, we would love to help. You can give us a call or send us an email for more information.

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