

Registration decision: Ginkgo Green NZ Limited

The facts

1. Ginkgo Green NZ Limited (“the Applicant”) was incorporated under the *Companies Act 1993* on 19 June 2003.
2. The Applicant was registered by the Charities Commission (“the Commission”) on 7 November 2008 with registration backdated to 30 June 2008. On 28 February 2011 the Applicant was removed from the Charities Register for failing to file its 2010 annual return and accompanying financial statements.
3. The Applicant re-applied to the Commission for registration as a charitable entity on 30 March 2011.
4. Clause 41.2 of the Applicant’s constitution sets out the purposes of the company as:

41.2 Sole Object

The sole object for which the Company is established is to operate in such manner as is consistent with the charitable purposes in New Zealand of Disability Training Services H.B. Trust Board, a Charitable Trust incorporated under the Charitable Trusts Act 1957 and is registered as a charitable entity under the Charities Act 2005 and to hold the capital and income of the Company as the Board shall consider to be in the interests of Disability Training Services H.B. Trust Board.

5. Disability Training Services H.B. Trust Board (CC21864) was registered by the Commission on 17 March 2008. Its purposes are set out in clause 3 of its deed of trust:

3. PURPOSES

The purposes of the Trust are as follows:

- (a) *To establish operate and maintain the place of business and training where people with disabilities may find employment and employment training and receive vocational guidance.*
- (b) *To foster the welfare of people with disabilities.*
- (c) *To use any profits or surpluses to promote and expand the purposes of the Trust.*
- (d) *To enrol members and seek the enrolment or assistance of such persons who are interested in fostering and furthering the general purposes of the Trust.*

6. The Applicant supplied a cover letter dated 28 March 2011 with the application, that stated:

You will note from the annual return file that the company had no assets or liabilities as at 30 June 2010 nor received any income or paid any expenditure to 30 June 2010.

As previously advised the charitable company was formed sometime ago to preserve the name until such time as it commenced operations. It still has not yet commenced operations, but the intention still remains to do so in the future. In the meantime it is important to preserve the company name.

As a result, there are no financial statements that have been prepared for Ginkgo Green NZ Limited to 30 June 2010.

7. The application was analysed and on 2 May 2011, the Commission sent the Applicant a notice that may lead to a decline on the basis that as the Applicant has yet to commence operations, it is not an entity "established and maintained exclusively for charitable purposes" as required by section 13(1)(b)(i) of the *Charities Act 2005*.

8. On 1 June 2011, the Applicant responded to the notice that may lead to a decline. The Applicant stated:

1. *As you will be aware, under Section 13(1) an entity qualifies for registration if it meets the requirements set out in subsections (a) - (d), inclusive.*
2. *The requirements set out in Section 13(1)(a) do not apply in this case because Ginkgo Green NZ Limited is a Company, and not a Trust.*
3. *Therefore, Ginkgo Green NZ Limited qualifies for registration if it satisfies the conditions set out in subsections (b) - (d), inclusive.*
4. *Section 13(1)(b) requires that an institution is:
(a) Established and maintained exclusively for charitable purposes;
and
(b) Is not carried on for private pecuniary profit.*
5. *The Commission has not raised any concerns regarding the private pecuniary profit head, and accordingly we understand the Commission is satisfied on this point.*
6. *It is to be noted that Section 13(1)(b)(i) requires an entity be "established and maintained exclusively for charitable purposes.*
7. *The Commission was not satisfied that this head was met because "the Company has yet to commence operations".*
8. *It is our submission that Section 13(1)(b)(i) does not require an institution to commence operations; rather, it requires the institution to be "established and maintained" exclusively for charitable purposes. We would suggest that the requirement that the institution "commence operations" is a "gloss" placed on the wording of Section 13(1)(b)(i) that is not justified.*

9. *Ginkgo Green NZ Limited has clearly been established.*
10. *It is equally clear that the Company has been "maintained" and that it had regularly filed Annual Returns with the Companies Office and has (but for the omission of filing the most Annual Return) complied with the requirements of the Act.*
11. *The Company has also "maintained" its strategy of preserving the Company name so that it is available when the Company commences its operations.*
12. *It is therefore submitted that the Company satisfies the requirements of Section 13(1)(b).*
13. *As the entity is incorporated under the Companies Act 1993, then the name of the Company complies with Section 15.*
14. *We understand no objections have been raised in respect of the Company's Director and accordingly the requirements of Section 13(1)(d) are satisfied.*
15. *We therefore submit that as all the requirements set out in Section 13(1)(b)-(d), inclusive are satisfied, Ginkgo Green NZ Limited qualifies for registration as a charitable entity.*
16. *It is noted that Section 14 expands on the requirements of Section 13(1)(a). As discussed, Section 13(1)(a) does not apply to Ginkgo Green NZ Limited, as it is a Company, and not a Trust. Therefore reference to Section 14 is not relevant to the Commission's decision.*

We therefore submit that as the requirements set out in Section 13(1) as they are relevant to Ginkgo Green NZ Limited are met, Ginkgo Green NZ Limited is qualified for registration as a charitable entity.

The issues

9. The issue the Commission must consider is whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* ("*the Act*"). In this case, the key issue for consideration is whether the Applicant is a society or institution established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act.

The law on charitable purposes

10. Under section 13(1)(b) of the Act a society or institution must be established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual.

11. Section 5(1) of the Act states:
- ...charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.*
12. In addition to being within one of the categories of charitable purpose, to be charitable at law, a purpose must also be for the public benefit.¹ This means that the purpose must be directed to benefit the public or a sufficient section of the public.
13. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not prevent qualification for registration if it is merely ancillary to a charitable purpose.
14. In considering an application, section 18(3)(a) of the Act requires the Commission to have regard to:
- i) the activities of the entity at the time at which the application was made; and*
 - ii) the proposed activities of the entity; and*
 - iii) any other information that it considers is relevant.*

Charities Commission's analysis

15. The Commission has assessed the Applicant's purposes set out in clause 41.2 of its constitution and the purposes set out in clause 3 of the Disability Training Services H.B. Trust Board's deed of trust. The Commission concludes that if the Applicant was undertaking the purposes set out in its rules, this would be charitable under the relief of poverty.

Established and maintained for exclusively charitable purposes?

16. Section 13(1)(b) of the Act specifies that an entity qualifies for registration as a charitable entity if:
- (b) in the case of a society or an institution, the society or institution—*
 - (i) is established and maintained exclusively for charitable purposes; and*
 - (ii) is not carried on for the private pecuniary profit of any individual;*

¹ Accepted as common ground in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, para [32].

17. In his letter of 28 March 2011, the Applicant's solicitor states:

*You will note from the annual return file that the company had no assets, or liabilities as at 30 June 2010 nor received any income or paid any expenditure to 30 June 2010. As previously advised **the charitable company was formed sometime ago to preserve the name until such time as it commenced operations. It still has not yet commenced operations**, but the intention still remains to do so in the future. In the meantime it is important to preserve the company name.*
[Emphasis added]

18. In his letter of 1 June 2011, the Applicant's solicitor states:

8. *It is our submission that Section 13(1)(b)(i) does not require an institution to commence operations; rather, it requires the institution to be "established and maintained" exclusively for charitable purposes. We would suggest that the requirement that the institution "commence operations" is a "gloss" placed on the wording of Section 13(1)(b)(i) that is not justified.*

9. *Ginkgo Green NZ Limited has clearly been established.*

10. *It is equally clear that the Company has been "maintained" and that it had regularly filed Annual Returns with the Companies Office and has (but for the omission of filing the most Annual Return) complied with the requirements of the Act.*

11. *The Company has also "maintained" its strategy of preserving the Company name so that it is available when the Company commences its operations.*

12. *It is therefore submitted that the Company satisfies the requirements of Section 13(1)(b).*

19. The Commission considers that an Applicant that has no assets or liabilities, has not received any income or paid any expenditure, and has not undertaken any activities since its establishment in 2003, is not being "maintained exclusively for charitable purposes".

20. An intention to commence operations at some undefined time in the future does not satisfy the Commission that the Applicant currently meets the requirements of section 13(b)(i) of the Act.

21. The Commission is not of the opinion that submitting annual returns to the Companies Office and preserving a company name amounts to "maintaining" an entity for exclusively charitable purposes.

22. The Commission notes that if a company is already registered as a legal entity under the Companies Act 1993, registration under the Charities Act is not necessary in order to preserve that company's name.

Conclusion

23. The Commission concludes that the Applicant may have been established for charitable purposes, but it is not being "maintained exclusively for charitable purposes", therefore it does not satisfy the requirements of section 13(1)(b)(i) of the Act.

Promoting public trust and confidence in the charitable sector

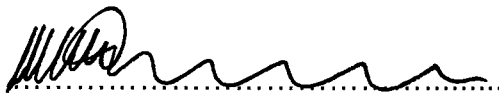
24. The first function of the Commission listed in section 10(1) of the Act is to "promote public trust and confidence in the charitable sector". The Commission considers that allowing entities to be registered which are not carrying out any charitable purposes will not promote public trust and confidence in the charitable sector.

Charities Commission's determination

25. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that it is not established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act.

For the above reasons, the Commission declines the Applicant's application for registration as a charitable entity.

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

13/7/11
Date