

## **Deregistration decision: Kahungatanga New Zealand**

### **The facts**

1. Kahungatanga New Zealand (“the society”) applied to the Charities Commission (“the Commission”) for registration on 27 December 2009. The society was registered as a charitable entity under the *Charities Act 2005* (“the Act”) on 15 January 2010.
2. The Commission received a notice of change on 26 February 2010 which added one officer and removed the original officer.
3. During a registration assessment of an applicant with the same primary contact person, it was noted that the society appeared to have only one officer, in contravention of its constitution which required a minimum of six officers.
4. Clause 9.1 of the society’s constitution states:  

*“The Executive Committee will be composed of a Chairperson, Secretary, Treasurer and no less than three (3) ordinary members and no more than six (6) ordinary members.”*
5. On 8 April 2010, the Commission sent a letter to the society requesting an Officer Certification Form for each officer of the society.
6. On 11 June 2010, the Commission received a notice of change amending the society’s address and removing the only officer from the society.
7. On 26 July 2010 the Commission sent a notice of intention to remove the society from the register on the grounds that it does not meet the requirements of section 13(1)(d) of the Act as it does not appear to have any qualified officers.
8. The Commission did not receive a response to this notice.

### **The issues**

9. The Commission must consider whether the society is, or is no longer, qualified for registration as a charitable entity under section 32(1)(a) of the Act. In order to be qualified for registration, the society must meet all of the essential requirements for registration under the Act. In this case, the key issues for consideration are whether the society can be considered to be an “entity” as defined by section 4(1) of the Act, and if so, whether it meets the requirements of section 13(1)(d) of the Act.

## The law on charitable purpose and deregistration

10. Section 4(1) of the Act states:

**entity** means any society, institution, or trustees of a trust

**officer-**

(a) means, in relation to the trustees of a trust, any of those trustees;  
and

(b) means, in relation to any other entity-

(i) a member of the board or governing body of the entity if it has a board or governing body; or

(ii) in any other case, a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive); and

(c) includes any class or classes of persons that are declared by regulations to be officers for the purposes of this Act; but

(d) excludes any class or classes of persons that are declared by regulations not to be officers for the purposes of this Act

11. Section 13 of the Act sets out the essential requirements for registration, and provides:

### **13 Essential requirements**

(1) An entity qualifies for registration as a charitable entity if,—

(a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and

(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; and

(c) the entity has a name that complies with section 15; and

(d) all of the officers of the entity are qualified to be officers of a charitable entity under section 16.

12. Section 16 of the Act sets out the factors that will disqualify a person from being an officer of a charitable entity:

### **16 Qualifications of officers of charitable entities**

(1) A person who is not disqualified by this section is qualified to be an officer of a charitable entity.

- (2) *The following persons are disqualified from being officers of charitable entities:*
- (a) *an individual who is an undischarged bankrupt:*
  - (b) *an individual who is under the age of 16 years:*
  - (c) *an individual who, or a body corporate that, has been convicted of a crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961) and has been sentenced for that crime within the last 7 years:*
  - (d) *an individual who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, the Securities Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993:*
  - (e) *an individual who, or a body corporate that, is disqualified from being an officer of a charitable entity under section 31(4):*
  - (f) *an individual who is subject to a property order made under the Protection of Personal and Property Rights Act 1988, or whose property is managed by a trustee corporation under section 32 of that Act:*
  - (g) *a body corporate that is being wound up, is in liquidation or receivership, or is subject to statutory management under the Corporations (Investigation and Management) Act 1989:*
  - (h) *in relation to any particular entity, an individual who, or a body corporate that, does not comply with any qualifications for officers contained in the rules of that entity.*
- (3) *Subsection (2) does not apply to an officer of an entity if that officer was appointed, under an Act, by the Governor-General, by the Governor-General in Council, or by a Minister.*
- (4) *The Commission may, by written notice to an entity, waive the application of any of the disqualifying factors set out in subsection (2)(a) to (g), in relation to an officer of that entity.*
- (5) *If the Commission waives the application of a disqualifying factor set out in subsection (2)(a) to (g), the officer to whom the waiver relates must not be treated as being disqualified from being an officer of a charitable entity in relation to the entity by reason of the application of that disqualifying factor.*
- (6) *The waiver may be granted on any terms or conditions that the Commission thinks fit.*
- (7) *The Commission may vary a waiver in the same way as a waiver may be granted under this section.*
- (8) *The Commission may, by written notice to an entity, revoke a waiver granted under this section.*

13. Section 32(1)(a) of the Act provides that the Commission may remove an entity from the register if the entity is not, or is no longer, qualified for registration as a charitable entity.
14. When considering whether a registered entity continues to qualify for charitable status, section 50(2) of the Act empowers the Commission to examine and enquire into matters in connection with charitable entities and persons, including:
  - (a) *the activities and proposed activities of the charitable entity or person:*
  - (b) *the nature, objects, and purposes of the charitable entity:*
  - (c) *the management and administration of the charitable entity:*
  - (d) *the results and outcomes achieved by the charitable entity or person:*
  - (e) *the value, condition, management, and application of the property and income belonging to the charitable entity or person.*
15. Under section 35(1)(a) of the Act, if an objection to removal of an entity from the register is received, the Commission must not proceed with the removal unless it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

## **Charities Commission's analysis**

16. The Commission has firstly considered whether the society is an "entity" as defined in section 4(1) of the Act, and secondly, whether the society meets the requirements under section 13(1)(d) of the Act.

### Is the society an "entity"?

17. Section 4(1) of the Act defines "entity" as "any society, institution, or trustees of a trust."
18. The Commission does not consider that the society is a trust. The society stated it is a "society or institution" on its application form. The society's constitution does not reveal any intention of creating a trust or the presence of any property passing from a settlor.
19. The society is not incorporated under any enactment, such as the *Incorporated Societies Act 1908*, the *Charitable Trusts Act 1957*, or the *Companies Act 1993*. Accordingly, the Commission has considered whether the society is an "unincorporated" society or institution.
20. Section 5(1) of the *Interpretation Act 1999* provides that "the meaning of an enactment must be ascertained from its text and in the light of its purpose". The terms "society or institution" are not defined in the *Charities Act 2005*, it is therefore necessary to look at the plain meaning of these words and the definitions of these terms that are normally used.

21. The conventional starting point for determining the plain meaning of statutory terms is the dictionary. The *Concise Oxford English Dictionary*<sup>1</sup> defines these terms as follows:

**Society** 3. An organisation or club formed for a particular purpose or activity.

**Institution** 1. A large organisation formed for a particular purposes, such as a college, bank etc.

**Organisation** 2. An organised group of people with a particular purpose, such as a business or government department.

22. These definitions indicate that a “society” or “institution” will consist of several people who band together for a common purpose.

23. In *Hartigan Nominees Pty Ltd v Rydge*,<sup>2</sup> the Court defined an unincorporated association as “a group of people defined and bound together by rules and called by a distinctive name”.

24. In *Conservative & Unionist Central Office v Burrell*,<sup>3</sup> the court said that an unincorporated association meant:

*Two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be contractual.*<sup>4</sup>

25. Based on the plain meaning of the words and the court’s judgments in *Hartigan Nominees Pty Ltd* and *Conservative & Unionist Central Office*, the Commission considers that an unincorporated society or institution must have at least two members. In the present case, all officers have removed themselves from the society and therefore no officers can be identified. Accordingly, the Commission considers that the society is not an unincorporated society or institution and therefore it is not an “entity” as defined in section 4(1) of the Act.

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<sup>1</sup> 11<sup>th</sup> ed., Revised, Oxford, Oxford University Press, 2006, “society”, “institution” and “organisation”.

<sup>2</sup> (1992) 29 NSWLR 405 cited by Gino Dal Pont, *Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 365.

<sup>3</sup> [1980] 3 All ER 42 and on appeal [1982] 2 All ER 1 (CA).

<sup>4</sup> [1980] 3 All ER 42 at 58, and on appeal [1982] 2 All ER 1, 4 (CA) cited by Mark von Dadelszen, *Law of Societies in New Zealand, Unincorporated, Incorporated, and Charitable* Wellington, Butterworths, 2000 at 10, para 2.1.2.

### Does the society meet the requirements of s13(1)(d) of the Act?

26. Notwithstanding the Commission's conclusion that the society is not an "entity", the Commission has proceeded to consider whether the society meets the requirements under section 13(1)(d) of the Act.
27. Clause 9.1 of the society's constitution states:

*"The Executive Committee will be composed of a Chairperson, Secretary Treasurer and no less than (3) ordinary members and no more than sic (6) ordinary members."*
28. As the society has no current officers, it does not appear to meet the essential requirements of section 13(1)(d) of the Act, which requires all the officers of the entity to be qualified officers under section 16 of the Act.

### Conclusion

29. The Commission concludes that the society is not a valid entity as defined by section 4(1) of the Act and therefore does not meet the essential requirements under section 13 of the Act.
30. In the alternative, if the society is a valid entity, the Commission concludes that it does not meet the essential requirements of section 13(1)(d) of the Act.

### Public interest

31. Section 35(1) of the Act states that the Commission must not proceed with the removal of entity from the register unless it is satisfied that it is in the public interest to do so.
32. Section 10(1)(a) of the Act obliges the Commission to promote public trust and confidence in the charitable sector. The Commission considers that public trust and confidence in registered charitable entities would not be maintained if entities and non-valid entities, which did not meet the essential requirements for registration, remained on the register.

### **Charities Commission's determination**

33. The Commission determines that the society is not, or is no longer, qualified for registration as a charitable entity because it is not a valid entity.
34. Under section 35(1) of the Act, the Commission is satisfied that it is in the public interest to proceed with the society's removal from the register and that one ground for removal from the register has been satisfied, that is, it is not qualified for registration as a charitable entity.

35. The decision of the Commission is therefore to remove the society from the Register, pursuant to section 31 of the Act, with effect from 23 September 2010.

**For the above reasons, the Commission determines to deregister the society as a charitable entity by removing the society from the Register.**

Signed for and on behalf of the Charities Commission

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Trevor Garrett  
Chief Executive

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Date