



Australian Government
Department of the Environment

Ref: SPIRE

Mr Alex Hawke MP
Chair
Standing Committee on the Environment
House of Representatives
Parliament House
Canberra ACT 2601

Dear Chair

Thank you for the opportunity to appear before the Standing Committee on the Environment's hearing into the Register of Environmental Organisations held on 16 June 2015.

I am pleased to provide for the Committee at **Attachment A** supplementary information on relevant international comparisons in relation to Deductible Gift Recipients.

The Department's response to a number of questions taken on notice during the hearing is enclosed at **Attachment B**.

I also wish to correct and clarify the following evidence given at the hearing:

In answer to your question about the historical intent behind the Register (page 1 of Proof Hansard 16 June 2015) I advised that it was my understanding that only the Register of Environmental Organisations has joint ministerial decision making. I would like to clarify that in fact the four registers not administered by the Australian Taxation Office (Register of Environmental Organisations, Register of Cultural Organisations, Register of Harm Prevention Charities and the Overseas Aid Deduction Scheme) have joint ministerial decision-making structures.

In answer to your question about the resources applied to the administration of the Register (page 11 Proof Hansard 16 June 2015), I stated that over the course of the year around 2.5 ASL (average staffing level) would be allocated to the Register. On closer examination I would like to clarify that there is an average number of 1.5 employees dedicated to the administration of the Register.

I apologise for any misunderstanding that may have arisen. I would be pleased to appear again before the Committee at any stage.

Yours sincerely

Lara Musgrave
Assistant Secretary, Engagement and Evaluation
Policy Analysis and Implementation Division
17 July 2015

ATTACHMENT A

Department of the Environment

Supplementary background material – international practice charitable tax concessions

House of Representatives Standing Committee on the Environment

**Inquiry into the administration, transparency and effectiveness of the
Register of Environmental Organisations under the *Income Tax
Assessment Act 1997***

OVERVIEW

The Terms of Reference for the Inquiry into the administration, transparency and effectiveness of the Register of Environmental Organisations include examination of “*“relevant governance arrangements in international jurisdictions, and exploring methods to adopt best practice in Australia.”*”

This paper provides an overview of charitable tax concessions across a sample of relevant international jurisdictions. While these jurisdictions are broadly comparable to Australia the different legal frameworks in each country make direct comparisons difficult.¹

¹ For broader international examples of charity law see Not for Profit Project Melbourne Law School, *Defining Charity: literature review* (20 February 2011) Melbourne University < <http://www.law.unimelb.edu.au/3E4618E0-A491-11E1-8C420050568D0140>>

UNITED KINGDOM

- The United Kingdom provides the body of law that forms the basis of the definition of charities across a number of comparable international jurisdictions.
- Registered charities in the United Kingdom are eligible for certain tax reliefs, including tax exemption for most types of income. To benefit, an organisation must be recognised by Her Majesty's Revenue and Customs as having 'charitable purposes' that help the public (known as being 'for public benefit'). Under the *Charities Act 2011* (UK), "the advancement of environmental protection or improvement" is considered to be a charitable purpose.
- Charities must be registered with the Charity Commission. Within England and Wales, the Commission is responsible for:
 - : registering eligible organisations in England and Wales which are established for only charitable purposes;
 - : taking enforcement action when there is malpractice or misconduct;
 - : ensuring charities meet their legal requirements, including providing information on their activities each year;
 - : making appropriate information about each registered charity widely available;
 - : providing online services and guidance to help charities run as effectively as possible.
- Guidance for charities on campaigning and engaging in political activities published by the Charity Commission² provides:
 - : To be a registered charity an organisation must be established for charitable purposes only. An organisation will not be charitable if its purposes are political.
 - : Political campaigning, or political activity, can be legitimate and valuable activities for charities to undertake, however these activities must only be undertaken by a charity as a means of supporting their charitable purposes. These must not be the continuing and sole activity of the charity.
 - : A charity cannot exist for a political purpose, that is to further the interests of any political party, or securing or opposing a change in the law, policy or decisions domestically or internationally. A charity must stress its independence and ensure that any involvement with political parties is balanced. A charity must not give support or funding to a political party, nor to a candidate or politician. However, a charity may give support to specific policies advocated by political parties if it would help achieve its charitable purposes.
 - : Charity trustees must comply with charity law, and civil and criminal laws that apply. Where relevant they are required to comply with the Code of the Advertising Standards Authority.
 - : Emotive or controversial material can be used in a campaign where this is lawful, but material must be factually accurate and have a legitimate evidence base.

² Charity Commission, *Speaking Out: guidance on campaigning and political activity by charities* (1 March 2008) UK Government < <https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities>>

- Donations by individuals to charities or to community amateur sports clubs are tax free. This is called tax relief. The tax goes to the taxpayer (individuals, sole traders and partnerships) or the charity depending on the payment mechanism. For example, donating through Gift Aid means charities and community amateur sports clubs can claim an extra 25p for every £1 donated and does not cost the donor any extra.

NEW ZEALAND

- In New Zealand, organisations, including environmental organisations, meeting eligibility criteria are approved under the *Income Tax Act 2007* (NZ) as 'donee organisations'. Tax credits can be claimed for donations to donee organisations approved by the New Zealand Inland Revenue Service. A list of donee organisations is publicly available.
- An organisation does not have to be a registered charity to be eligible for donee organisation status. Registered charities will automatically be assessed for donee status. Organisations approved by government for donee status are listed in the Income Tax Act.
- A donee organisation must be a New Zealand society, institution, association, organisation, trust or fund. Its funds must be applied wholly or principally to charitable, benevolent, philanthropic or cultural purposes in New Zealand. This means that the organisation's aims or purposes should be carried out in New Zealand, even if this results in paying money outside New Zealand to achieve these purposes.³
- The Inland Revenue Service considers benevolent and philanthropic purposes doing good for others. This includes organisations that may not meet the strict legal definition of charity but are popularly seen as charitable in that their proceeds and funds are used to benefit the public.
- Charities that apply the principal part or all of their funds outside New Zealand must be approved for donee organisation status by Parliament. Approval is limited to organisations whose funds are mainly used for:
 - : the relief of poverty, hunger, sickness or the results of war or natural disaster
 - : the economy of developing countries (as recognised by the United Nations)
 - : raising the educational standards of a developing country.
- There is no express prohibition on political activities by organisations with donee status or for registered charities.
- Individuals who give cash donations of NZ\$5 or more to donee organisations may claim a tax credit of one-third of their total donations, up to the amount of their taxable income.

ELIGIBILITY AS A CHARITY

- The *Charities Act 2005* (NZ) governs charities in New Zealand. This Act is based on the common law approach to charities, stemming from the United Kingdom's common law authorities on the issue and the *Statute of Charitable Uses* (also known as the Statue of Elizabeth) that came into force in England in 1601.

³ The content in this section is summarised from Inland Revenue Guide IRR 255 *Charitable and donee organisations: A tax guide for charities, donee organisations and other groups* (August 2014)
<<https://www.ird.govt.nz/resources/8/2/820319004ba3d849841dbd9ef8e4b077/ir255.pdf>>

- The *Charities Act 2005* (NZ) established Charities Services or Ngā Rātonga Kaupapa Atawhai which is part of the Department of Internal Affairs, it maintains the Charities Register, which contains information about more than 27,000 Registered Charities. The Act also established the Charities Registration Board, an independent three-person Board, which makes decisions about registering or deregistering charities.
- To be eligible to register as a charity, an organisation has to show that its purpose and activities meet the definition of a 'charitable purpose', set out in the *Charities Act 2005* (NZ) as: the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community. Charities must demonstrate that they have exclusively charitable purposes for the public benefit.
- Guidance published by Charities Services indicates environmental organisations are considered to fall within the "other purposes beneficial to the community" category of charities.⁴ A purpose is considered to be beneficial to the community:
 - : by promoting the preservation of places of historic interest or natural beauty
 - : by providing and maintaining a memorial garden for the benefit of the community
 - : by organising or participating in environmental projects designed to:
 - preserve and protect flora and fauna
 - preserve, protect and restore rivers, or
 - improve the urban environment
 - : by developing and providing programmes promoting the protection and preservation of the environment through re-use, reduction, recycling and recovery of waste and by educating institutions, industries, businesses and individuals about efficient waste management systems.⁵

RE GREENPEACE OF NEW ZEALAND INCORPORATED

- An August 2014 decision by the New Zealand Supreme Court on an appeal brought by Greenpeace New Zealand has developed the law in New Zealand around what may qualify as a charitable purpose. The ruling in *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 concerned both charities engaging in advocacy and charities engaging in illegal activities.

POLITICAL PURPOSES/ADVOCACY

- The Court determined that charitable and political purposes are not necessarily mutually exclusive and that the *Charities Act 2005* (NZ) does not exclude political purposes in the definition of charitable purpose. The Court found that a blanket exclusion of political purposes "is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognises as charitable."

⁴ The article by Byrnes, Rebecca "Filling the Gaps: Recognition of Environmental Protection as a Charitable Purpose" *Environmental and Planning Law Journal*, Volume 31 Issue 6, provides a useful discussion of the common law surrounding this issue.

⁵ New Zealand Charities Service <<https://charities.govt.nz/apply-for-registration/charitable-purpose/purposes-beneficial-to-the-community-examples-of-wording-for-purpose-clauses/>> accessed 7/2/2015 4:16 PM

- The New Zealand Supreme Court endorsed the Australian High Court's judgement *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 and stated:

"assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute."

- The Court raised as an example that where an entity proposed advocating for human rights, or the protection of the environment, or the promotion of amenities to make a community pleasant, that may be a charitable end. However, it cautioned that *"it will usually be more difficult for those who promote ideas they consider to be of public benefit to show charitable purpose as readily as those who can show tangible utility in the good they do."*
- Updated guidance from New Zealand's Charity Services following the case clarifies that when assessing whether a political or advocacy purpose is a charitable purpose, the following is considered:
 - : Whether the applicant is advocating or campaigning for charitable ends;
 - : Whether the means promoted to achieve that end is charitable; and
 - : Whether the manner in which the cause is promoted is charitable.⁶
- An organisation can be registered as a charity even if it includes a non-charitable purpose. A non-charitable purpose must be ancillary to the charitable purpose and further the achievement of the charitable purpose.

ILLEGAL ACTIVITIES

- The Court also considered whether illegal action such as trespass would result in an organisation failing to meet the public benefit test.
- Under the *Charities Act 2005* (NZ) at section 32, an organisation can have its status as a charity revoked if it has engaged in serious wrongdoing or any person has engaged in serious wrongdoing in connection with the entity.
- The Court found that a purpose that is illegal will not be 'established and maintained exclusively for charitable purposes' and that:

"Assessment of illegal purpose is ... a matter of fact and degree. Patterns of behaviour, the nature and seriousness of illegal activity, any express or implied ratification or authorisation, steps taken to prevent recurrence, intention or inadvertence in the illegality, may all be relevant."

⁶ Charity Services, *Political Purposes* (2014) <<https://charities.govt.nz/apply-for-registration/charitable-purpose/political-purposes/>>

CANADA

- In Canada organisations can become registered charities by meeting certain requirements of the *Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.))* including that the entity is established and operated for charitable purposes and devotes its resources to charitable activities. The Act does not define charity, and hence uses the common law definition originating in the United Kingdom. Under these arrangements environmental organisations are eligible to apply for registration as a charity.
- A registered charity pays no income tax and is able to issue tax receipts to donors that are then used for non-refundable tax credits or deductions.
- Organisations with political purposes cannot qualify for registration as a charity. Political purposes are considered those which seek to:
 - : further the interests of a political party, or support a political party or candidate for public office; or
 - : retain, oppose, or change the law, policy, or decision of any level of government in Canada.
- The Policy Statement on Political Activities⁷ released by the Canada Revenue Agency provides information for registered charities on political activities and allowable limits under the *Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.))*. This statement provides:
 - : A charity may not take part in an illegal activity or a partisan political activity. A partisan political activity is one that involves direct or indirect support of, or opposition to, any political party or candidate for public office.
 - : A charity may take part in political activities and public awareness campaigns if they are non-partisan and connected and subordinate to the charity's purposes. A charity may make the public aware of a public policy issue provided:
 - It does not explicitly connect its views to any political party
 - The issue is connected to its purposes
 - Its views are based on a well-reasoned position
 - Public awareness campaigns do not become the charity's primary activity.
 - : When a charity takes part in political activities, the *Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.))* requires that 'substantially all' of its resources must be devoted to charitable activities. Resources include the total of a charity's financial assets, staff, volunteers, directors, and its premises and equipment. 'Substantially all' means 90 per cent or more. As a general rule, a charity that devotes no more than 10 per cent of its total resources a year to political activities is considered to be operating within the 'substantially all' provision.
- For smaller charities, discretion is used to determine appropriate expenditure on political activities:
 - : Registered charities with less than \$50,000 annual income in the previous year can devote up to 20 per cent of their resources to political activities in the current year.

⁷ Political Activities Policy Statement CPS-022 (2 September 2003) Canada Revenue Agency < <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html> >

- : Registered charities whose annual income in the previous year was between \$50,000 and \$100,000 can devote up to 15 per cent of their resources to political activities in the current year.
- : Registered charities whose annual income in the previous year was between \$100,000 and \$200,000 can devote up to 12 per cent of their resources to political activities in the current year.
- The policy statement differentiates education and public awareness raising activities and provides that a “charity whose object includes the advancement of education must take care not to disregard the boundary between education and propaganda.” The statement cites *Challenge Team v. Revenue Canada* [2000] 2 C.T.C. 352 at para. 1 (Fed. C.A.):

“We all agree with the appellant that educating people from a particular political or moral perspective may be educational in the charitable sense in that it enables listeners to make an informed and critical choice. However, an activity is not educational in the charitable sense when it is undertaken “solely to promote a particular point of view” (per Iacobucci J. Vancouver Society of Immigrant and Visible Minority Women v. M.N.R., [1999] 1 S.C.R. 10, at paragraph 169).

The statement provides that “the degree of bias in an activity will determine if it can still be considered educational.”

UNITED STATES OF AMERICA

- In the United States of America, tax-exempt organisations are referred to as 501(c) organisations based on the section of the *Internal Revenue Code* (26 USC § 501(c)) that gives the basis of that exemption. There are 29 categories under this provision, although § 501(c)(3) is the most common and aligns most closely to the Australian definition of charity. Donations made to a § 501(c)(3) organisation are tax-deductible.
- To be tax-exempt under section 501(c)(3) of the Internal Revenue Code, an organisation must be organised and operated exclusively for exempt purposes set forth in section 501(c)(3). The exempt purposes set forth in this section are: charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. Environmental organisations are commonly registered under this category.
- Organisations registered under section 501(c)(3) are expressly prohibited from engaging in political campaigns. Guidance provided by the Internal Revenue Service on this issue clarifies that⁸:
 - : Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity. Certain non-partisan political activities or expenditures are not prohibited. For example, voter education activities conducted in a non-partisan manner do not constitute prohibited political campaign activity.

⁸ United States of America Internal Revenue Service <http://www.irs.gov/Charities-&Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501%28c%29%283%29-Tax-Exempt-Organizations> accessed 22/06/2015 11:59 AM

- In general, no organisation may qualify for section 501(c)(3) status if a substantial part of its activities is attempting to influence legislation (lobbying). Attempting to influence legislation includes urging the public to contact a legislative body for the purpose of proposing, supporting, or opposing legislation.
- A variety of factors are considered in determining whether lobbying constitutes a substantial part of an organisations overall activities, including the time committed and the expenditures devoted to the activity. An organisation may retain tax-exempt status, provided its lobbying and political activity expenditures do not exceed a specified limit. This limit is generally based upon the size of the organisation and may not exceed \$1,000,000.
- Violating this prohibition may result in denial or revocation of tax-exempt status and organisations may be subject to an excise tax equal to five percent of their lobbying expenditure for the year in which they cease to qualify for exemption.
- It should be noted that under other provisions of the Inland Revenue Code such as 501(c)(4) and 501(c)(6) organisations may become registered as charities with greater political freedom but they are unable to receive tax-deductible contributions. As an example in the United States Greenpeace is represented by two separate entitites, Greenpeace Inc and Greenpeace Fund Inc. which employ different strategies to achieve their objectives. Greenpeace, Inc is a campaigning and lobbying organisation which is registered as a 501(c)(4) entity and is not able to receive tax-deductible donations. Greenpeace Fund, Inc is a grant making organisations able to receive tax-deductible contributions to fund research, charitable and public education activities worldwide and it has limits on its lobbying activity.

ATTACHMENT B

Register of Environmental Organisations
Submission 185 - Supplementary Submission
House of Representatives Standing Committee on the Environment
Register of Environmental Organisations
Answers to questions on notice
Department of the Environment
Public Hearing, 16 June 2015

Topic: Complaints

Proof Hansard Page and Date Page 3, 16 June 2015

Mr Tony Zappia MP asked:

Mr ZAPPIA: Thank you for your evidence. Can I just pursue the line of questioning that the Chair was heading down? In fact, the last question that he asked was what I was going to ask first: how many complaints have you received in the last 12 months, and perhaps the preceding 12 months? Whilst I do not necessarily expect that you might have those figures available, if you do I would welcome them. If not, could you that on notice?

Ms Musgrave: We can get those for you.

Mr ZAPPIA: More specifically, how many complaints have resulted in an organisation being deregistered, if any?

Ms Musgrave: We will take that on notice, but I think we can get that quite quickly.

Answer:

In 2013-14 the Department received two complaints about registered organisations.

One matter was resolved following provision of supplementary information by the organisation.

The other was referred to the Australian Charities and Not-for-profits Commission. After the Commission informed the Department that there was no information to support the complaint, the Department closed the matter.

In 2014-15 the Department received one complaint, which is currently under investigation by the Department and has also been referred to the Australian Charities and Not-for-profits Commission.

Over this period no organisation has been deregistered on the basis of a complaint received.

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Topic: Deregistration

Proof Hansard Page and Date Page 4, 16 June 2015

Mr Tony Zappia MP asked:

Mr ZAPPIA: All right. I will go to the next step then. Has the department ever provided a recommendation to the minister to deregister an organisation because the organisation was not compliant with its objectives, as stated in its charter?

Ms Musgrave: Not to my knowledge, but we will double-check to make sure.

Answer:

As stated in the Department's submission, since the introduction of the Register of Environmental Organisations in 1992, 126 organisations have been removed from the Register. Of those, 105 requested their removal from the register, 14 failed to provide the relevant statistical and other reports that are required in the legislation and seven had their Australian business number cancelled.

No organisations were deregistered on the basis that the organisation was not compliant with its objectives, as stated in its constitutional documents.

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Topic: Compliance with stated objectives

Proof Hansard Page and Date Page 4, 16 June 2015

Mr Tony Zappia MP asked:

Mr ZAPPIA: Has the department in its own right, at any time, as a result of those reports or the documentation lodged—but more particularly the reports—had to make any judgements about whether an organisation was in fact exceeding or not complying with its stated objectives?

Ms Musgrave: Yes, we have.

Mr ZAPPIA: Can we be provided with some details at some stage?

Mr Writer: We normally would not comment on individual cases, but we can certainly provide some general information about that.

Answer:

As required by section 30-265(1) of the *Income Tax Assessment Act* 1997, the Department's concern is whether the organisation's principal purpose is:

- a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or
- b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment.

Three compliance letters issued in 2013–14 and one in 2014–15 raised issues concerning compliance with the principal purpose requirement. Of these:

- One organisation subsequently requested removal from the Register;
- Two organisations provided sufficient information to satisfy the Department that they were in compliance and the matter was resolved; and
- One organisation did not provide sufficient information in its response to the Department, and the matter was referred to the Australian Taxation Office for further consideration. The Australian Taxation Office has not yet formally notified the Department of the outcome of its review of the matter.

Register of Environmental Organisations
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Topic: Organisations refused listing

Proof Hansard Page and Date Page 13, 16 June 2015.

or Written Question:

Mr Tony Zappia MP asked:

Mr ZAPPIA: Have any applications, in recent times, been refused a place on the register?

Ms Musgrave: No. I can say no with confidence, as to recent times, for the last couple of years. Oh—someone was refused? Give me half a second; I will just check that answer.

CHAIR: You can take it on notice if you like.

Mr Writer: We can do that, yes.

Ms Musgrave: We will come back. It will potentially be around technicalities of someone's material in their application and then we went, 'No, that does not meet it,' and then they fixed it up.

Mr ZAPPIA: I will qualify the question because I want to make it clear. Have they been refused on the basis that, from the documentation lodged, they would not comply with the objectives of the register?

Ms Musgrave: Yes; okay.

Answer:

In 2013-14 and 2014-15 three organisations were refused registration on the basis that, from the documentation lodged, they did not comply with the eligibility requirements of the Register.

Organisations that are refused registration are provided notice by the Department of the issue(s) relating to their application. The organisation may then:

- Decide not to proceed with the application
- Take action to address the identified issue, then seek reconsideration
- Request Ministerial consideration of the application notwithstanding the issues identified.

Of the three organisations refused registration since 2013-14, two have subsequently submitted supplementary information and sought reconsideration by the Minister. One of these organisations has now been listed on the Register and one application is currently under consideration.

Register of Environmental Organisations
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Topic: Information and education

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Mr Alex Hawke MP, Chair asked:

CHAIR: Take that on notice and come back to us on that; it will be safer to do that, I think, for everybody. I refer to your submission on page 15, going back to this idea—in the department's interpretation anyway—of the provision of information and education, or the carrying out of research, which are the terms in the act, about the principal purpose tests. You note that these purposes should ultimately be directed at some positive benefit relating to the protection of the natural environment.

Can you elaborate on this, perhaps, just so we understand it? I think this will form the basis of some of our inquiry. What, in your interpretation, as the Department of the Environment—of this particular section? Are there examples—and you do not have to provide them all today—of what you interpret as within that and what you would interpret as without that? There must be both. You can either elaborate for us today or come back to us with something if you wanted to. But how does the department interpret this particular section?

Answer:

As stated in the Department's submission, the second limb of the principal purpose test at section 30–265(1) of the *Income Tax Assessment Act 1997* requires that the provision of information or education (or carrying on of research) be about the natural environment or a significant aspect of it.

There is no express requirement in the Act that the information or education be about *the protection and enhancement* of the natural environment.

The Department considers that in the broader statutory context it is reasonable to interpret this section as requiring that the provision of information or education (or carrying out of research) be ultimately directed at some positive benefit relating to the protection of the natural environment.

For example, an organisation that provides information about carrying out land clearing would not meet the 'principal purpose' test in section 30-265(1).

A further example is an organisation that provides information about harvesting of native species but for purposes other than environmental ones, such as for consumption (such as using their meat or skins). This organisation would also not meet the 'principal purpose' test in section 30-265(1).

The Department has not had to apply this clarification in assessing an organisation's principal purpose in 2013-14 or 2014-15.