
MULTI-STRUCTURE REPORT

For Te Puni Kokiri

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L A W Y E R S



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1. INTRODUCTION

1.1 Multi-Structures – What Are They?

1.1.1 Throughout this report we use the term “multi-structures” to cover the various possible legal structures that an individual or organisation can use to trade or operate. There are many possibilities for Maori organisations including:

- A partnership
- A limited liability company
- Co-operative companies
- Partially or wholly owned subsidiary companies
- A trust, including private express trusts (ie. trading trusts) and charitable trusts
- An incorporated society

1.1.2 Individuals or organisations will choose one or more of these “multi-structures” to suit their objectives, whether these be business, social or cultural objectives. Many Maori organisations operate using more than one of these structures – for example a limited liability company for the profit-making side of the operation and a charitable trust for social benefit purposes.

1.1.3 What all these types of structure have in common is that they are legally independent of the individuals or organisations who create, own and manage them. They are also usually set up for a specific purpose such as farming or managing a scholarship fund, and the structure chosen in each case is based on how well it fits that purpose and ongoing operation.

1.1.4 As with any legal structure, several issues arise at the time of formation, some of which include:

- **Purpose** – the purpose of the structure, which is often focused around increasing economic opportunities.
- **Risk** – the need to manage risk associated with the structure and the way that will be achieved.
- **Tax** – the tax implications of creating the structure.
- **Governance** – the governance methodology to be adopted.
- **Finance** - the requirement to raise or borrow money and to earn income.
- **Operational** – the need for administration. For instance, will the Multi-structure be an employer?

- 1.1.5 Multi-structures are not new. Indeed the coalescing of whanau, hapu and iwi over the centuries for specific purposes or for specific projects (including strategic alliances, warfare and marriages) has been a hallmark of traditional ‘Maori society’. In more recent times commerce and trade have provided the catalyst for Maori to coalesce in multi-structures including offshore trading in the nineteenth century, with oil exploration companies in the early twentieth century and forestry and fishing in the latter twentieth and early twenty first centuries.
- 1.1.6 In this respect multi-structures are particularly applicable to the use and development of Maori land and resources as they can be operated at many levels including whanau, hapu and iwi. The discussion of the specific details of multi-structures in the remainder of this report will focus principally on the Maori land use and development context.
- 1.1.7 Two types of multi-structures are being considered. The first type is the joint venture. The second is the subsidiary. For clarity, we define each of these terms as:

“A joint venture is the entry into mutual arrangements, agreements or contracts with other organisations or persons with similar aims and objectives, where such arrangements, agreements or contracts have the purpose of combining resources to jointly achieve those aims and objectives”.

A subsidiary is:

“The creation of a separate entity under the umbrella of the parent entity to assist or supplement the aims and objectives of the parent entity and can include a limited liability company, a trading trust, a partnership, an incorporated society, and various trust boards and corporations”.

- 1.1.8 The joint venture can take the form of a number of vehicles, including a partnership, limited liability company, trust or a co-operative. Specific definitions of those categories of joint venture are set out in Section 2.2 under the establishment of joint venture multi-structures.
- 1.1.9 The most commonly used joint venture vehicles are partnerships and limited liability companies. The advantages of one over the other are discussed in Section 2.1.3 of Section 2.
- 1.1.10 The subsidiary, usually a limited liability company, can be used as a separate vehicle, more commonly as a trading arm of the parent. Specific definitions of the types of subsidiaries are set out in Section 2.3 of this report.

- 1.1.11 The remainder of Section 1 of this report will discuss multi-structures in a generic sense as mechanisms that can be used to assist raising finance; to assist in managing assets; to assist in managing income; and to increase economic opportunities.
- 1.1.12 Section 2 of this report then goes into the specific benefits and potential downsides of multi-structures looking separately at joint venture multi-structures and subsidiary multi-structures under Section 2.1.
- 1.1.13 Section 2.2 describes the processes to establish categories of joint venture multi-structures, including the partnership, the limited liability company; a co-operative company; and a trust, including charitable trusts.
- Under each of the above categories, the presented information is divided into sections including a definition; a process for formation; and a discussion on rules and governance. This same structure is followed for subsidiary multi-structures, including the categories of limited liability company and trading trust.
- 1.1.14 Section 2.4 of the report discusses why multi-structures in a generic sense, including all the pre-described categories, should be used. Section 2.5 covers the specific roles and responsibilities of those that run the various categories of multi-structures previously described.
- 1.1.15 Section 2.6 addresses the question of legal ownership of the assets the multi-structure is using and some tax implications that arise from the creation of the multi-structure to use those assets.
- 1.1.16 Section 3 of this report focuses on the relationship between the Ahu Whenua Trust and multi-structures, looking specifically at a company example. Disadvantages of the Trust utilising a company are also highlighted.
- 1.1.17 A glossary of commonly used terms throughout this report is included at the end of this report as Schedule 1. Also available to be read in conjunction with this report is The Report on Multi-structure Templates. This report has a flow chart diagram presentation annexed with checklists for forming various multi-structures and examples of documents referred to in the formation process, including a Joint Venture Partnership Deed; a Joint Venture Company Constitution; a Joint Venture Shareholder Agreement; a template for creating a governance document for any of the suggested multi-structures and a list of principles and duties of those in charge of the various categories of multi-structure.

1.2 Multi-Structures As Mechanisms For:

- **Finance**
- **Managing assets**
- **Managing income**
- **Increasing economic opportunities**

1.2.1 Finance

Multi structures can assist with raising finance in the following ways:

- They can be equipped with the power to borrow and/or receive grants.
- They can trade and earn income.
- They can receive capital injection from outside parties who are associated with them.

Other **benefits** in using multi-structures to raise finance include:

- **Economies of scale** – they may allow the combination of resources, which brings with it collective bargaining power and increased security to offer to lenders.
- **Specific purpose or project** – they are usually created for a specific purpose or project, so the lender knows that the finance will be targeted towards that purpose or project.
- **Statutory restrictions** – they may overcome any statutory restrictions faced by the associated entities. For instance a multi-structure can be established so that it is not subject to Te Ture Whenua Maori Act 1993 and/or the Maori Land Court.
- **Lender comfort** – they enable an injection of expertise and/or enhanced governance. This gives the lender a degree of comfort that the venture is more likely to succeed and the borrowing will be repaid.
- **Separation of funding** – because the multi-structure is a separate legal vehicle, the finance is separated from borrowings of associated entities. This reduces the likelihood of the funding of the multi-structure being mixed with those of the associated entities.
- **Reduction of risk** – the use of a separate multi-structure from the underlying associated entities can reduce the level of risk for those associated entities.

- **Confidence** – the focussed approach of a multi-structure for a specific project or purpose and the other benefits referred to above can have a positive effect on the market and those dealing with the multi-structure. This ‘confidence’ can have a further comforting effect on potential sources of finance.

Potential downsides in using multi-structures to raise finance include:

- **Exposure to risk** – as the multi-structure usually only has the use of the assets, it may not be able to provide security to borrow money unless there is a link back to the owners of the assets. This may require those owners to agree to guarantee borrowings or provide land as security, which in turn exposes them personally and/or the land if the multi-structure is not successful.
- **Statutory restrictions** – where Maori land is required as security, the associated entities will still need to comply with statutory restrictions.
- **No track record** - the multi-structure in its initial stages is a new creation undertaking a new venture, with no business success history to present to a lender. This can make it hard to convince a lender or a proposed partner with capital to inject, to provide that finance.

Discussion

In the context of Maori organisations, one of the recurring issues facing individual Maori landowners is the lack of finance to develop their land. This problem is compounded where the land is not administered. By forming a trust under the Te Ture Whenua Maori Act or an Incorporation under that Act, the owners can act collectively to raise finance. By taking a further step, with perhaps two trusts forming a joint venture partnership with each making their assets available for use by the joint venture, they may obviate the need to use their Maori land as security. This is because the multi-structure has access to the combined asset base for a particular development project. Other resources such as security over livestock or a crop could be used instead. The combined resource allows greater comfort for the lender.

In addition the separate multi-structure entity can overcome the statutory constraints the underlying organisations are subject to. This is because the multi-structure is not directly subject to the Maori land legislation.

The weaknesses identified above can in many circumstances be overcome. The multi-structure can prepare projected cash flow forecasts based on solid business plans that convince a lender it will become self sufficient in terms of meeting loan instalments and other outgoings such as rates, utilities and insurance. In that case the lender may not require guarantees from the assets owners. As discussed

above, if the planned development involves other assets those assets may be accepted as security for borrowings without the need for a link to the actual land itself. Likewise if the multi-structure is leasing land from the associated entities, then the lease may provide sufficient security for borrowings.

In summary, multi-structures have several benefits as avenues for raising finance. While there are some weaknesses, in many circumstances with proper planning and preparation, these can be overcome.

1.2.2 Managing Assets

Multi-structures can provide **benefits** in managing assets on behalf of collectives in a number of ways including:

- **Efficiency** – they are formulated specifically for a purpose so have the benefit of being single-minded and focussed toward achieving that purpose. This allows for efficiency in asset management.
- **Economies of Scale-** they may be able to take advantage of their collective bargaining power. For instance they maybe able to obtain increased prices for stock or from cropping arrangements.
- **Finance** – the combined asset base may enhance the ability to be able to borrow and raise money needed for the management process, than the associated entities acting individually.
- **Independence** – although they have a duty to report back to and account to the stakeholders, they are not directly responsible to a multiple number of individual owners. This means that management does not get bogged down with trying to take on board multiple and differing opinions in an environment where not everyone can get their own way.
- **Governance** – being a separate legal entity, they have their own separate governance structure so the owners of the assets being managed receive the benefit of those governance skills in dealing with the management of the assets of the multi-structure. At the same time, the owners retain their separate identity and retain ownership of their land. This is particularly important when dealing with Maori land.
- **Expertise** – they provide a means to access from both internal and external sources the necessary expertise and experience to improve the management of the assets.

- **Accountability** – they can provide an additional layer of accountability from the multi-structure managing the assets back to the owners, which can be both internal and external to the multi-structure.
- **Innovation** – they may encourage new and novel ideas for asset management. Because they are independent, they may not necessarily adopt a conservative approach.

Potential downsides in using multi-structures to manage assets include:

- **Control** – owners may experience a loss of control over their assets.
- **Values** – the values of the multi-structure may be different to one or more of the associated entities. For instance, a multi-structure may suggest a use for Maori land, which is inconsistent with tikanga.
- **Statutory constraints** – in some cases, statutory constraints will still apply. For instance, the need to get Maori Land Court consents for leases and mortgages that involve Maori land.
- **Duplication** – the additional layer created by the multi-structure may result in duplication of effort. Both the multi-structure and the associated entities need to be managed.
- **Up-skilling opportunities** – by passing the asset management responsibility to a multi-structure, owners potentially pass up the opportunity to learn and apply management skills.

Discussion

A fundamental issue facing Maori organisations can be a lack of expertise amongst the owners when it comes to using and developing their Maori land assets. As with the ability to raise finance, the ability of individual owners to co-opt or contract in usually expensive expertise is very limited. This requires both identifying the type of expertise required and funding it. The multi-structure can provide the solution.

Most of the weaknesses set out above can be overcome. In particular the loss of control can be addressed by including stringent reporting requirements to the associated entities. There is also an ability to appoint directors, trustees or officers to the Board of the multi-structure. The risk to values can be overcome by incorporating agreed values including tikanga into the founding documentation of the multi-structure at establishment.

In certain circumstances the statutory constraints regarding an Ahu Whenua Trust or a Maori Incorporation, can be overcome. The requirement to obtain Maori Land Court consent or confirmation is unnecessary where the trust order or order of incorporation permits an alienation by way of lease, license, or forestry right. For completeness we note that an alienation by way of lease, license, or forestry right for a term of more than 21 years or mortgage, is required to be noted by the Registrar.

Although duplication cannot be avoided, the administrative duties of the associated entities are less than they would otherwise have been without the multi-structure.

The loss of owner opportunity to participate in the asset management can be addressed by including rules in the founding documentation establishing the multi-structures requiring:

- Involving some owners in the management.
- Training and mentoring of rangatahi from the associated entities by experienced management personnel.
- Succession planning for key roles.
- Involvement of rangatahi in assistant management roles.

In summary, multi-structures have many benefits as mechanisms for managing assets in comparison to a much smaller number of weaknesses, which can in most cases be overcome.

1.2.3 Managing Income

The **benefits** in using multi-structures to manage income derived from the utilisation and development of assets are:

- **Focus** - the multi-structure is responsible for collecting and managing income derived from its specific operations. This focused emphasis avoids distraction and enables income to be managed for the success of the operation.
- **Accountability** – an extra layer of accountability is provided and the multi-structure will be required to follow general accounting principles in dealing with income. This means that the multi-structure will be required amongst other things to:
 - Open and maintain a separate bank account.
 - Keep all funds separate.
 - Develop and follow a process for approving the payment of expenses.
 - Appoint accountants.
 - Keep proper accounts.
 - Meet any taxation obligations.

- Provide annual reports to stakeholders in accordance with the Rules (i.e. Trust Deed or Constitution).
- **Streamlined processes** – because the multi-structure is purpose orientated and equipped with management expertise it is able to implement streamlined processes in terms of managing income. This includes determining entitlements to net profits, responsibilities for any losses, and the appropriate level of tax to be paid.
- **Efficiency** – multi-structures can result in increased efficiency. For instance it is possible to streamline expenses and increase margins as a result.
- **Independence** – the independence of the multi-structure can ensure that the multi-structure income is managed for the benefit of the specific business operations. The multi-structure is not distracted by the individual priorities of the associated entities.

Potential downsides of using multi-structures to manage income include:

- **Control** – owners may experience a loss of control over or immediate accessibility to net profits and expenditure or investment decision-making.
- **Priorities** – of the stakeholders become secondary to those of the multi-structure.
- **Duplication** - the additional layer created by the multi-structure may result in duplication of effort. Both the multi-structure and the associated entities need to be managed.

Discussion

An aim of Maori organisations is to obtain income to be distributed to their owners. Therefore it is sensible to build into the Rules of the multi-structure a means to enable the distribution of profits to occur. It is possible to devise a formula calculating each of the associated entities' entitlements. This formula would usually reflect the respective contribution of the associated entity to the multi-structure.

Any income received by the associated entities is able to be distributed to the owners in accordance with the owner's wishes.

The potential downsides outlined above can be overcome by establishing clear rules, which deal with how net profits are to be treated, expenditure levels, key investment decisions and distributions. Providing information on each of these matters then becomes part of the reporting back process.

Loss of control can be addressed by the associated entities appointing directors, trustees or officers to the Board of the multi-structure. The ability to appoint usually being governed by the extent of the respective contributions of the associated entities to the formation of the multi-structure.

The problems concerning priorities can be overcome by the associated entities setting out their respective priorities at the outset. These can then be included in the rules of the multi-structure where appropriate. For instance this could include making provision for urupa, waahi tapu or papakainga.

The exclusion of certain land or assets can lessen an associated entities contribution to the multi-structure and therefore lead to a reduction in their share of any profits.

Although duplication cannot be avoided, the administrative duties of the associated entities and therefore costs may be less than they would otherwise have been without the multi-structure.

In summary multi-structures have many benefits as mechanisms for managing income in comparison to a much smaller number of weaknesses, which in most cases can be overcome.

1.2.4 Increasing Economic Opportunities

As multi-structures tend to be project or purpose specific they are an ideal vehicle for increasing economic opportunities. This can be achieved by:

- Making the objective the focus of the multi-structure.
- Using the multi-structure to raise finance, either by way of grant, borrowing or capital injection. The funds can then be earmarked for the particular project or purpose.
- Using the expertise of the multi-structure to utilise and develop the assets it is managing.
- Using the economies of scale that arise when asset resources are combined under the governance of the multi-structure.

Other **benefits** of using a multi-structure to increase economic opportunities include:

- **Focus** - the aims and objectives of the multi-structure can identify the area of economic development to be targeted. The focus can ensure specific opportunities are taken rather than

missed or lost. The focus also minimises distractions away from the core purpose or project.

- **Risk** – any new economic venture carries a high element of risk. The multi-structure enables the flexibility to minimise risk by isolating the multi-structure from the associated entities. If the venture does not succeed then the failure may not necessarily have a direct effect on the associated entities. Where a joint venture is concerned the business risk can be shared amongst the associated entities.
- **Innovation** – the enhanced expertise and focus that a multi-structure can provide may also result in innovation that leads to further economic opportunities.
- **Confidence** – the multi-structure approach can enhance the all important business confidence, not only with the new entity itself but also with the associated entities, stakeholders and the market. Greater confidence and apparent success can lead to spin off opportunities in related or new areas of business.

Potential downsides of using a multi-structure to increase economic opportunities include:

- **Risk** – even though the multi-structure is a separate entity and risks are shared, the failure of the multi-structure to succeed may tarnish the associated entities.
- **Potential damage to the assets** – if the multi-structure involves a complete change in use of the assets and does not succeed, then returning the assets to their earlier use may be difficult if they have been damaged in the process.
- **Cost** – there is a set up and development cost for multi-structures in terms of legal, accounting and ongoing administration.
- **Loss of control** – owners may experience a loss of control over their assets. Decisions relating to the multi-structure are made by the multi-structure.

Discussion

In the context of Maori organisations, issues that individual owners face include access to innovation and the ability to put good ideas into practice. Innovation may be as simple as suggesting the collective use of many small areas of land for the purposes of production, that on their own are too small to generate a high level of production. Other examples may involve thinking outside the square and taking the fairly low-level production land and using it for a brand new scheme such as a market garden and negotiating with local retailers a supply contract for their fruit and vegetables.

The multi-structure allows the economies of scale to create an environment where greater expertise leads to greater innovation and an environment where good ideas can be more easily turned into reality.

The risk weakness identified above can be overcome by structuring the multi-structure to isolate it from the associated entities where possible. This will be easier to achieve if it does not have to borrow money against the assets.

The potential damage to assets will not always be an issue. It is specific to the nature of development undertaken in the course of the multi-structure's operations. Where those operations involve a significant change in the use of the asset, it may not be possible to return the asset to its original use, at the end of the project or if the venture does not succeed. This can be overcome by inserting appropriate compensation provisions in the rules of the multi-structure.

Although the costs may increase this often can be alleviated by the ability to share those costs amongst the associated entities.

In summary, it is up to the management of the multi-structure to pursue the ideas and objectives, weigh up the risks against the potential benefits and then implement the necessary processes and strategy to make them happen. A well planned and well managed venture is far more likely to succeed and result in increased economic opportunities. The multi-structure is the ideal vehicle to provide this.

2. DEVELOPMENT OF MULTI-STRUCTURES

We now turn to deal with the development of multi-structures. In order to do so we will look at the benefits and potential downsides of both multi-structure forms (i.e. joint venture and subsidiary). We will then consider the establishment of the particular types of multi-structures identified in Part 1, why multi-structures should be used and look at the roles and responsibilities for those responsible for the multi-structures.

2.1 The Benefits And Potential Downsides Of Multi-Structures

Joint Venture Multi-Structures

2.1.1 The discussion in Part 1 of this report makes it clear that a number of key themes emerge regarding both types of multi-structures. The key benefits for joint venture multi-structures include:

- **Focus** – the ability of the new entity to focus on the specific purpose or project that it was set up for.
- **Finance** - the provision of a vehicle to raise finance or receive finance to fund the utilisation and development of the assets which individual owners or existing associated entities could not raise on their own.
- **Economies of scale** - providing a vehicle to combine resources where individual owners or existing entities may not have the technical capabilities to use and develop assets on their own. The combined operation enables the multi-structure to use its combined resources to great effect.
- **Sharing risk** - the provision of a vehicle to enable the sharing of risk when it comes to using and developing assets. This will help risk adverse associated entities who may be willing to progress with the development of their particular land asset but who do not want to take on the personal risk of attempting that on their own.
- **Taking collective action** - the ability of individuals and/or existing organisations to take collective action without losing their autonomy or ownership of the land. This is particularly important where Maori land is concerned.
- **Governance** - to provide a governance structure that acts on behalf of the asset owners steering the multi-structure towards the vision and purpose or project it was set up for. This means making sure day-to-day management is always lined up with the multi-structure's goals. It is important to ensure that decisions are made for the ultimate benefit of all stakeholders, but in an efficient manner without the need to go back to the associated entities or individual owners for every decision.

- **Freedom** – the ability and freedom to operate outside of the restrictions of the Maori land statutory regime.
- **Efficiency** – the ability of the asset owners to reap the benefits of the efficient utilisation and development of the assets without having to change anything they currently do or without necessarily having to change any elements of the existing structures of those owners.
- **Expertise** - the ability to increase expertise over a range of asset owners and/or to contract in those capable of providing expertise to utilise and manage the assets and to ensure they are developed to their full economic potential.
- **Innovation** - the ability to encourage innovation and/or to contract in those capable of providing innovation as to how the assets will be developed to their full economic potential.
- **Confidence** – the multi-structure approach can enhance the all important business confidence, not only with the new entity itself but also with the associated entities, stakeholders and the market. Greater confidence and apparent success can lead to spin off opportunities in related or new areas of business.

2.1.2 **Potential downsides** of joint venture multi-structures include:

- **Cost** - there is a set up and development cost in terms of legal, accounting and administration.
- **Compliance** - as with any entity there are compliance issues. These include legal requirements such as filing tax returns and paying tax; administrative compliance such as organising and holding meetings and reporting back to the stakeholders; and financial compliance such as producing annual financial statements of account.
- **Risk** - there are elements of risk associated with any new project the multi-structure undertakes, especially if it involves borrowing money. For instance even though finance is borrowed through the multi-structure entity, the personal guarantees and/or security from the land owning stakeholders may be required.
- **Loss of control** - although the multi-structure will be required to report at certain intervals to the stakeholders, the decisions are made by the multi-structure. The stakeholders can feel as though they have lost control of their assets. This is compounded if the level of reporting is inadequate and/or

where the stakeholders are not represented in the governance of the multi-structure.

- **Regulation** – New Zealand has a strong regulatory environment, which can affect economic prospects especially when it comes to large entities merging or a multi-structure which would have a dominant position in the New Zealand market. For instance the proposed merger of Air New Zealand and Qantas could not proceed because it did not receive Commerce Commission approval.
- **Values** – the values of the multi-structure may be different to one or more of the associated entities. For instance a multi-structure may suggest a use for Maori land, which is inconsistent with tikanga.
- **Duplication** – the additional layer created by the multi-structure may result in duplication of effort. Both the multi-structure and the associated entity need to be managed.
- **Up-skilling opportunities** – the passing of the asset management responsibility to a multi-structure can result in decreased opportunities for the owners to learn and apply management skills.

Partnership or Company

2.1.3 As stated in the introduction, the most commonly used joint venture vehicles are either a partnership or limited liability company. The key advantages of a partnership are as follows:

- A partnership is very simple to establish
- A partnership is very simple to administer and operate
- A partnership is very flexible, provided the partners agree.

The main disadvantage of a partnership is that the partners are jointly liable for all the debts and liabilities of the partnership.

A company, on the other hand, has the following key advantages:

- The shareholders obtain the benefits of limited liability. This means their liability for any debts is limited to the extent of the amount unpaid on their shares.
- Like a partnership, it is easy to establish.

The main disadvantage of a company, when compared with a partnership, is that it has increased administration and is less flexible.

Both vehicles offer benefits, including:

- Economies of scale
- Enhanced governance
- The ability to share risks
- Access to finance
- Provision of greater focus, innovation and expertise.

Subsidiary Multi-Structures

2.1.4 The key benefits for a subsidiary multi-structure include:

- **Focus** – the ability of the subsidiary to focus on the specific purpose or project that it was set up for.
- **Risk** – the subsidiary enables the flexibility to minimise risk by isolating its activities from the parent. If the subsidiary venture does not succeed then the failure may not necessarily have a direct effect on the parent.
- **Governance** – the subsidiary can have their own separate governance structure.
- **Accountability** – the subsidiary can provide an additional layer of accountability to that of the parent.

2.1.5 **Potential downsides** to a subsidiary multi-structure include:

- **Cost** – there is a setup and development cost in terms of legal, accounting and administration.
- **Risk** – there are elements of risk associated with any new project undertaken by the subsidiary. The personal guarantees and/or security from the parent may still be required.
- **Duplication** – the additional layer created by the subsidiary may result in duplication of effort.

Discussion about Multi-Structure benefits and weaknesses

2.1.6 Regardless of the type of multi-structure used, the identified benefits and weaknesses often apply. It is important to note that some types of entities have more restrictions than others.

2.1.7 An incorporated society for example is not recommended as an appropriate joint venture multi-structure vehicle associated with high risk as it is membership based and is not focussed on pecuniary gain.

- 2.1.8 A subsidiary on the other hand does not have the benefits that coalescing as a joint venture may have, including benefits arising from economies of scale.
- 2.1.9 Trusts established under Te Ture Whenua Maori Act 1993 are not recommended as a vehicle for a multi-structure. Such trusts are constituted in respect of Maori land or general land owned by Maori and are subject to Maori land statutory restrictions. However, it is possible for an Ahu Whenua Trust to benefit from a multi-structure through entering into a joint venture or through the establishment of a subsidiary or trading arm. We discuss the specific benefits of an Ahu Whenua Trust utilising a multi-structure in Part 3.
- 2.1.10 Some of the weaknesses outlined above can be overcome. The potential for increased returns from economies of scale and increased collective bargaining power can offset costs associated with setup, development and compliance. The adoption of streamlined processes can also be used to assist with compliance requirements. The use of collective bargaining power and/or combined resources may also avoid the need to give personal guarantees and land as security. Stringent reporting requirements can also be provided for in the rules of the multi-structure to keep stakeholders fully informed. An awareness of the regulatory environment can allow appropriate planning to ensure that multi-structures can proceed.
- 2.1.11 The risk to values can be overcome by incorporating agreed values including tikanga into the founding documentation of the multi-structure at establishment.
- 2.1.12 Although duplication cannot be avoided, the administrative duties of the associated entities can be less than they would otherwise have been without the multi-structure.
- 2.1.13 The loss of up-skilling can be addressed by including rules in the founding documentation establishing the multi-structures, which require:
- Involving some owners in management.
 - Involvement of rangatahi in assistant management roles.
 - Training and mentoring of rangatahi from the associated entities by experienced management personnel.
 - Succession planning for key roles.

Summary

- 2.1.14 It is essential to identify the specific project or purpose, which will form the nature of the multi-structure. That includes the identification of the parties who will participate. This information is generally

contained in a written agreement to enter into a joint venture. Once that decision has been made the parties need to determine the best vehicle to achieve their objectives.

2.1.15 This may also require the associated entities to carefully consider their own rules to ensure that they have the power to enter into a multi-structure. In some cases their rules will need to be amended prior to the joint venture proceeding. For example their rules may need to be amended to enable them to enter into joint ventures or to hold shares in a subsidiary company.

2.2 The Establishment Of Joint Venture Multi-Structures

2.2.1 Each of the types of vehicles identified in Part 1 of this document has a process associated with its establishment. We set out in clause 2.2.8 a summary process for forming the following as a joint venture multi-structure:

- Partnership
- Limited Liability Company.
- Cooperative Company.
- Trust including a Charitable Trust.

2.2.2 Each of the above vehicles is suitable for a joint venture multi-structure. A joint venture is defined as:

The entry into mutual arrangements, agreements or contracts with other organisations or persons with similar aims and objectives, where such arrangements, agreements or contracts have the purpose of combining resources to jointly achieve those aims and objectives.

2.2.3 A joint venture usually involves two or more separate parties coming together into the arrangement to combine resources to achieve the common aims and objectives.

2.2.4 A joint venture can be more orientated towards a specific project or purpose and as such may be established for a specific period of time or have a defined termination date at the conclusion of the purpose or project being undertaken.

2.2.5 Underlying a joint venture arrangement is an agreement to enter into the joint venture. The written agreement identifies the common aims and objectives and sets out the trading or operational vehicle to be used (i.e. partnership, company or trust). This agreement should also cover:

- The management structure to be adopted.
- The processes for selecting the management committee, chief executive or general manager.
- The powers of the joint venture entity (e.g. to borrow and raise money).
- The treatment of profits and losses.
- Dispute resolution process.
- Appropriate off-ramp and/or exit provisions.

2.2.6 The joint venture embodies the agreement reached between two or more parties and sets out the rules by which the joint venture will operate. The agreement reached will be subject to the laws of contract and is legally enforceable.

2.2.7 The elements of contract law applying to a joint venture arrangement include:

- The establishment of an agreement between the parties.
- Consideration, for instance this can include the contributions of cash, assets, expertise or labour.
- An intention to create legal relations (i.e. something over and above an arrangement of a purely social or domestic kind).
- A capacity by the parties to contract, which in most cases excludes persons who are bankrupt.

2.2.8 **Formation process:**

(a) Partnership

Definition:

Partnership - a contractually-based arrangement governed by statute representing a collection of persons (“partners”) carrying on a business in common with a view to profit.

Formation of Partnership:

A partnership is formed pursuant to the Partnership Act 1908 and the process includes:

- Identifying the partners who will participate in the arrangement.

- Identifying a partnership name.
- Preparing a partnership deed.

Rules and Governance:

The partnership deed sets out:

- The property that will be owned or used.
- Treatment of profits and losses.
- Governance.
- Dispute resolution process.
- Dissolution arrangements.

A copy of a template joint venture multi-structure partnership deed is attached as Schedule A to the multi-structure template report.

Every partner is an agent of the arrangement (referred to as a 'firm') and the acts of every partner carried out in the usual course of business of the kind carried on by the firm bind the other partners, making them all jointly and severally liable for all debts and obligations of the partnership.

At times it is necessary to identify when an arrangement is intended to be a partnership, for example co-owners in land are not automatically partners under a partnership arrangement. In the absence of anything to the contrary in the partnership deed, the Partnership Act states that all partners are entitled to share equally in the capital and profits of a business carried on by the firm and must contribute equally to the losses whether of capital or otherwise sustained by the firm.

A partnership does not as a collective pay tax but each of the individual partners have a requirement to account for tax on profit received through the avenue of the partnership.

A partnership becomes operative as soon as the partnership deed is signed and the common property or business purpose commences to operate. The Partnership Act also sets out certain circumstances in which the partnership is dissolved, other than by agreement amongst the partners, including incidences of death or bankruptcy of a partner, the partnership undertaking any unlawful event, or by one of the partners applying to the Court for dissolution.

The Partnership Act also permits the formation of special partnerships for the transaction of agricultural, mining, mercantile, mechanical or manufacturing businesses. A special

partnership is required to register its existence by way of certificate in the Court and cannot be entered into for a period longer than 7 years without going through a renewal process.

(b) Company:

Definitions:

A statutory creation of The Companies Act 1993. It is an independent legal entity comprising with one or more directors and one or more shareholders. It provides limited liability.

Formation of Limited Liability Company:

The process to incorporate a limited liability company is set out in the Companies Act 1993 and administered by the Companies Office.

It includes:

- Obtaining name approval from the Companies Office.
- Preparing documentation including entering details of the directors and shareholders, address for the registered office and address for correspondence for the company.
- Drafting the Constitution. A precedent template example is attached to the multi-structure template report as Schedule B.
- Where appropriate a shareholder agreement should be used. Such a document is recommended where there are multiple shareholders. A template example is attached to the multi-structure template report as Schedule C.
- Pay the prescribed fee for incorporating a company.
- Once the above information has been filed on-line, the documentation is processed.
- The consent to act as directors and shareholders is required.
- The Companies Office then issues a Certificate of Incorporation.

- Once incorporated, it should then obtain a separate IRD number and GST number and apply to be registered for GST purposes with the Inland Revenue Department.
- A separate bank account should be opened and maintained for the company.

Rules and Governance for a Limited Liability Company:

The constitution is the document that sets out the company's rules and its governance structure. Where the company has multi shareholders, a shareholder agreement should be used to record the capital injection from each specific shareholder, their rights to profits and their obligations in respect of any losses, and a process to enable them to exit the company. This document is also used to identify any preference shares and pre-emptive rights (i.e. the rights of existing shareholders to buy up shares that become available from either an increase in share capital or when an existing shareholder wishes to exit the company and sell its shares).

Once incorporated, the company can operate as a separate legal entity immediately. It is obligated to account for tax on its income and to file an annual return. If the company is a publicly listed company it also has requirements under the Securities Act and the Financial Reporting legislation to account to its shareholders.

(c) Co-operative Company

Definition:

Co-operative Company – a company, the principle activity of which is, and is stated in its constitution as being, a cooperative activity and in which not less than 60% of the voting rights are held by the transacting shareholders.

Formation of Co-operative Company:

Traditionally, co-operative companies were agricultural based businesses such as dairy companies and companies involved with produce marketing. However, wider co-operative activities are possible. Certain service industries such as plumbers operate supply co-operatives and there are also those that provide a range of financial services to their members such as the PSIS.

A co-operative company is established for the purpose of allowing its owners to carry on business on a mutual basis. As a company it is incorporated under the Companies Act 1993 and thus the formation process set out in (b) above applies.

An additional feature however is that the company incorporated under the Companies Act 1993 also must apply for registration under the Co-operative Companies Act 1996 in order to operate as a co-operative. Both applications for incorporation and registration can be filed simultaneously. Only a duly registered co-operative company may have the word 'co-operative' in its name.

The additional process involves:

- Completion of an application for registration as a co-operative under the Co-operative Companies Act 1996.
- The application must be authorised by the constitution or by a special resolution of the shareholders of the company which must be attached to the application.
- Completion of a statutory declaration by the directors that the company will be a co-operative company.
- Filing the application and supporting documentation with the company's office.
- The company's office then issues a certificate of registration.
- There is no additional fee to register as a co-operative company.

Rules and Governance for a Co-operative Company

The constitution remains the document that sets out the co-operative company's rules and governance structure. For more detailed information please refer to the previous section under (b).

A co-operative company must principally carry out a co-operative activity as defined in its constitution. Such an activity may include the shareholders being provided with goods or services. This could include marketing and processing services and other things ancillary to the activity.

A key difference between a limited liability company and a co-operative company is in features of its ownership that ensure the continuous active membership. These include the ability to

surrender shares if, for example, a dairy farmer who is a transacting shareholder changes to another type of farming.

Not less than 60 % of the voting rights in a co-operative company must be held by transacting shareholders. They are shareholders who supply the company, buy its goods or use its services. For example, a dairy farmer supplying milk to a co-operative dairy company would be a transacting shareholder.

Co-operative company profits are returned as rebates to the shareholders or as shares in lieu of rebates.

(d) Trust

Definition:

An equitable obligation binding a person or persons (“the Trustee/s”) to deal with property over which they have control (“the Trust Property”) for the benefit of persons (“beneficiaries”) who may enforce the obligation, or for a charitable purpose, which may be enforced pursuant to the Charitable Trusts Act. A trust is not a legal entity distinct from its trustees.

The Trustee Act 1956 covers many types of trusts including some that come into existence by circumstance rather than by an expressed intention. A large number of trusts in New Zealand are purpose trusts including family trusts formed to provide protection to the owner of assets who are able to separate their individual ownership by moving those assets into the trust.

Process for formation of a Trust:

The process for setting up a trust include:

- Identifying a settlor, who forms the trust and makes available the trust property.
- Identifying the trustees, who are responsible to care for and administer the trust property.
- Identifying the beneficiaries who are entitled to receive the trust property and who are identified by a class. Beneficiaries can be discretionary or final beneficiaries.
- Preparation of a trust deed recording each of these elements and the rules and provisions of the trust.

- Once signed the trust becomes immediately operative.

Process for formation of a Charitable Trust:

For a charitable trust under the Charitable Trusts Act 1957, although they are purpose trusts, they do not require a human beneficiary to enforce them. They are public trusts enforceable by the Attorney General. The process to form them includes:

- Identifying the settlor who forms the trust.
- Identifying the charitable purpose and the property on trust to meet that purpose.
- Preparation of a trust deed to record the charitable purpose and the appointment of trustees.
- Obtaining the consent of the IRD to the charitable purpose.
- Applying for income tax exemption.

If it is impracticable to carry out that purpose or the purpose is uncertain, then the Court can sanction a suitable scheme for the application of the fund to some other charitable purpose.

Charitable trusts enjoy various advantages in respect of taxation and any income the trust makes is usually exempt from income tax.

2.3 The Establishment of Subsidiary Multi-Structures

2.3.1 The establishment of subsidiary multi-structures are dealt with in this section. In particular we set out below a summary process for the formation of the following entities as a subsidiary multi-structure:

- Limited Liability Company.
- Trading Trust.

2.3.2 Each of the above entities is suitable for a subsidiary multi-structure. A subsidiary multi-structure for the purposes of this report, involve the parent body setting up a trading arm. The subsidiary, usually a limited liability company or a trading trust, can be used as a separate vehicle to pursue, in most instances, the trading operations for an organisation.

2.3.3 Almost all types of organisations can set up a subsidiary multi-structure. These include the following:

- Partnership
- Limited Liability Company
- Co-operative Company
- Trust including a Charitable Trust
- Ahu Whenua Trust
- Whenua Topu Trust
- Maori Trust Board
- Incorporated Society
- Maori Incorporation

2.3.4 Formation Process

(a) **Limited Liability Company**

Definitions:

A statutory creation of The Companies Act 1993. It is an independent legal entity comprising with one or more directors and one or more shareholders. It provides limited liability.

Subsidiary

An entity created under the umbrella of a parent organisation to assist or supplement the aims and objectives of the parent organisation.

Process for subsidiary company:

The process to formulate a subsidiary company is the same process identified above although special consideration needs to be given to the relationship between the parent company and subsidiary and whether the subsidiary will be wholly or partially owned by the parent company.

Formation of Limited Liability Company:

The process to incorporate a limited liability company is set out in the Companies Act 1993 and administered by the Companies Office.

It includes:

- Obtaining name approval from the Companies Office.

- Preparing documentation including entering details of the directors and shareholders, address for the registered office and address for correspondence for the company.
- Drafting the Constitution. A precedent template example is attached to the multi-structure template report as Schedule B.
- Where appropriate a shareholder agreement should be used. Such a document is recommended where there are multiple shareholders. A template example is attached to the multi-structure template report as Schedule C.
- Pay the prescribed fee for incorporating a company.
- Once the above information has been filed on-line, the documentation is processed.
- The consent to act as directors and shareholders is required.
- The Companies Office then issues a Certificate of Incorporation.
- Once incorporated, it should then obtain a separate IRD number and GST number and apply to be registered for GST purposes with the Inland Revenue Department.
- A separate bank account should be opened and maintained for the company.

Rules and Governance for a Limited Liability Company:

The constitution is the document that sets out the company's rules and its governance structure. Where the company has multi shareholders, a shareholder agreement should be used to record the capital injection from each specific shareholder, their rights to profits and their obligations in respect of any losses, and a process to enable them to exit the company. This document is also used to identify any preference shares and pre-emptive rights (i.e. the rights of existing shareholders to buy up shares that become available from either an increase in share capital or when an existing shareholder wishes to exit the company and sell its shares).

Once incorporated, the company can operate as a separate legal entity immediately. It is obligated to account for tax on its income and to file an annual return. If the company is a

publicly listed company it also has requirements under the Securities Act and the Financial Reporting legislation to account to its shareholders.

Rules and Governance for subsidiary company:

The subsidiary will have its own constitution setting out its rules and governance structure and in particular any requirements on it to refer certain decisions back to the parent company.

(b) Trading Trust

Definition:

An equitable obligation binding a person or persons (“the Trustee/s”) to deal with property over which they have control (“the Trust Property”) for the benefit of persons (“beneficiaries”) who may enforce the obligation, or for a charitable purpose, which may be enforced pursuant to the Charitable Trusts Act. A trust is not a legal entity distinct from its trustees.

The Trustee Act 1956 covers many types of trusts including some that come into existence by circumstance rather than by an expressed intention. A trading trust is formed to:

- Separate the trading operations from the parent trust;
- Allow access to the tax benefits applicable to the parent for the trading arm;
- Distinguish parts of the trust property in the parent trust, suitable for disposition to the trading trust.

Process for formation of a Trading Trust:

The process for setting up a trading trust include:

- Identifying a settlor, who forms the trust and makes available the trust property.
- Identifying the trustees, who are responsible to care for and administer the trust property.
- Identifying the beneficiaries who are entitled to receive the trust property and who are identified by a class. Beneficiaries can be discretionary or final beneficiaries.

- Preparation of a trust deed recording each of these elements and the rules and provisions of the trust.
- Once signed the trust becomes immediately operative.

Process for formation of a Charitable Trust:

The process to form a Charitable Trust referred to under Clause 2.2.8 (d) above applies and includes:

- Identifying the settlor who forms the trust.
- Identifying the charitable purpose and the property on trust to meet that purpose.
- Preparation of a trust deed to record the charitable purpose and the appointment of trustees.
- Obtaining the consent of the IRD to the charitable purpose.
- Applying for income tax exemption.

If it is impracticable to carry out that purpose or the purpose is uncertain, then the Court can sanction a suitable scheme for the application of the fund to some other charitable purpose.

As stated above, Charitable trusts enjoy various advantages in respect of taxation and any income the trust makes is usually exempt from income tax.

2.4 Why Multi-Structures Should Be Used

2.4.1 Multi-structures should be used to take advantage of the benefits of each option set out in section 2.1 of this report. Perhaps the biggest overall advantage in using a joint venture multi-structure is economies of scale. By coalescing and working together, two or more organisations can achieve significantly more than they could as individual organisations.

2.4.2 A significant result of economies of scale is that governance can be enhanced. At its core governance is about leadership and it encompasses all the issues facing an organisation, directing and controlling the activities of that organisation and supervising the people that work for it. It includes a system of checks and balances to ensure that decisions are made for the ultimate benefit of the organisation and its stakeholders.

- 2.4.3 Good governance by an effective board, management committee, chief executive or manager can significantly improve the organisations results. On the other hand poor governance can put those assets at risk of commercial failure, exposure to financial and legal problems and result in the organisation losing sight of its purpose and its responsibilities to its stakeholders. An example of the relevant issues to be considered when drafting a governance document are contained in appendix D of the multi-structures template report.
- 2.4.4 The governance structure of a multi-structure will undertake key tasks on behalf of the multi-structure including:
- Setting the purpose and vision.
 - Setting the strategies to achieve the vision.
 - Monitoring performance and demonstrating accountability to the stakeholders.
- 2.4.5 To meet these tasks those in control must have a strong sense of the organisations destination and must also have the ability to balance making a profit with meeting, if required, any social and cultural aspirations of the stakeholders.
- 2.4.6 The separating out of commercial aspirations via a multi-structure is one way of focussing on those aspirations. For example, a subsidiary multi-structure can focus on the commercial or trading aspects whilst the parent organisation can be left to focus on any social and cultural aspirations of the stakeholders.
- 2.4.7 If the vision of the underlying landowners is to upskill many of those owners or to upskill the next generation then the adoption of a more entrepreneurial approach via a multi-structure, may provide the answer. This could encourage people to work on the land and learn those skills themselves under the guidance of those who currently have the expertise. The adoption of a more conservative approach where land is used solely for grazing for instance, is unlikely to provide this opportunity.
- 2.4.8 Using a multi-structure to manage assets removes to some extent the landowners' immediate control and access to income and dividends. On the other hand, if the multi-structure is well governed and successful, the income and dividends that will eventually be realised may be significantly larger and of greater benefit to those owners.
- 2.4.9 Where the assets involved provide the opportunity to be developed into a trading arm of the stakeholders, then the adoption of a multi-structure as the vehicle to conduct the training operations is extremely relevant.

2.5 Roles And Responsibilities For Partners, Directors, Trustees and Management Members of Multi-Structures

2.5.1 The roles of multi-structure:

- Partners in the case of Partnerships;
- Directors in the case of companies;
- Trustees in the case of trusts;
- Management committees and/or a general manager in the case of other options;

in a generic sense include putting in place the strategies to enable the multi-structure to meet the aims and objectives for which it was formulated. We discuss below the specific roles of Partners, Directors, Trustees and Management Committees.

2.5.2 In general terms, the governance role involves :

- Reviewing the purpose.
- Analysing the strengths, weaknesses and opportunities associated with the purpose.
- Analysing the environment in which the multi-structure will operate (including the political, economic and social environment.)
- Analysing any competitors.
- Identifying the appropriate strategies.

2.5.3 The strategies can include investment strategies, product strategies, brand strategies, human resources strategies and technological strategies. Those in management will need to set the timeframes and the reporting back processes and then monitor the implementation of the strategies. Monitoring will include checking budget and financial performance, legal compliance and management performance. It also includes setting up key indicators to give a picture of progress and against which to measure performance.

2.5.4 Stakeholders, both internal and external all expect high standards of accountability from partners, directors, trustees and management. This means those in charge need to provide a clear and accurate view of what the multi-structure is doing, how it is performing and assurance it is operating in the best interests of the stakeholders.

- 2.5.5 Partners, directors, trustees and management are also expected to prepare strategic plans which include foreseeing potential obstacles and putting in place plans to minimise the impact of events or changes that would have a negative effect. Obstacles come in many forms and can include key staff leaving, misuse of funds, technology failures, exchange rate variations and civil emergencies. Plans to counter obstacles can include ongoing training within the workplace, audit requirements in dealing with funds, and monetary restrictions on cheque signatories, cash flow forecasting, policies for legal compliance and policies for dealing with civil emergencies.
- 2.5.6 In the context of Maori land, a multi-structure managing the land should involve itself in consultation and meetings with the owners and although not required to, should voluntarily advise the owners of the important strategic business decisions.
- 2.5.7 Where there is both a board of directors (i.e. an executive committee) and a management team, then a distinction should be drawn between the board and management. The board setting the overall direction for the multi-structure and management carrying out the day to day running of it. Where the board does not have a separate management team they should form committees where it would enhance the effectiveness in key areas.

2.5.8 Roles of Partners:

The roles of Partners include:

- Applying high ethical standards to the governance of the partnership.
- Administering and managing the business of the partnership.
- Ensuring integrity of the partnership's affairs.
- Following the direction set out in the partnership deed.
- Setting the visions and goals of the partnership and identifying the strategies to achieve them.
- Determining delegations to management or staff and reviewing those delegations from time to time.
- Appointing a manager or management committee if appropriate for the governance structure.
- Ensuring the laws that apply to the partnership and the legal requirements arising from those laws are complied with.

- Attending partnership meetings and contribute to debate in an informed and constructive manner.
- Evaluating their own performance and that of the partnership.
- Making decisions in the interests of the partnership.

2.5.9 Roles of Directors:

The roles of Directors include:

- Applying high ethical standards to the governance of the company.
- Ensuring integrity both in financial reporting and in the timeliness and balance of disclosures of the company's affairs.
- Setting the visions and goals of the company and identifying the strategies to achieve them.
- Reviewing processes that identify and manage potential and actual risks in the operations of the company.
- Reporting to shareholders and fostering constructive relationships with them that respects their interests within the context of the company's ownership and fundamental purpose.
- Determining delegations to management or staff and reviewing those delegations from time to time.
- Appointing a general manager or management committee if appropriate for the governance structure.
- Ensuring the laws that apply to the company and the legal requirements arising from those laws are complied with.
- Attending board meetings and contribute to debate in an informed and constructive manner.
- Evaluating their own performance and ensuring their remuneration is transparent, fair and reasonable.
- Making decisions in the interests of the company based on a fair process and excluding themselves from decisions that give rise to a conflict of interest.

2.5.10 Roles of Trustees:

Roles of Trustees include:

- Applying high ethical standards to the governance of the trust.
- Administering and managing the business of the trust.
- Acting in the interests of the beneficiaries at all times and with impartiality.
- Following the direction set out in the trust deed or trust order, and where applicable the intentions of the settlors if these are recorded e.g. in a memorandum of wishes.
- Complying with the provisions of the relevant trust legislation.
- Collecting, managing and distributing the trust's income.
- Ensuring integrity in the financial reporting of the trust's affairs which includes contracting the necessary expertise to provide that reporting.
- Protecting and preserving the trust property for the ultimate gain of the final beneficiaries, which includes making prudent investment decisions.
- Attending trust meetings and recording minutes of those meetings.
- Evaluating their own performance and ensuring any remuneration or expenses payable to them is fair and reasonable and within the confines of the trust deed or trust order.

2.5.11 Trustees should not delegate their duties unless the trust deed or trust order specifically permits this.

2.5.12 In the context of an Ahu Whenua Trust, the trustees have additional obligations that are codified in the Te Ture Whenua Maori Act. These include getting the consent of owners if the land is to be dealt with in a certain way. For example no land may be sold or gifted unless three quarters of the owners agree and no land may be the subject of a long-term lease unless at least half of the owners agree. In addition there are fairly restrictive rules associated with meetings as set out in the Maori Assembled Owners Regulations 1995 which include having to give 14 clear days notice of a calling of a meeting, ensuring there is the required quorum at every meeting and then ensuring that amongst those present the appropriate number of owners vote in favour of any resolutions put forward dealing with the land assets.

2.5.13 Roles of Management Committees:

Roles of Management Committees include:

- Putting in place processes to carry through the direction of the entity.
- Carrying out the day to day running of the entity.
- Employing and supervising the staff.
- Providing information back to the Board or to the stakeholders and preparing reports containing this information, particularly in regard to the business plan and budget targets.
- Ensuring proper records are kept in all aspects of the day to day running of the entity.

2.5.14 The appointment or nomination of partners, directors, trustees and management is a very important process to ensure those who sit around the board table have the right skills and visions to make the multi-structure successful. In some situations this will mean avoiding the appointment of such persons by member election or owner election and instead having a process to appoint them from the market place. It will also mean giving consideration to the size of the board, the necessary mix of skills and the period those on the board should hold office. The election from amongst the board of a chairperson is very important as that person is the key link between the board and management or where there is no management between the board and the stakeholders.

2.5.15 It is essential that those in charge observe and foster high ethical standards and that their remuneration is transparent, fair and reasonable. The Institute of Directors in New Zealand issues a handbook setting out principles and guidelines of directors in public companies, but those principles and guidelines are equally applicable to private companies or other multi-structure entities. A list of those principles are annexed to the multi-structure template report as Schedule E.

2.5.16 In summary an effective governance structure will be well-chaired, have good information to base its decisions on, will convene regularly and follow a clear meeting procedure and will include a mix of skills with no hesitation in bringing in outside help or specialist expertise when needed.

Management discussion

2.5.17 The appropriate management structure depends upon the size and nature of the multi-structure. Management can be under the guidance

of a committee, carried out by partners, a board of directors, trustees or delegated to a chief executive or general manager. Partners, directors, trustees or committee members can be elected, appointed or a combination of both.

- 2.5.18 If a committee or board structure is used, a Chairperson is elected from those on the committee or board. The Chair determines the frequency of meetings, place of meetings, a quorum for meetings and the manner in which decisions are made (e.g. usually one vote per member with the chair having a casting vote).
- 2.5.19 It is necessary to build in a process for removing and/or replacing partners, directors, trustees or committee members which can be achieved either by utilising an automatic rotation provisions or by utilising standard employment-type provisions or building in performance reviews.
- 2.5.20 If management is delegated to a chief executive or general manager, that person will be appointed in accordance with a selection process. Flexibility can be provided by limiting the term of appointment to one or two years with an automatic review process. At the end of that term, the role can be readvertised with the incumbent being entitled to reapply and the organisation being given the opportunity to test the market.
- 2.5.21 It may be necessary to define in the appointment process, acts that constitute serious misconduct and include a power of the organisation to dismiss partners, directors, trustees, committee members and/or the chief executive or general manager in the event any of them committing actions that meet the serious misconduct definition. Any such dismissal would still need to follow legal processes including natural justice and under employment law, if applicable. An example of serious misconduct in the committee context may be the continued absence of a committee member from committee meetings for say three or more consecutive meetings.
- 2.5.22 The multi-structure should adequately remunerate its management representatives at market level so it can attract and retain appropriately skilled persons, who in turn can guide the multi-structure towards achieving the purpose it has been formed for.
- 2.5.23 The degree of accountability between the multi-structure management responsible to manage the assets and the owners of the assets will vary depending on the nature of the assets being managed. The scale covers complete delegation at one end to a requirement to get sign-off on most decisions at the other end. Ideally with the right management in place; a balance will be found. The need for associated entities to constantly be involved and supervise the operations of the multi-structure i.e. the other end of the scale, to a large extent defeats the whole purpose of utilising a multi-structure.

2.6 Legal Ownership And General Tax Implications

- 2.6.1 With the use of multi-structures, the ownership of the assets invariably remains with the original owners, i.e. the stakeholders that set up the multi-structure.
- 2.6.2 As the assets have been made available to the multi-structure for use and development, the income derived from that use will initially be collected and accounted for in the multi-structure in accordance with the accountability requirements set out in clause 1.2.3.
- 2.6.3 It would be usual for the tax on the income and profit derived from the multi-structure to be paid at that point before the net proceeds are distributed back to the underlying owners. However, the point at which tax becomes payable will depend on the nature of the multi-structure. If the multi-structure is a legal entity in its own right such as a company, then it will pay tax at the point where income or profit is derived.
- 2.6.4 If it is a partnership, the rules are different. A partnership is not a separate tax-paying entity under the Income Tax Act, so it is required to make a joint return of the gross income derived by the partners collectively. The allowable deductions of each partner relating to that gross income would then be made and the individual partners making up the multi-structure partnership would then be responsible to pay tax on their share of the profits.
- 2.6.5 Putting this into the context of Maori land, if the multi-structure was carrying out a farming partnership, the individual partners may be eligible to be taxed as Maori authorities at a lower tax rate of 19.5%. The appropriate multi-structure can have significant tax implications. In some instances the structure is such that no tax is payable (i.e. a trading trust). In other instances such as the reference earlier in this paragraph, lower rates are available. The important point to be made is that taxation advice specific to the needs of the associated entities and the multi-structure should be obtained. This will ensure that any taxation benefits or implications arising from a multi-structure can be utilised to best effect.
- 2.6.6 In respect of GST the multi-structure should be GST-registered.
- 2.6.7 Generally, in the situations where a multi-structure has assets made available for its use and development, the multi-structure **will** pay tax on any profit or income derived from that use and development unless it is either a charity or constructed as a partnership. In a partnership scenario, the respective partners will pay tax on the partnership profits derived from that use and development determined by market value. Market value needs to be reviewed from time-to-time to allow for changing relativities in asset valuations. Losses would typically be shared in the same proportion as profits.

3. THE RELATIONSHIP BETWEEN THE AHU WHENUA TRUST AND MULTI-STRUCTURES

3.0 Process For Forming An Ahu Whenua Trust:

An Ahu Whenua Trust is set up under the Te Ture Whenua Maori Act 1993. The process to set up an Ahu Whenua Trust includes all or some of the owners meeting and:

- Agreeing to form the trust.
- Agreeing which blocks of land should be included in the trust.
- Agreeing to the terms of a trust order or rules of the trust. (This should include inserting a rule enabling the trustees to create a multi-structure such as a company or enter into a multi-structure such as a joint venture.) Agreeing to and recording the other terms of the trust including the trustees' powers, rights and obligations.
- Nominating trustees.

The landowners are then required to obtain the approval of the Maori Land Court to the trust formation and to the content of the Trust Order.

The Maori Land Court needs to be satisfied that the constitution of the trust will promote and facilitate the use and administration of the land of behalf of the owners. The Maori land Court also needs to be satisfied that:

- The owners have had sufficient notice.
- The owners have had sufficient opportunity to discuss the proposal to set up the trust.
- There is no objection of any merit among the owners.

The trustees are bound by the Trustee Act 1956 the same as a private purpose trust with their key duty being to maximize the assets and minimize the liabilities of the trust to the best of their ability and within the law.

The owners can nominate anyone to be a trustee including someone who is not an owner themselves providing the Maori Land Court is satisfied the trustee has the requisite ability, experience and knowledge.

The Maori Land Court is unlikely to appoint anyone who is:

- Bankrupt.
- Imprisoned.
- Convicted of a crime involving dishonesty.

- Has a history of mental disability.
- A minor.
- Known to the Court to have mis-conducted themselves in respect of a previous trust.
- Any corporation in liquidation or no longer in business.

The Maori Land Court will not appoint a person or body unless it is satisfied that the appointment is broadly acceptable to the owners.

Although the trust order will generally set out the objectives of the trust, trust funds can be spent for Maori community purposes under Section 218 of the Act which include the promotion of health, the promotion of social cultural and economic welfare of Maori people, the promotion of education and vocational training of Maori people and anything else the trustees deem appropriate providing the Maori Land Court approves.

Despite the existence of an Ahu Whenua Trust, succession to individual shares in the Maori land block will continue and the ability of the owners to represent themselves at owners meetings also continues.

Under the Act, Ahu Whenua Trusts may apply to the Maori Land Court to review the terms, operations or other aspect of the trust. An Ahu Whenua Trust can be terminated on application to the Court, following a meeting of the owners and following the lodgment of an application by the trustees. At that point the land will revert back to the current beneficial owners or whoever the Court determines is entitled.

3.1 Why Would An Ahu Whenua Trust Create A Company?

3.1.1 An Ahu Whenua Trust would create a company to receive the benefits of utilising a multi-structure outlined in Part 2 and including:

- To access the limited liability regime that comes with a company pursuant to The Companies Act that the trust, acting through its trustees, does not have access to even if those trustees are indemnified through the Trust Deed and The Trustee Act 1956. This means the liability of the trust shareholder is limited to any amounts unpaid on its share and the trust shareholder is not personally liable for the debts of the company.
- Creating a separate entity as a trading arm so it does not become blurred with other operations of the trust.

- Creating a separate entity that can be combined with other trusts or other entities to carry out a specific purpose usually associated with trade and business.
- To provide a vehicle through which to operate a trading arm that is legally separated from the trust itself for the purposes of sharing risk and steering operational risk away from the trust.
- To provide a separate vehicle that makes the combination of resources relating to trading operations with other entities more easy to achieve.
- To provide a vehicle with perpetual succession. The continuation of a company is not affected by the death of its shareholders.
- To provide a vehicle separate from the trust to raise finance or receive grants or capital injections from other parties towards development of assets or towards a particular project.
- To provide a structure with separate governance from the trust that is focused on the development of assets or the particular project the trust wishes to pursue, thereby providing economies of scale, focused expertise and additional innovation in respect of that objective.
- To provide a vehicle that potentially has a different structure from the trust that is not subject to some of the restrictions the trust may be subject to under the Maori Land Statutory Regime.
- A company has considerable scope for tax planning. For instance, options exist to allow a loss-making company to transfer these losses to its shareholders or to carry them forward for use by future subsidiary companies.
- To provide a vehicle that can act as a separate employer and income earner from the trust, which may have benefits in respect of tax that the trust itself cannot access.

3.1.2 In summary, there are many reasons an Ahu Whenua Trust may create a company and the circumstances where this would be most beneficial is where it is intending to set up a trading arm or be involved in a specific commercial project.

3.2 How Would An Ahu Whenua Trust Create A Company?

3.2.1 Decision:

The first step is for the trust, through its trustees, to make a decision to create a company. That decision would include identifying a company name; who is to act as directors of the company; and who are to be the shareholders of the company which would in most cases be the trust itself.

3.2.2 Process:

The process to incorporate the company includes:

- Checking the terms of the Ahu Whenua Trust order to ensure that the Trustees have the power to create a company.
- Obtain name approval from The Companies Office.
- Prepare The Companies Office documentation including entering details of the directors and shareholders, address for the registered office and address for correspondence for the company; drafting the Constitution and filing the above documents on-line with The Companies Office.
- The Constitution is an important document as it sets out the purpose of the company and its governance structure. Depending on the composition of the company, it may also require a shareholders' agreement, although this does not need to be filed as part of the incorporation documentation. A template setting out the types of matters to be covered in a shareholders agreement is set out in Schedule C to the multi-structures template report.
- Once the above information has been entered on-line, the company is submitted to The Companies Office for processing. The consent to act as directors and shareholders is then produced, which is signed by those fulfilling those roles and faxed into The Companies Office.
- The Companies Office then issues a Certificate of Incorporation and the company immediately becomes operative.
- If the company is incorporated to trade, it should then obtain a separate IRD number and GST number and apply to be registered for GST purposes with the Inland Revenue Department.

3.2.3 Rules

The rules as to how the company will operate will be contained in the Constitution mentioned in 3.2.2. This will include details such as:

- Quorum requirements for meetings, including the annual general meeting.
- Any rules relating to the transfer of shares, including pre-emptive rights if existing shareholders are entitled to take up shares that become available for sale.
- Details of the share capital.
- Director rotation provisions.
- Reporting procedures, including financial reporting procedures.

A template constitution is attached as Schedule B to the multi-structure templates report.

3.2.4 Governance

The governance of a company is carried out by its directors, who often operate as a board. The board is responsible to set the purpose and vision for the future of the company and the directors will then work through a process to plan the strategies that will enable that purpose and vision to be realized.

The directors are responsible to monitor the company's performance, particularly in the areas of budget and financial performance, legal compliance and any key indicator they may have identified in setting their vision and purpose. They must act in good faith and in the best interests of the company and must exercise their powers for a proper purpose.

If the company has a chief executive or general manager, then that person will report to the board of directors and they are also responsible to monitor performance in that role and to make decisions relating to an appropriate remuneration for the role.

In summary, the directors are responsible and accountable to the owners of the company, namely the Ahu Whenua Trust shareholder. A template setting out relevant governance matters is set out in Schedule D of the multi-structures template report.

3.3 How Does The Company Impact On The Trust's Control Of Land, Assets And Income?

- 3.3.1 The creation of a company does not change the underlying ownership in the trust's land. The multi-structure is created to use and develop the land and, accordingly, the ownership remains with the Ahu Whenua Trust. It is possible however for the non-land assets to be transferred to the company.
- 3.3.2 The company through its directors takes on, on behalf of the Ahu Whenua Trustees, responsibility to use and manage the land and assets and collect the income from their utilization and development. Depending on the agreement between the Ahu Whenua Trust and the company, the net income after deduction of development expenses and payment of tax by the company would then be channeled back to the Ahu Whenua Trust for distribution in accordance with its trust order.
- 3.3.3 The Ahu Whenua Trustees are likely to experience a degree of loss of control over the land and assets, handed over to the company directors. It is possible for the trustees to retain some control through the imposition of stringent reporting requirements on the company directors. The trust could also appoint trustees as directors to the company. If the company is effectively acting as a subsidiary on behalf of the trust, then the degree of control retained will be greater than if it is a joint venture trading arm with separate directors.
- 3.3.4 Control is also retained to some extent by means of the Ahu Whenua Trust being a shareholder in the company. Under The Companies Act, major transactions a company is involved in require shareholder consent. Accordingly, the company may not be able to borrow money or lease assets without obtaining the consent of the Ahu Whenua Trustees in their capacity as shareholders, where these actions constitute major transactions.
- 3.3.5 The company would not be able to alienate land without the consent of the Ahu Whenua trustees and where the alienation involves a sale or gift the consent of the Maori Land Court.
- 3.3.6 In terms of the income, again this would depend on the reporting requirements forming part of the relationship between the company and the trust but the company, as the entity responsible to collect any income, would be subject to the standard financial reporting requirements, including tasks such as:
- Liaising with internal and external auditors.
 - The formation of and review of annual financial budgets and plans.
 - Assessment of the performance of financial management.

- Review of audit findings and the annual financial statements.
- Review of accounting policies.
- Monitoring of corporate risk assessment and the internal controls in place.
- Supervision of any special investigations when requested by the trust.

3.4 Disadvantages Of An Ahu Whenua Trust Utilising A Company.

3.4.1 The disadvantages of an Ahu Whenua Trust forming a company include:

- The company may lose income or go into liquidation. If the company runs into difficulties in trade, then its options include:
 - a) Voluntary liquidation
 - b) Going into receivership pending liquidation.
 - c) Being put into liquidation by one or more of its creditors.

While the extent of the trust's liabilities as shareholder will be limited to the extent of the share capital, the collapse of the company could tarnish the reputation of the trust and affect any subsequent trading arrangements it enters into.

- The trust may have provided guarantees in respect of the company's borrowings or dealings, in which case it will be exposed to the extent of those guarantees, if the company runs into financial difficulties.
- Companies may not be suitable to meet the non-commercial objectives of whanau, hapu and iwi and may not be the best vehicle to ensure future generations of hapu or iwi members benefit from the assets the company is managing.
- Unless tax exempt, companies are liable for tax at company rates of 33 cents in the dollar.
- Under the company regime, directors have added responsibilities and can be personally liable in the event they carry on business in circumstances where they fail to meet their obligations or duties.
- Many suppliers will insist on personal guarantees from the company's directors if credit is required. This can make it difficult to find directors who are prepared to take on this role.

3.4.2 In summary, a company structure is well suited for commercial operations and examples of some Maori companies include Whale Watch Kaikoura Limited, Mai Media Limited and Shotover Jet Limited. However, the requirement that shareholders hold shares makes it a less appropriate structure in some circumstances for hapu and iwi . If an Ahu Whenua Trust already exists which, in turn, creates the company then this overcomes that particular disadvantage.

Other Key Examples

The other key examples referred to in this report include for joint venture multi-structures, the co-operative company and trust structures set out in section 2 above.

The subsidiary multi-structures already discussed above include not only a limited liability company but also a trading trust, again set out in section 2 above.

SCHEDULE 1

GLOSSARY OF KEY TERMS

Accountability: The requirement to provide information to the stakeholders/owners relating to the entity's operations; financial performance; and major decisions made in the course of those operations.

Ahu Whenua Trust: A trust set up under the Te Ture Whenua Maori Act to promote and facilitate the use and administration of Maori land in the interests of those beneficially entitled to the land.

An incorporated society: A collection of not less than fifteen persons associated for any lawful purpose but not for pecuniary gain who, on application to the Registrar in accordance with the Incorporated Societies Act 1908, become incorporated as a Society.

Charitable Trust: An equitable obligation binding a person to deal with property over which they have control to meet a specifically identified charitable purpose.

Constitution: A document that sets out an organisation's purpose and governance structure. It can also be referred to as a set of rules in the case of an incorporated society; a Trust Order in the case of Ahu Whenua Trusts; a Constitution in the case of Maori incorporations; a Trust Deed in the case of Private Express Trusts; and a Partnership Deed in the case of Partnerships.

Co-operative company: A company, the principal activity of which is a co-operative activity and in which not less than 60% of the voting rights are held by the transacting shareholders.

Economies of scale: The ability to make savings in cost and time input by combining resources.

Governance: The method by which an organisation is run, including a combination of the people who run it, the processes it is run by, and the policies that are applied.

Limited liability company: A statutory creation of The Companies Act 1993, being an independent legal entity comprising one or more directors and one or more shareholders and providing limited liability.

Limited liability: The restriction of liability of a company entity to the extent of its unpaid share capital.

Multi-structures: Legal vehicles to trade or operate independently of the persons or organisations who have created them.

Partnership: Contractually-based arrangement governed by the Partnership Act 1908 representing a collection of persons carrying on a business in common with a view to profit.

Risk adverse: A state of reluctance to take on commercial business risk associated with owning and operating various assets.

Stakeholders: The underlying owners of the assets or those for whose benefit the assets are held - in the case of a trust, the beneficiaries; in the case of a company, the shareholders; in the case of a partnership, the partners and in the case of a subsidiary, the parent organisation.

Subsidiary: An entity created under the umbrella of a parent organisation to assist or supplement the aims and objectives of the parent.

Trust: An equitable obligation binding a person to deal with property over which they have control for the benefit of persons who may enforce the obligation.