



**Tax Working Group Information Release**

**Release Document**

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*The advice represents the preliminary views of the Secretariat and does not necessarily represent the views of the whole Group or the Government.*

*Some papers contain draft suggested text for the Final Report. This text does not constitute the considered views of the Group. Please see the Final Report for the agreed position of the Group.*

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# Coversheet: Understanding impacts for Māori and update on Te Ao Māori framework

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*Position Paper for Session 22 of the Tax Working Group  
9 November, 2018*

## Purpose of discussion

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Following the release of the Group's Interim Report, the Secretariat consulted with Māori stakeholders at five hui around the country. This paper advises the Group of the feedback received at these hui, and provides advice on the implications of taxing more capital gains for Māori collectively-owned assets. The paper also provides an update on the Te Ao Māori framework (*He Ara Waiora*) for tax policy.

Finally, the paper proposes draft text for inclusion in the Final Report.

## Key points for discussion

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- The feedback gathered from engagement hui with Māori
- The impacts of extending the taxation of capital gains on Māori collectively-owned assets, including the following key issues:
  - Māori group reorganisations and intra-group asset transfers
  - Death and gifting of Māori interests
  - Māori freehold land
  - Voluntary sale of Māori collectively-owned assets
- Next steps on the development of a Te Ao Māori framework for tax policy

## Recommended actions

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We recommend that you:

- a. **Note** the feedback the Secretariat received from Māori engagement hui in October.
- b. **Note**, in relation to extending the taxation of capital gains:
  - The no change of ownership in substance roll-over principle that is being considered by the Group would not necessarily include certain transactions undertaken by Māori organisations, such as a transfer of an asset from an iwi to a hapū;
  - If the Group recommends generous roll-over treatment on death and gifting (or either a sizable cap on such transfers or a delineation between 'liquid' and illiquid assets) the vast majority of bequeathed and gifted interests in Māori freehold land and Māori authorities will be within the limits of that relief;

- The distinct context of Māori freehold land, including that it is held for intergenerational purposes and its restrictions for alienation; and
  - Such taxation may place an obstacle on a Māori organisation seeking to regain ownership of ancestral land.
- c. **Agree** that it should be explored how the change of ownership in substance roll-over principle could be designed in a way that accommodates Māori collectively-owned structures and transactions (such as iwi to hapū asset transfers).
- d. **Agree** that whether tax applies to disposals of Māori freehold land and interests in that land should be considered further by the Government.
- e. **Agree** that a roll-over relief principle should be considered further by the Government in relation to Māori organisations that realise capital gains in order to regain ancestral land.
- f. **Note** that if recommendations (d) and (e) are agreed to by the Group, this should be progressed by the Government through further engagement with Māori and inter-agency consultation in order to balance the broader policy objectives.
- g. **Note** that there may be other circumstances that warrant consideration for relief in relation to Māori collectively-owned assets but that this could only be explored through further engagement with Māori.
- h. **Note** that the substantive recommendations above need to be weighed against the effect of general roll-over decisions reached by the Group.
- i. **Note** that Sacha McMeeking (University of Canterbury) will present a paper to the Group on Thursday 8 November (at meeting 22) that consolidates a range of views from within Māoridom and identifies possible next steps for *He Ara Waiora*.
- j. **Agree** that that an update with proposed next steps on *He Ara Waiora* and wording for the final report be provided in the Secretariat's upcoming paper on frameworks, which is due for consideration by the Group at meeting 23.

# Understanding impacts for Māori and update on Te Ao Māori framework

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*Position Paper for Session 22  
of the Tax Working Group*

November 2018

*Prepared by Inland Revenue and the Treasury*



## TABLE OF CONTENTS

Executive summary	6
1. Introduction	7
1.1 Purpose	7
1.2 The Crown's role as a partner to the Treaty of Waitangi	7
1.3 Previous advice	7
1.4 Overview of engagement with Māori	8
2. Extending the taxation of capital gains	10
2.1 Overview	10
2.2 The Māori collectively-owned asset base	10
2.3 Roll-over relief – no change of ownership in substance	11
2.4 Death and gifting	13
2.5 Māori freehold land	14
2.6 Voluntary sale of Māori collectively-owned assets	16
2.7 Small business options	19
2.8 Intangible assets	20
3. Te Ao Māori framework <i>He Ara Waiora</i> – next steps	21
Appendix A: Feedback from engagement with Māori	23
Appendix B: Previous advice on Māori collectives and assets	26
Appendix C: Suggested text for Final Report	31
Appendix D: Summary of worldwide approaches	32

## Executive summary

This paper provides the Tax Working Group with advice as to the implications of extending the taxation of capital gains on Māori collectively-owned assets. This advice incorporates feedback from the engagement hui sessions held in October and is a continuation of the Secretariat's previous advice in this area. The paper also provides an update on the Te Ao Māori framework for tax policy.

This advice was originally intended to be presented to the Group once general decisions on roll-over had been made, such that it would fulfil the functions of:

- explaining how those general principles may apply to Māori collectively-owned assets; and
- whether anything further in terms of roll-over should be considered in the context of Māori collectively-owned assets.

Understandably, the Group is still considering the extent of roll-over relief. Also, it became apparent through the hui process that further consultation, once the general principles were established, would be beneficial both for Māori and the Crown in seeking to understand the implications of those general principles. A further consultation process would also allow the Crown to give further consideration to the wider policy context (such as broader Māori economic development and the Treaty settlement process) of these issues through an inter-agency process.

This paper recommends exploring how the 'no change of ownership in substance principle' could accommodate Māori collectively-owned organisations and how they manage and structure their assets. Further, the following decisions should be made by the Government, once the general roll-over principles have been decided, as part of a further consultation process:

- whether there should be an exclusion or limited roll-over relief for Māori freehold land and interests in that land;
- whether there should be a stand-alone roll-over relief principle in relation to Māori organisations that realise capital gains in order to regain ancestral land; and
- whether there are other circumstances that warrant consideration for relief in relation to Māori collectively-owned assets.

# 1. Introduction

## 1.1 Purpose

1. This paper provides the Tax Working Group with advice as to the implications of extending the taxation of capital gains on Māori collectively-owned assets. This advice incorporates feedback from the engagement hui sessions held in October and is a continuation of the Secretariat's previous advice in this area. The paper also provides an update on the Te Ao Māori framework for tax policy.

## 1.2 The Crown's role as a partner to the Treaty of Waitangi

2. The Crown has a specific obligation under the principles of the Treaty of Waitangi to understand the impact of proposed policy changes for Māori, to consider how any negative or unintended effects might be mitigated, and to balance consideration of any impacts for Māori with broader public policy objectives.
3. The Crown (through the Crown-Māori relations portfolio) has recently been consulting on the proposed intent and values for the Crown/Māori relationship. The Government's intent is to work more effectively with Māori on initiatives that will benefit Māori and the country generally.<sup>1</sup> This intent is shaped by the following values:
  - Partnership: The Crown and Māori will act reasonably, honourably, and in good faith towards each other as Treaty partners.
  - Participation: The Crown will encourage and make it easier for Māori to more actively participate in the relationship.
  - Protection: The Crown will take active, positive steps to ensure that Māori interests are protected as appropriate.
  - Recognition of cultural values: The Crown will recognise and provide for Māori perspectives and values.
  - Use mana-enhancing processes: For example, this involves a commitment to early engagement and an ongoing relationship.

## 1.3 Previous advice

4. In its meeting on 14 September, the Group considered the paper *Extending the taxation of capital income: implications for Māori collectively-owned assets* ("the 14 September paper"). In that paper, the Secretariat:
  - provided the Group with an overview of the Māori collectively-owned asset base and Te Ao Māori perspectives;
  - explored possible implications of extending the taxation of capital income on Māori collectively-owned assets; and
  - outlined the proposed approach to engagement with Māori after the Interim Report is released.

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<sup>1</sup> See <https://www.justice.govt.nz/assets/Documents/Publications/Cabinet-paper-Initial-scope-of-CrownMaori-Relations-portfolio.pdf>

5. The Group were comfortable with the proposed engagement plan and agreed with the Secretariat's proposal to report back once Māori engagement had been completed.
6. Note that some of the contextual information on the Māori collectively-owned asset base and Te Ao Māori perspectives from the 14 September paper is replicated in Appendix B.

#### **1.4 Overview of engagement with Māori**

7. In October the Secretariat arranged and conducted five hui in Rotorua, Wellington, Auckland, Christchurch and Kaikohe. The objectives of the engagement hui were to ensure that the recommendations and ideas raised in the Interim Report were well understood by Māori organisations, and to collect feedback to inform further advice.
8. Each hui consisted of a presentation by the Secretariat,<sup>2</sup> with time for discussion on the proposals and ideas raised in the Interim Report. The Secretariat's presentation had a strong focus on the implications of extending the taxation of capital gains, but also covered the Interim Report's proposals in relation to the environment, charities, and Māori authorities. The hui also served to test the thinking and approach of the Treasury's September discussion paper *He Ara Waiora/A Pathway Towards Wellbeing*, which explored Te Ao Māori perspectives in relation to the Treasury's Living Standards Framework (in the context of the Group's work).
9. Overall, the hui were constructive sessions where a range of views were expressed. Attendance levels were moderate and were likely affected by the number of other government engagement processes taking place, as well as the ongoing nature of the Group's work with final recommendations yet to be made. However, there was representation from a wide range of iwi and Māori entities, as well as key organisations such as the Federation of Māori Authorities, the New Zealand Māori Council, and the Iwi Chairs Forum. The hui helped to build understanding of the Group's work among participants and the feedback received was extremely valuable in understanding the range of areas of interest and concern, as well as some of the areas and transactions that could be impacted.
10. A significant constraint on the engagement process was that it is currently not possible to determine with any certainty the transactions that Māori organisations undertake that might or might not be affected by further taxation of capital gains. This will be dependent on the Group's final decisions on roll-over relief. We anticipate that any proposals that the Government progresses in this area will be firmer, so further engagement with Māori would be more valuable in terms of specific feedback on proposed rules. Engagement on firmer proposals is also likely to generate greater levels of participation from Māori.

11. Key insights from the hui are as follows:

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<sup>2</sup> The presentations used a slide pack that had been provided to the Group in draft for noting at its 28 September meeting.

- In relation to the Māori authority regime, participants expressed support for the Group's recommendation to extend the 17.5% tax rate to wholly-owned subsidiaries of Māori authorities.
- In relation to extending the taxation of capital gains, a number of issues were raised which are detailed in the next chapter (and in Appendix A). While there was generally support for making the tax system fairer, there was concern that in practice it may generate more inequities. This was seen to be particularly acute because the tax will not be enacted on a level playing field, as Māori have not been able to benefit from the asset price rises and returns on investment for the assets over which they lost control through Crown action. As such, many participants considered some form of exemption would be 'fair' but engaged in constructive dialogue about implications of the possible tax change. For example, a key area of discussion was around how principles of roll-over relief might apply to the reorganisation of assets within iwi or other Māori entities.
- There was a lot of interest in seeing efforts to preserve and develop natural ecosystems recognised, for example, through biodiversity tax credits.
- There was healthy discussion on charities and interest in the Department of Internal Affairs Review of the Charities Act 2005.
- A desire for greater recognition for extensive amount of unpaid work done by Māori was also a theme. This was raised in the context of whenua (e.g., for Māori land trusts) and the extensive amount of voluntary work that is undertaken to sustain collective land management and development. It was also raised in relation to the marae, with individuals and whānau for whom government services are inaccessible or ineffective. In this context, the social and economic challenges experienced by many Māori communities was discussed and a sense of frustration was expressed about the failure of the Crown to effectively address this.
- In relation to *He Ara Waiora* and the development of a Te Ao Māori framework for tax policy, participants were generally supportive of the intent but signalled clearly the risks of tokenism and were interested in seeing more work such that the framework could have practical application.

12. A short summary of other feedback received by the Secretariat at the hui is provided at Appendix A. This includes some feedback on the issues of environment, charities, and Māori authorities which are not otherwise commented on in this paper.

## **2. Extending the taxation of capital gains**

### **2.1 Overview**

13. In many cases, Māori collectively-owned assets would not naturally fit within the general roll-over approaches that are being considered by the Group (and the excluded home policy set out in the Group's terms of reference). Accordingly, the impacts of extending the taxation of capital gains on Māori collectively-owned assets warrants special attention by the Group. This part of the paper builds on previous Secretariat advice to the Group by considering these impacts (post-engagement with Māori) and proposing options intended to mitigate these impacts where appropriate.
14. As mentioned above, the Secretariat cannot yet set out a complete picture for how extending the taxation of capital gains would affect Māori collectively-owned assets due to the fact that key design issues are still being worked through by the Group. This was expected, and it is a natural consequence of formulating a major tax proposal with consultation steps along the way.
15. As a result, the Secretariat's advice is for the Group to make general recommendations to the Government in this area. Policy development and precision will undoubtedly advance and improve from a further round of engagement with Māori. The Government will need to give consideration to the wider policy context that tax changes would land within, such as broader Māori economic development and the Treaty settlement process. There are also a number of policy processes currently underway that may have impacts for Māori collectively-owned assets. The cumulative impact of such changes may also need to be factored into specific decisions on tax policy. In particular, it is not clear whether tax is the most appropriate policy lever to give effect to these broader policy considerations.
16. Specific issues raised during engagement with Māori are described below under what the Secretariat believes to be the main issues with how extending the taxation of capital gains would affect Māori collectively-owned assets. Some concerns raised that do not relate to these main issues are detailed in the feedback summary in Appendix A.
17. In Appendix D we have provided a summary of how some other countries have approached the taxation of collectively-owned indigenous assets in relation to the taxation of capital gains.

### **2.2 The Māori collectively-owned asset base**

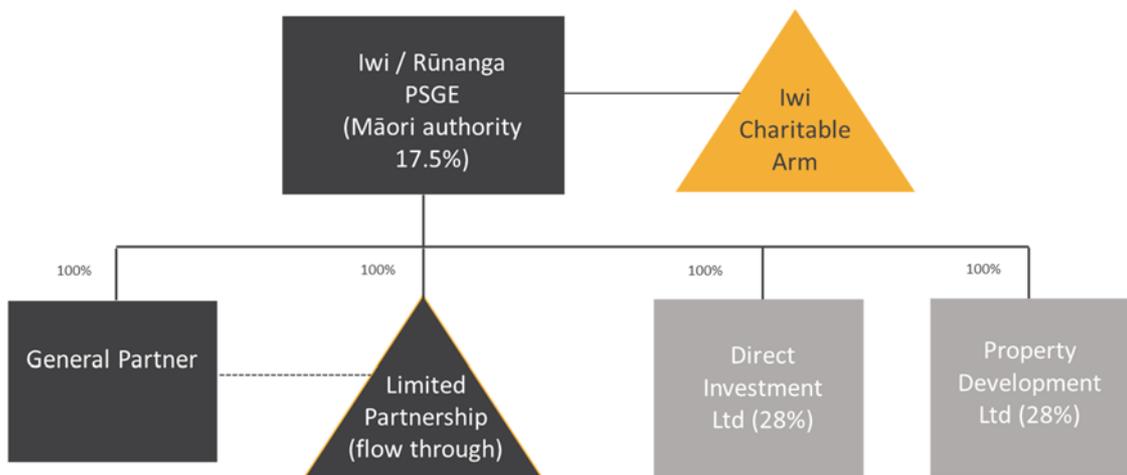
18. The size of the Māori economy is estimated to be approximately \$50 billion in assets, with Māori collectives comprising \$15 billion, and \$9 billion of those collectives being Post Settlement Governance Entities (PSGEs).
19. Māori collectively-owned assets are administered through a range of specific legal entities, such as PSGEs, Māori Trust Boards, Tenths Trusts, Ahu Whenua Trusts, and

Māori Incorporations. These entities are generally responsible for holding and managing the assets and administering any benefits to the members. Often, these entities have either charitable or Māori authority tax status and hold assets such as Māori freehold land, general title land, wāhi tapu, river and lake bed title, property (schools and buildings), fishing quota, financial assets (shares and bonds), and cultural taonga.

20. Some collectively-owned Māori assets have been returned through Treaty settlement. In the case of land, these assets generally belonged to Māori prior to European settlement but were lost due to acquisition or confiscation.
21. A distinctive characteristic of Māori collectively-owned assets is that, generally, the ownership base (being one of whakapapa or birth right) increases as the population grows. Unlike most other types of assets, new owners do not have to pay for their ownership interest, so there is effectively a perpetual shareholder dilution. This unique ‘involuntary membership’ aspect of Māori authorities sets them apart from traditional savings vehicles such as managed funds and KiwiSaver accounts. While there are similarities in the way that Māori authorities and savings vehicles are taxed at the marginal rate of members, Māori authorities can have difficulty identifying their members for the purpose of distribution and this can lead to over-taxation in practice. In addition, a large proportion of Māori land is underutilised in an economic sense.
22. The Secretariat also notes that if capital gains of a Māori authority are taxed under a policy of extending the taxation of capital gains, this would remove the need for the Māori authority regime’s existing rules that allow non-taxable distribution of capital gains to members. Instead, any tax paid on realised capital gains would generate Māori authority credits that would be distributed to members in the usual way.
23. Further information that was previously provided to the Group as to the Māori collectively-owned asset base and the surrounding context is set out in Appendix B.

### **2.3 Roll-over relief – no change of ownership in substance**

24. At the Group’s 12 October meeting it was agreed that roll-over relief should be provided to business reorganisations which do not result in a change in the asset’s ownership in substance. This would help to ensure that taxation is not an obstacle to the implementation of an efficient restructure of business assets.
25. The Group also noted this roll-over principle may need to incorporate transactions between iwi and hapū. This section discusses the types of reorganisation and asset transfers that a Māori organisation may undertake.
26. We understand that some Māori organisations are structured using a combination of companies, charitable entities, and limited partnerships within one wholly-owned group. An organisation that is structured in this way (e.g. the Post-Settlement Governance Entity example below) would be able to access business reorganisation roll-over treatment for a reorganisation of its assets to achieve its strategic objectives.



27. From engagement, the Secretariat is aware that some Māori groups operate collaboratively according to whakapapa relationships (iwi and hapū) rather than relationships formalised through legal status. Members of hapū will be members of iwi, but not necessarily members of other hapū associated with the same iwi. An asset transfer from an iwi to an associated hapū will detach individual ownership interests in that asset for Māori that belong to the iwi but not the hapū (e.g., when returning land to the customary owner). Thus, these whakapapa/whenua relationships can drive asset transfers that would result in a change of ownership in substance, and which could be subject to tax under the Group's thinking for taxing more capital gains.
28. In the Treaty settlement context, assets are transferred from the Crown according to its policy of negotiating with large natural groups (which can be contrary to Māori preference). Following this settlement, assets will often be transferred to different holding entities according to the needs of the various assets and the particular nature of the group. For instance, a transfer may be from an iwi PSGE to a hapū that was the customary owner of the asset in question. An example provided in hui was the transfer of pounamu interests returned in the Treaty settlement to the particular hapū that had customary ownership of that taonga. Under a straightforward approach to the roll-over relief principle for no change of ownership in substance, such an asset transfer would likely be considered an actual change of ownership in substance.
29. Throughout engagement, there were strong views from participants that taxation of an iwi-hapū asset transfer of the kind described above would be an unjust outcome, given the Crown has set the parameters of the negotiating party through the large natural groupings policy. In addition, the intention of such transfers is not to realise capital gains through a sale to a third party; it is to place collectively-owned assets under the historical ownership entity or group.
30. During engagement, inter-hapū transactions and inter-iwi transactions were also discussed. An inter-hapū transaction can be considered analogous to an iwi's reorganisation of assets provided that the asset remains within the iwi.
31. With respect to inter-hapū transactions, the Secretariat considers that it should be explored how the no change of ownership in substance roll-over relief principle could

be designed to accommodate Māori collectively-owned structures and transactions. This should be available to all Māori collectives (for example, within an over-arching iwi structure). In particular, the Secretariat considers that asset transfers from iwi to associated hapū (and from hapū to iwi) and inter-hapū transactions merit inclusion.

32. Inter-iwi transactions were raised as a possibility in the context of Moana New Zealand, which is owned by several iwi and holds a 50% stake in Sealord. Sale of an ownership interest in Moana by one iwi to another iwi would be considered a realisation event under ordinary principles for taxing more capital gains.
33. Inter-iwi transactions can be intended to address historic circumstances (for instance, a transaction that allows an iwi to acquire ancestral land from another iwi), but they can also have a commercial element. Such transactions do not neatly fit within the ‘no change of ownership in substance’ roll-over relief principle. The Secretariat considers that it is more appropriate for these types of transactions to be considered below in the context of voluntary sale of collectively-owned assets.
34. Another option considered was whether there should be time-limited relief immediately following a Treaty settlement to allow a PSGE to reorganise its assets without capital gains tax consequences. However, when considered against the broader roll-over relief principle, this approach seemed unduly restrictive and risked punishing Māori organisations for initial structuring moves that may need to be unwound or improved upon at a later point in time.

## **2.4 Death and gifting**

35. A significant number of Māori have interests in Māori freehold land (and/or Māori authorities). Māori will typically hold on to these interests until death such that they are bequeathed to descendants. Māori can also transfer interests during their lifetime to members of the preferred classes of alienee.<sup>3</sup> Such gifts and transfers on death are prima facie realisation events under an extension to the taxation of capital gains. However, we note that one of the arguments made by hui participants during engagement with Māori was that the considering death to be a realisation event for the purposes of taxation is a Pākehā-centric view; a Māori approach may have greater regard to the intergenerational purpose of holding assets and passing them on to descendants.
36. In relation to the realisation events of death and gifting, one of the options the Group is considering is roll-over relief that is limited to a certain threshold. The perpetual shareholder dilution of interests in Māori freehold land and Māori authorities referred to above means that, if this option is pursued, the value of individual ownership interests are unlikely to exceed the threshold that the Group recommends to Government.
37. Previous advice highlighted that there may be particular valuation and cashflow difficulties from requiring tax to be paid on ‘illiquid’ assets at death. The Secretariat

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<sup>3</sup> The Secretariat notes the growing trend of trusts that hold whanau interests in Māori freehold land. Such trusts result in beneficial interests arising upon Māori being born into the whanau instead of upon death or through a gift.

considers that interests in Māori freehold land and Māori authorities are best categorised as illiquid assets. That is, it is difficult to sell, borrow against, or exchange these interests at short notice. This is due to legislative restrictions applying to the sale of Māori freehold land (for instance, sale requires 75% of owners to approve the sale) and compounding practical issues including ownership registers which are often incomplete.

38. If the Group decided that there would be no roll-over on death or for gifts, whether tax could apply on transfers of Māori freehold land would need to be considered. In reality, because of the dilution of ownership, gains are likely to be non-existent or very small. The possibility of exempting Māori freehold land is discussed below. This would separately remove any tax impost on the transfer of interests in such land.

## 2.5 Māori freehold land

39. In the paper *Extending the taxation of capital income: implications for Māori collectively-owned assets* which was considered by the Group on 14 September, the Secretariat raised the issue of an exemption from extending the taxation of capital gains for Māori freehold land. This issue was identified again in the Secretariat paper *The excluded home* (which was considered on 28 September). The Group has noted that the issue would be revisited following engagement with Māori.
40. Any sale of Māori freehold land requires the consent of at least 75% of owners. In general, the poor quality of data in owner registers, and the difficulties in accessing owner details, make it challenging for owners to achieve the 75% threshold and, even then, a sale is not assured because it is usually subject to confirmation by the Māori Land Court.<sup>4</sup> These constraints mean that Māori freehold land will be sold less frequently when compared with other New Zealand land.
41. We received some feedback during the hui in relation to the alienation of Māori freehold land (other than through gifting and death, which we discuss above). Participants at hui advised the Secretariat that it is difficult to raise capital to develop Māori freehold land, as banks can be reluctant to lend to Māori collectives with such land as security. Consequently, portions of Māori freehold land can be sold in order to fund development on the remainder. Hui participants considered that the objective of such a transaction is not necessarily to generate a capital gain; it may instead be to efficiently utilise already-owned land. Sometimes Māori freehold land is also sold due to financial hardship. There are also entities that apply to the Māori Land Court to sell land in order to rationalise land holdings.
42. Another relevant piece of feedback in relation to this issue is that Māori freehold land can be converted into general title. This is usually in order to overcome the legislative restrictions placed on Māori freehold land under Te Ture Whenua Māori Act 1993,

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<sup>4</sup> When considering a sale of land, the Māori Land Court must have regard to the principles in the Preamble to Te Ture Whenua Māori Act and the general directive in section 2 of that Act, all of which have a focus on land retention for Māori.

which can have the effect of inhibiting development of land. This scenario warrants further exploration.

43. However, sales of Māori freehold land and conversion into general title are still very rare. In the Secretariat's view, having Māori freehold land in the base for taxing more capital gains would not result in a significant number of taxable events (assuming roll-over relief is applied to the gifting and transfers of interests in the land on death of Māori freehold owner).
44. The Secretariat has made reference in earlier advice to the analogy between the family home and Māori freehold land, but we acknowledge that this analogy is not perfect. Accordingly, any special consideration of Māori freehold land should be on its own right and not as an extension to the Government's policy on taxation of the family home as reflected in the Group's terms of reference. Some justifications for special consideration of some kind for Māori freehold land are as follows:
  - a) Māori freehold land is an ancestral place of cultural significance through which Māori collectively connect with their whānau through whakapapa.
  - b) An exemption for Māori freehold land would support Māori to practice kaitiakitanga, as it would recognise the special nature of Māori freehold land; it is managed collectively for the long-term and not for any one generation of Māori.
  - c) The excluded home policy has an implicit bias in that it is disproportionately unavailable to Māori, who have lower home ownership rates than non-Māori. Special consideration of Māori freehold land may go some way to addressing this bias for Māori with interests in Māori freehold land.
45. Each of these justifications contains an element of fairness that has validity in terms of wider public policy objectives but does not necessarily fit neatly with the definition of fairness within the established principles of tax policy design. In light of the distinct context of Māori freehold land, these broader fairness factors, and the feedback we have received as to why Māori freehold land can be sold (while keeping in mind that it is a rare occurrence), the Secretariat sees merit in further consideration being given to the taxation of this land. A range of options could be considered, including, for example, a general exemption for Māori freehold land, or roll-over relief for gains made on the sale of such land if those gains are reinvested in other Māori freehold land.
46. A decision on treatment of Māori freehold land would need to be informed by an inter-agency process to ensure the Crown's Treaty responsibilities are appropriately balanced and any risks (such as precedent risks) to wider policy objectives of the Government are considered. As such, if the Group wishes to agree that further consideration be given to this issue, officials consider it should recommend that the Government explore this through an inter-agency process, with further Māori engagement.

47. If Māori freehold land has an exemption from taxation of capital gains, we would expect such an exemption to cease upon conversion to general title. The land would then be included in the tax base at its market value free of the previous restrictions. This valuation would take into account the increased value that results from removal of the legislative and administrative restrictions of Māori freehold land status. If Māori freehold land is generally part of the tax base for extending the taxation of capital gains, consideration would need to be given to whether its valuation includes or ignores the reduced market value resulting from its legislative and administrative restrictions.

## **2.6 Voluntary sale of Māori collectively-owned assets**

48. The Secretariat has previously advised that tax relief of some kind may be justified in relation to the voluntary sale of Māori collectively-owned assets.<sup>5</sup> This section of the paper is a follow-up to that advice. However, we note that the Group's thinking on roll-over relief in a general sense is still evolving, particularly in relation to whether a 'like for like' asset reinvestment roll-over relief principle is merited.

49. Regardless of how broad the Group's general roll-over approaches are, there may still be instances where the approach does not apply in the Māori collectively-owned assets context. For example, any business assets or like-for-like roll-over would presumably be predicated on an understanding that the replacement assets would be actively used to conduct a business (as opposed to not being used in a business or being rented out to a third party). This may not be the case for an iwi that sells land which is rented out to third parties or where the proceeds are used to purchase culturally significant land that it has no intention or capacity to use as a business premises.

50. A Māori collectively-owned organisation may, over time, seek to regain ownership of land that was lost through prior Crown action. For instance, a Tenth Trust may wish to sell current assets in order to acquire land that was not held in reserve for Māori as per agreements made in the 19<sup>th</sup> century. The issue is how an extension to the taxation of capital gains would affect such the intent and feasibility of such a transaction. We note that various types of Māori organisations (Ahu Whenua Trusts, Māori incorporations, and PSGEs) are relevant to this issue.

51. In engagement, participants supported relief from taxation of capital gains in relation to Māori collectively-owned assets, including Treaty settlement assets. There were requests for relief from such taxation because it would impede:

- d) the process of Māori restoring their economic base, and
- e) the ability to recover control of ancestral land that was lost as a result of Crown action.

52. Suggestions included exempting the Māori authority regime, or it could be targeted to particular assets (for instance, Treaty settlement assets, or Māori freehold land

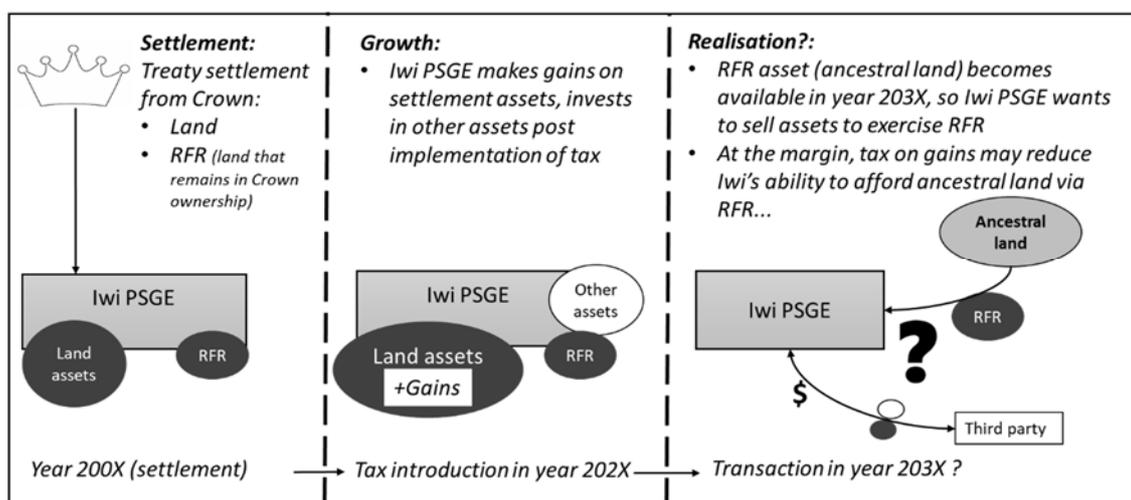
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<sup>5</sup> Refer earlier Secretariat papers *Extending the taxation of capital income: implications for Māori collectively-owned assets* and *Rollover treatment and Loss ring-fencing*.

which is discussed above). Some suggested a time-limited exemption (such as 50 years) rather than in perpetuity. For some participants, the distinction between an exemption and roll-over relief was not well understood. Discussion about how roll-over relief could apply in practice were limited as most participants were coming to grips with the broad intent and shape of the proposals.

53. In determining how extending the taxation of capital gains might affect the intent and feasibility of a Māori organisation seeking to regain ancestral land, an example may help to illustrate the issue. The example below is from the Treaty settlement context and is summarised as follows:

- In year 200X, the Crown reaches settlement with an iwi PSGE under which land assets are transferred to the PSGE. Also provided is a right of first refusal (RFR) for a parcel of the iwi’s ancestral land that remains in Crown use and which is within the iwi’s area of interest.
- In year 202X, the Government introduces an extension to the taxation of capital gains. The iwi PSGE makes gains on its settlement assets and generally expands its commercial portfolio following implementation of the tax.
- In year 203X, the Crown is ready to dispose of the ancestral land for which the iwi PSGE has an RFR. The iwi’s intent is to sell its land assets and some of its other (non-settlement) assets in order to generate enough cash to exercise its RFR and thereby purchase the ancestral land. However, by selling its current assets the iwi will be realising its accumulated gains on those assets and may be subject to tax on those gains.
- The issue is that, at the margin, extending the taxation of capital gains without some tax relief may reduce the iwi PSGE’s ability to afford the ancestral land. The iwi may be ‘locked in’ to assets that it views as less culturally significant and valuable.



54. In light of broader Government policy objectives, the Secretariat’s view is that there is merit in exploring a roll-over relief principle in relation to the regaining of land that was lost through historical Crown action. Such a principle would recognise that taxation of capital gains could constrain a Māori organisation’s ability to regain control over ancestral land that was lost through Crown action. From one perspective, this is little different from the constraint that arises through taxing other income from

capital (e.g. income tax on rental income, dividends, and interest) that Māori organisations own. However, another perspective is that the lock-in incentives created by a realisation-based tax in effect create a tax system that disincentivises switching to otherwise-preferred assets, including ancestral land.

55. In relation to the suggestion of an exemption, to the extent that a Māori organisation does not sell the assets that it has regained, roll-over relief would be as effective as an exemption if the policy objective is to avoid placing an obstacle on Māori organisations seeking to regain ancestral land. This is because any gains of a previous asset would be transferred into the ancestral land asset and would stay untaxed, as they would under an exemption (unless the ancestral land asset is itself sold, at which point taxation may again be appropriate depending on the circumstances of that sale).
56. In the context of Treaty settlement, an argument for this roll-over approach is the arbitrary nature of asset receipt through Treaty settlement; the Crown can only provide redress to iwi using the assets that it owns. In order to recover ancestral land that is in private ownership, Māori groups may enter into transactions which would not be undertaken had that land been available to the Crown at the time of Treaty settlement. While these transactions are voluntary, they are carried out from a position that is uncontrolled and unintended. In some cases, it may take decades before it is possible to recover such land.
57. However, we consider that this roll-over relief principle should be subject to further work being done by the Government in determining the detailed policy design of such an approach. For instance, the following key questions will need to be worked through:
  - What land qualifies for this roll-over relief when acquired. For instance, in the Treaty settlement context, land acquired under an RFR has a very strong case for being included due to its connection to the Crown's original settlement. Further, assets that are mana whenua assets or assets within the relevant rohe identified in the Treaty settlement process may be included. The appropriate limits to the roll-over relief are less clear outside of the Treaty settlement context at this stage.
  - Whether it is only the ultimate ancestral land acquisition that merits roll-over relief, or whether prior transactions should also be included. I.e., should a Māori organisation that buys and sells a series of assets before acquiring a piece of ancestral land be eligible for roll-over relief for each transaction?
58. If the Government takes this roll-over principle forward in the context of taxing more capital gains, more engagement with Māori will be vital in order to develop sensible rules that operate as intended and are appropriate for the context of Māori collectively-owned assets. As above with Māori freehold land, the Secretariat considers that such a principle would also need to be informed through an inter-agency process.
59. In addition to this roll-over principle that would apply to Māori organisations regaining ancestral land, there may be other circumstances that warrant consideration for relief. Further discussions with Māori would be needed to clarify these circumstances once key design features of extending the taxation of capital gains have been finalised.

60. For example, there was discussion in the hui about transactions after a Treaty settlement that can occur to align an iwi's asset holdings with their strategic objectives. We heard that sometimes getting clarity and buy-in to these objectives takes time and also depends on available capability. This can result in a desire to sell an asset or assets acquired in the Treaty settlement for other assets (for example a rural school for a commercial property). Where changes to the asset mix involve sale or purchase of assets outside of the iwi structure, roll-over principle relating to the same economic owner would not apply.

61. Factors that may warrant some form of relief include:

- asset acquisition through a Treaty settlement is constrained by the nature of assets made available by the Crown;
- iwi may not have fully developed strategic and commercial capability when these decisions are required to make judge the alignment of available assets with their strategic objectives; and
- it can take time to get wider buy-in from the iwi membership to the strategic objectives and what mix of assets best aligns with this.

62. Post-settlement government entities are indemnified for any tax liability relating to the transfer of assets from the Crown to the entity. The merits of a time-limited indemnity on any realised capital gains could be explored by the Government, for example, for a five-year period following settlement date. Considering the merits of such an indemnity should include weighing up the risk of incentivising rushed decision-making to meet any arbitrary time-limit.

## **2.7 Small business options**

63. Following direction from Government, the Group is currently thinking about small business concessions, particularly an exemption or roll-over relief in relation to extending the taxation of capital gains. There are a number of possible policy rationales for such an exemption, including:

- ensuring tax is not a barrier to expansion and reinvestment by small businesses;
- preserving the retirement savings of small business owners;
- reducing compliance costs for small businesses;
- the larger relative scale of risks for smaller operations, reflected in high rates of bankruptcy for such businesses; and
- promoting innovation and entrepreneurship.

64. The Secretariat recommends that the Group consider the extent to which its objectives in relation to small business concessions apply to small Māori business organisations. The application of such concessions to Māori businesses would depend on the design, particularly in respect of entities that are not closely-controlled.

65. For example, Australia's small business concessions require businesses to aggregate the turnover and assets of any commonly controlled entities (similar to consolidation) to determine whether they qualify as small businesses. Depending on its design, if the Group were to recommend this sort of rule the Secretariat notes that it could disqualify

larger organisations, such as iwi, that own several small businesses, from accessing the small business concessions.

## **2.8 Intangible assets**

66. During engagement with Māori, there was some discussion of how intangible assets would be treated under an extension to the taxation of capital gains. Hui participants advised that interests in fisheries and New Zealand emission units (from forestry interests) are significant intangible assets for Māori collectives.
67. Consistent with previous advice on intangible assets, the Secretariat notes that Māori cultural assets would only be within the tax base to the extent that rights over those assets are capable of being legally enforced. If rights over Māori cultural assets are enforceable, we understand the likelihood of Māori selling such rights is rare.

### 3. Te Ao Māori framework *He Ara Waiora* – next steps

68. The Group’s Interim Report set out the prototype framework *He Ara Waiora* that was developed based on feedback from Māori organisations about how tikanga Māori could support a future-focused tax system. The fuller context was set out in an accompanying discussion paper prepared by the Secretariat.<sup>6</sup> In response, the Government welcomed this work and indicated it was looking forward to seeing how this work has progressed in the Final Report.<sup>7</sup>
69. Through the engagement process, views were sought on how the tikanga concepts could apply to the issues under discussion. Concerns were raised about risks of tokenism, based on previous approaches by government departments in the past. Some noted the range of definitions and uses of these kupu, including regional variations, and questioned how they could be applied in tax policy. Others offered views about how they could apply, for example in relation to:
- Manaakitanga, including:
    - providing insights on dimensions of fairness in considering an extension of capital gains tax;
    - care for the distinctive circumstances around the social and economic challenges faced by many Māori;
    - how manaakitanga is impeded or could be supported through tax, such as
      - tax levied on petrol vouchers that enable transport to marae to do volunteer work; and
      - differential tax treatment for donation of money versus labour (the latter not being eligible for tax rebates).
  - Kaitiakitanga, including:
    - how prioritising supporting ecosystems over profit could be incentivised or recognised (e.g. by investing in biodiversity, retaining land in pristine condition rather than commercialising, lower-intensity agricultural practices to avoid negative environmental impacts)
70. Some participants encouraged further detailed work to unpack the tikanga concepts such as koha and utu in order to get into more practical and specific issues around tax policy.
71. Overall, there was support for and a willingness to engage in further development of the work.
72. Two main areas of further development have been identified:
- *Identifying the chains of sub-concepts that sit under each of the tikanga (their whakapapa)*. This could provide a reference point for locating policy symptoms or opportunity to inform the problem definition stage of policy development. It could also improve policy outcomes through prompting questions and seeing connections between issues that would not otherwise be

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<sup>6</sup> E. O’Connell, et al *He Ara Waiora/A Pathway Towards Wellbeing* (<https://treasury.govt.nz/publications/dp/dp-18-11>).

<sup>7</sup> Letter from Minister of Finance and Minister of Revenue to the Tax Working Group, 20 September 2018 (<https://www.beehive.govt.nz/sites/default/files/2018-09/TWG%20letter%20final.pdf>).

identified. The thinking in Te Ao Māori is underpinned by interconnectedness, which is consistent with the increasing focus in public policy literature on systems-thinking and the value of diversity of thought. It would also help support dialogue between Māori and the Crown on tax policy development.

- *A practical policy tool to support policy application*, such as a policy wheel that goes through the steps from problem definition through to implementation and evaluation. This could set out how the tikanga can be brought to bear in the process alongside other relevant frameworks and knowledge. This would widen the policy consideration and would not disrupt the central role that the deep body of economic literature plays in tax policy development.

73. A key judgement call for progressing this work is whether it proceeds within the remit of tax policy or whether it has broader application in public policy. Indications from hui participants and other policy agencies are that it could lend itself to wider application with further development.
74. Sacha McMeeking of University of Canterbury is preparing a paper to provide to the Group that consolidates feedback from the hui and suggests how the work can be taken forward informed by the views of a range of leaders within Māoridom. This paper is to be presented to the Group on Thursday 8 November.
75. A further update and proposed content for the Final Report will be included in the paper to the Group on the frameworks chapter, which is due for consideration at the Group's next meeting.

## **Appendix A: Feedback from engagement with Māori**

### **Overview**

1. In October the Secretariat organised five hui. The objectives of the hui were to ensure that the recommendations and ideas raised in the Group's Interim Report were well understood by Māori organisations, and to collect feedback to inform further advice.
2. The dates and locations of the hui were as follows:
  - 9 October - Rotorua
  - 10 October - Wellington
  - 15 October - Auckland
  - 18 October – Christchurch
  - 23 October – Kaikohe
3. This appendix details some issues raised during engagement that are not addressed in the main body of this paper. This appendix is grouped under particular headings, and can be read as an extension to the “Overview of engagement with Māori” section.

### **Capital and wealth**

4. Much of the feedback the Secretariat received in relation to extending the taxation of capital gains is discussed in the main body of this paper. Some of the other issues and arguments that were raised in relation to the taxation of capital gains were as follows:
  - The tax would affect Māori collectives differently depending on the type of Māori collective, the nature of their asset base, and their particular structures and sizes.
  - Taxation of capital gains should be based on a framework that allows flexibility for future asset types and ways of gaining wealth that are currently unknown (e.g. the use of data in the future).
  - Some participants were concerned at the possibility that tax would increase rents as this would affect Māori tenants on low incomes. These issues were raised in respect of broader housing issues, particularly in low-income areas, where Māori have low levels of home ownership and are more impacted by either increasing house prices and/or supply constraints.
  - The difficulty of valuing land that is kept in its natural state and is unlikely to ever be sold (e.g. mountainous land). Requiring valuations on this land would be an additional burden on Māori collectives, particularly those that are asset rich but cash poor. The idea of including a Te Ao Māori perspective to valuation was also raised.
  - Co-investment with other iwi would be more complex under the tax, e.g., where the no change of ownership in substance principle only extends to intra-iwi groupings.
5. There was also support for the Group's decision to rule out wealth and land taxes as these options would disproportionately affect Māori collectives, many of which are asset rich but cash poor.

## **Māori authorities**

6. Issues were raised relating to whether the Māori authorities regime requirements appropriately reflect the nature of the entities suited to the regime. The Secretariat was advised that some Māori collective entities are set up to hold and manage the assets subsequent to the settlement transferring from the Crown to the PSGE (usually to move the assets back to their original owner). However, sometimes these entities are not able to access the regime, even though they may have the same characteristics of a Māori authority in substance.
7. It was also suggested that the regime could have a greater focus on the type of assets being held (e.g. Treaty settlement assets) rather than the particular nature of the entity e.g., the PSGE. This could be done by using existing rules supplemented with, for example, an additional option allowing all entities that hold Treaty settlement assets to qualify as Māori authorities.
8. While some Māori collectives have used limited partnerships in their structures as tax efficient vehicles, there were concerns that the limited partnership rules imposed heavily compliance costs and were not appropriate for the Māori sector.
9. Some hui participants raised questions about whether a Maori authority is liable to deduct resident withholding tax from distributions that remain unclaimed.

## **Charities**

10. The Charities regime was identified as being very important due to its relationship to the grassroots/marae in Te Ao Māori. Participants were keen to see genuine linkages between the Group's work and the Review of the Charities Act 2005.
11. It was emphasised that the concept of 'charitable purpose' needs to be thought about from a Māori perspective. Some participants thought it was an organisation's kawa that is most relevant to determining whether charitable work is being done. It was also said by some hui participants that the Charities regime could be restrictive for Māori collectives.
12. Aside from the issue of charitable entities, charitable work was a key theme of the hui. In particular, it was said that there is an inconsistency in the tax treatment of donations to charities, which are eligible for a tax credit, and volunteer labour, which is ignored by the tax system.
13. Specific tax questions were raised during the hui in relation to charities. For example, some participants were concerned that if a charity reimburses volunteers for the cost of travel, Inland Revenue may consider this payment to be taxable in the hands of the volunteers.

## **Environment**

14. There were strong views that the work Māori undertake on the environment (driven by kaitiaki obligations) should be recognised to a greater extent. It was noted that this work and the decisions of Māori collectives often forgo commercial opportunities.
15. The idea of tax being a mechanism for changing behaviour was supported by some hui participants, e.g., tax credits for environmentally enhancing behaviour and more consequences for organisations that cause damage to the environment through their practices.

## **Other feedback**

16. There was some support for the taxation of sugar, particularly in light of Māori health issues. It was proposed that alcohol and tobacco taxes should be levied in relation to the harm they cause society, with reinvestment into controlling consumption and addiction.
17. There was discussion about the interaction of the welfare system and the tax system. A particular issue raised was the effective marginal tax rates that apply as a person transitions from beneficiary status to working.
18. Issues were raised about the impact of secondary taxes and benefit abatement in areas with low-economic opportunities where it is commonplace for individuals to have two jobs.
19. Some hui participants commended the Group and the Secretariat for making the effort to engage appropriately and ensuring that the issues were understood and discussed. However, there was some cynicism as to whether the feedback from the hui will make a difference to outcomes.

## Appendix B: Previous advice on Māori collectives and assets

### Historical context

1. Prior to Pākehā (European) settlement in Aotearoa, Māori established territorial rights over land through the customary law concepts of tino rangatiratanga (sovereignty), asserting mana whenua (authority over a territory), and ahi kā (keeping the home fires burning / occupation).
2. Collectively, these customs awarded hapū authority over an area as well as the right to carry out social, cultural, and economic activity on the land and use of any associated taonga (assets). In turn, the hapū incurred obligations and responsibilities to protect and nurture the ecosystem, people, and way of life for current and future generations. These duties were captured in tikanga, the knowledge of which is preserved in whakapapa, waiata, korero, and Mātauranga Māori. Individual Māori identify their connection to hapū and whenua (translated as both ‘land’ and ‘umbilical cord’) through whakapapa (genealogy).
3. Prior to 1840, the Māori way of life was premised on a Te Ao Māori value system which upheld practices of tikanga and kawa (customs, protocols, practices, codes of conduct) and maintained wellbeing and prosperity by observing the balance between tapu and noa.
4. In the years following the signing of the Treaty of Waitangi (1840), the Crown reconstructed the cultural, social, political, and commercial landscape of Aotearoa New Zealand.
5. In 1818, all of the land in Aotearoa New Zealand was Māori land and the entire resident population was Māori. By 1862, the Crown had acquired approximately two-thirds of all the land. Subsequent legislation further enabled the Crown to acquire Māori land for settlement which effectively dispossessed Māori of most of their ancestral lands, and negatively impacted the way Māori sustained their value systems and customary law. Examples include:
  - The New Zealand Settlement Act 1863 allowed for the confiscation (raupatu) of land without compensation.
  - The Native Lands Act 1865 converted customary titles (collective ownership) to individual titles on a mass scale, this led to a substantial loss of Māori land.
  - The Public Works Act 1928 and the Reserves Act 1977 allowed the Crown to further alienate and displace Māori from their ancestral lands.
  - Maori Reserve Lands Act 1955.
  - Māori Affairs Amendment Act 1967.
6. Today, Māori land, acquired through mana whenua and still retained by iwi, hapū, and whānau, amounts to only 5% of the total land mass of Aotearoa New Zealand. Māori make up 15% of the resident population.
7. The Crown has acknowledged that historical actions, such as the acquisition and confiscation of Māori land, have disadvantaged Māori economically and socially,

with resulting impacts on Māori identity and self-determination. This disruption has also affected the retention of Māori knowledge systems and understanding of kaupapa Māori among individuals.

8. During the twentieth century, the Crown began taking action to address breaches of the Treaty of Waitangi. For example, the Treaty settlement process offers redress for the Crown's actions or omissions that breached the Treaty. Principles of the Treaty remain significant in the application of New Zealand's legal framework and the Crown has accepted a moral obligation to resolve historical grievances in accordance with these principles. While settlement redress is intended to be fair, durable, and final, it does not fully account for opportunity costs, time value of money, or factor in the resource capability of recipients.
9. A Treaty claim arises if any Māori are prejudicially affected by Crown actions or omissions, policies or practices, or legislation or legislative instruments that are inconsistent with the principles of the Treaty of Waitangi.
10. The provision of land and other assets as redress is a critical element of a Treaty settlement, enabling the Crown to take the constitutionally significant step of enacting legislation to remove the right of claimants to pursue their claims in any court or other forum.
11. Currently, there are various legislative and policy initiatives that support Māori to leverage their assets in the interests of restoring their economic base and improving wellbeing for Māori. Te Ture Whenua Maori Act 1993 intends to facilitate and promote "the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants, and ... protects wahi tapu". Initiatives such as the Whenua Māori Fund and Ngā Whenua Rāhui support Māori to develop, restore, and increase the utilisation of their land. As a Treaty partner, the Crown endeavours through such mechanisms to strengthen the Crown-Māori relationship, to achieve better economic, social, environmental, and cultural outcomes for Māori, and to enhance tino rangatiratanga.

### **Māori collectively-owned assets**

12. Since the introduction of the English legal system in New Zealand, Māori collectively-owned assets have been administered through a range of specific legal entities, such as post-settlement governance entities (PSGEs), Māori Trust Boards, Tenths Trusts, Ahu Whenua Trusts, and Māori Incorporations (see Appendix C). These entities are generally responsible for holding and managing the assets and administering any benefits to the members. Often, these entities have either charitable or Māori authority tax status and hold assets such as Māori freehold land, general title land, wāhi tapu, river and lake bed title, property (schools and buildings), fishing quota, financial assets (shares and bonds), and cultural taonga.
13. Some collectively-owned Māori assets have been returned through Treaty settlement. In the case of land, these assets generally belonged to Māori prior to European settlement but were lost due to acquisition or confiscation. These losses have

prevented the descendants of the original owners from managing, using, or receiving benefit from these assets over that time.

14. A distinctive characteristic of Māori collectively-owned assets is that, generally, the ownership base (being one of whakapapa or birth right) increases as the population grows. Unlike most other types of assets, new owners do not have to pay for their ownership interest, so there is effectively a perpetual shareholder dilution. In addition, a large proportion of the land is underutilised and/or operations on the land generate relatively low returns.
15. Most collectively-owned assets are managed and developed to:
  - generate growth to restore the economic base of the iwi and hapū;
  - preserve the assets for future generations; and
  - provide benefits to current and future generations of members, typically provided through health, education, and kaumatua grants (at the individual level) and environmental restoration, marae, and community grants are provided for the benefit of the community.
16. Some Māori entities managing collectively-owned assets generate returns to distribute to their owners, however, many Māori entities managing collectively-owned assets do not generate large returns on equity because the land:
  - is often marginal, limiting the potential for optimal returns (i.e. best suited to forestry or primary industries rather than the higher returning industries such as horticulture);
  - is often fragmented, limiting the scalability required for productive use;
  - has sometimes been locked-in long-term to perpetual leases (e.g. 99 years) or low-returning industries, such as forestry, while under Crown ownership or management;
  - is subject to distinctive restrictions in its management and administration under legislation (e.g. Te Ture Whenua Māori Act 1993); or
  - may be predominantly used for cultural reasons.
17. As a consequence of the low returns obtained by many Māori entities, most entities do not focus on the payment of dividends to individual owners. Some Māori entities generate sufficient profits to make distributions to owners, while other marginally profitable entities will distribute grants for education, health, marae, kaumatua, and tangihanga. Māori entities will typically accumulate reserves, often due to a requirement in their trust deeds or constitutions, to ensure prudent management of their assets for current and future generations, or try and grow their asset base to achieve intergenerational sustainability.

### **Māori freehold land**

18. Māori freehold land, as defined in Te Ture Whenua Māori Act 1993, comprises approximately 1.4 million hectares (5%) of the total land mass of Aotearoa. It is all that remains of Māori land that was acquired by hapū through mana whenua.

19. Māori freehold land is typically a place of cultural significance through which Māori connect with their whānau through whakapapa. It is often referred to as taonga tuku iho (cultural property, heritage) or tūrangawaewae, a place where one has rights of residence and belonging through kinship and whakapapa (representing the continuous genealogical link).
20. Some of the contextual factors around Māori freehold land include:
- *The extent of fragmentation:*
    - The 1.4 million hectares of Māori freehold land is fragmented, making up over approximately 27,000 land blocks, with an average block size of 52 hectares.
  - *The large number of owners:*
    - Māori freehold land blocks have an average of 113 owners each, ranging from blocks with one owner to one block with 14,703 owners. There are 219 owners per 100 hectares of Māori land compared with approximately 6 owners per 100 hectares for all other land.
  - *Administrative challenges:*
    - The total number of owners recorded is 3.1 million (which exceeds the total Māori population in Aotearoa, 598,602, as recorded in the 2013 census). This indicates the high proportion of deceased and untraceable Māori owners, ownership in multiple blocks and likely errors or inconsistencies in the data. Insufficient and inconsistent owner information can be restrictive for management (e.g. when 75% shareholder resolutions are required or when administering distributions).
  - *Governance issues:*
    - Land blocks with Te Ture Whenua Māori Act 1993 administration structures represent approximately 40% of total land blocks and comprise approximately 80% of the land.<sup>8</sup> Most of them remain ungoverned.
    - A majority (58%) of Māori land blocks have no governance structure.

### **Treaty settlement assets**

21. Broadly speaking, the Crown has accepted that historic actions by the Crown has had a significant negative economic impact on Māori, which has had flow on effects to other aspects of Māori wellbeing.
22. The settlement process provides Māori claimant groups with some redress for historic breaches of the Treaty of Waitangi by the Crown. Important elements of settlements include:<sup>9</sup>
- Crown acknowledgements of, and apologies for, Treaty breaches;
  - redress (the principle of redress was identified by the Court of Appeal in the 1987 Lands case); and

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<sup>8</sup> Ministry of Justice Māori Land Update June 2017.

<sup>9</sup> Historical claims relate to Crown actions prior to 21 September 1992.

- forward-focused mechanisms to reset and strengthen the ongoing Crown/Māori partnership under the Treaty.
23. The provision of redress enables the Crown to take the constitutionally significant step of enacting legislation to remove the right of claimants to pursue their claims in any court or other forum.

## **Appendix C: Suggested text for Final Report**

The following is suggested Final Report text based on the Secretariat's recommendations. Amended text will be provided if the Group come to different decisions. Square-brackets indicate that the proposed text is more tentative, given it would depend more heavily on the Group's general decisions.

### **Māori collectively-owned assets**

The Group recognises that Māori collectively-owned assets such as Māori freehold land and iwi assets are a unique form of capital in the New Zealand economy. Accordingly, the Group has paid particular attention to the ways in which extending the taxation of capital gains would affect such assets.

#### *No change of ownership in substance*

The Group considers that the roll-over relief principle applying to transactions that do not cause a change of ownership in substance should be explored in order to accommodate Māori collective structures and transactions where appropriate, such as asset transfers from iwi to associated hapū post-Treaty settlement.

#### *Death and gifting*

[In relation to interests in Māori freehold land and Māori authorities, the Group considers that its general approach to roll-over relief on death and gifting will allow Māori to pass on assets of special importance (such as interests in Māori freehold land) to whanau without tax.]

#### *Māori freehold land*

The Group considers that, given the distinct context of Māori freehold land, the Government should explore further the appropriate treatment in extending taxation of capital gains. This could be progressed through further engagement with Māori and inter-agency consultation. Such a process would enable the Government to make a decision that takes into account a wider range of policy objectives than tax alone.

#### *Voluntary sale of Māori collectively-owned assets*

The Group recommends that the Government consider the merits of a roll-over relief principle in relation to Māori organisations regaining ancestral land lost as a result of Crown action. This could be progressed through further engagement with Māori and inter-agency consultation. Such a process would similarly enable the Government to make a decision that takes into account a wider range of policy objectives.

There may be other circumstances that warrant consideration for relief. Further discussion with Māori would be needed to clarify these circumstances once key design features of extending the taxation of capital gains have been finalised.

## Appendix D: Summary of worldwide approaches

1. More than a dozen countries have enacted collective property laws applicable to indigenous peoples, including Australia, Canada and the US.<sup>10</sup>

### *Australia*

2. In Australia the Native Title Act 1993 (NTA) provides for payments to native title holders in relation to actions that affect their native title rights and interests. In 2010 the Australian Government released a consultation paper which concluded that benefits provided in respect of native title do not result in a net gain to the recipient. It recommended that a new law be introduced to clarify that payments for the extinguishment or impairment of native title rights and interests should not be subject to income tax (including capital gains tax (CGT)). In June 2013 the federal Parliament passed reforms that render certain payments to Indigenous persons exempt from income tax and CGT.
3. Another Australian CGT rule affecting indigenous peoples is that CGT is not payable on any capital gains which have occurred when two or more Aboriginal and Torres Strait Islander corporations have united, or when these corporations have transferred to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)*.

### *Canada*

4. First Nations people receive tax exemption under certain circumstances. Section 87 of the Indian Act provides a statutory exemption from taxation in respect of two types of property:
  - the interest of an Indian or a band<sup>11</sup> in reserve lands or surrendered lands; and
  - the personal property of an Indian or a band situated on a reserve.
5. The Section 87 exemption extends to capital gains tax. The Supreme Court of Canada has supported the view that the purpose of the Section 87 exemption was to preserve the entitlement of Indians to reserve lands and to ensure that the use of their property on reserve lands was not eroded by the ability of the government to tax. The purpose of the exemption was not to confer a general economic benefit upon Indians.<sup>12</sup>
6. Over time, more First Nation governments have entered the field of property taxation and derive revenue from property developments on their reserve lands.

### *US*

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<sup>10</sup> ["Collective Land Ownership in the 21<sup>st</sup> Century: Overview of Global Trends"](#) Liz Alden Wily, Land, 29 May 2018, p.13.

<sup>11</sup> A "band" is defined in section 2(1) as a "body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty the Queen, have been set apart..." Corporations and trusts are not Indians or bands.

<sup>12</sup> "Section 87 of the Indian Act: Recent Developments in the Taxation of Investment Income" Bill MacLagan, (2000), Canadian Tax Journal Vol 48, No.5, p1503

7. Generally, Indian tribes chartered under federal law are exempt from federal income taxation, regardless of the location where the income is earned.<sup>13</sup> As a sovereign entity, a tribe governs itself. It is effectively an independent nation even though it is located on American soil.
8. On the other hand, individual tribal members are only exempt from federal taxation while earning money on a reservation (allotted restricted lands that are held in trust by the US government). While earning money off the reservation, American Indians are subject to state income, corporate, and licensing taxes.
9. Some state rules specifically mention taxes on capital gains for indigenous entities. For example, the Alaska Native Claims Settlement Act established Alaska Native Settlement Trusts. These trusts are established to promote the health, education and welfare of their beneficiaries and preserve heritage and culture. These trusts pay tax on their income at the lowest rate specified for ordinary income and capital gains of an unmarried individual.

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<sup>13</sup> "Federal Taxation of Indian Tribes and Members" Congressional Research American Law Division (Yule Kim), 26 October 2007