Inland Revenue
Te Tari Taake

PUBLIC RULINGS UNIT

ISSUES PAPER No. 8

Unit trusts – whether more than one unit holder is required

Office of the Chief Tax Counsel
Inland Revenue

ISSUES PAPERS

Inland Revenue's Public Rulings Unit is responsible for developing and publishing binding public rulings and other public statements on aspects of tax law.

Occasionally, the technical and practical issues involved in these statements mean it is necessary or useful for us to seek comments and submissions from external parties before preparing a draft statement. This is done by researching and preparing an issues paper. An issues paper may set out the Commissioner's tentative views on an issue, and also set out possible alternative views. The purpose of an issues paper is to stimulate discussion and invite submissions from interested parties. We will consider these submissions when determining Inland Revenue's position on these issues.

The purpose of this issues paper is explained in [1] to [3]. The matters considered in this issues paper may form the basis of a future public statement, which we would circulate to interested parties for comment in the usual manner.

STATUS OF ISSUES PAPERS

Draft items, including this issues paper, produced by the Office of the Chief Tax Counsel represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form, these items may not be relied on by taxation officers, taxpayers or practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

SUBMISSIONS

To assist our consideration of the complex and important issues involved, we are seeking submissions from interested parties. The Commissioner is interested in receiving written submissions on the interpretation, practical issues and policy outcomes raised in this paper.

Email your submission to **public.consultation@ird.govt.nz**

We would appreciate receiving your submission by **21 April 2015**.

Please quote reference: IRRUIP8

ISSUES PAPER: IRRUIP8

Unit Trusts – whether the statutory definition requires more than one unit holder

All legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this issues paper.

Contents

Introduction

Purpose of this issues paper

1. Inland Revenue has recently been asked to reconsider whether a unit trust requires more than one unit holder.

2. The purpose of this paper is to consider and seek comments on the issue of whether the statutory definition of "unit trust" in the Income Tax Act 2007 (ITA) requires more than one unit holder. The significance of the issue is that if an entity is within the definition, it is taxed as a company. If it is not, it is taxed as a trust.

3. The Commissioner's preliminary view in this paper is that a trust with a single subscriber, purchaser or contributor can be within the definition of "unit trust" in the ITA. However, the conclusion reached is not entirely free from doubt. Also, if it is accepted that a single subscriber trust can be within the definition, there can be different views on the circumstances when a single subscriber trust would be within the definition. Some of these different views, arguments for and against them and the Commissioner's tentative conclusions, are set out in detail in this paper.

Interim Position

4. The Commissioner's current published position is set out in the commentary to BR Pub 95/5A – *Relationship between the "unit trust" and "qualifying trust" definitions*. The position is that to be a "unit trust" within the definition in the ITA, a unit trust must have more than one unit holder. The effect of this is that a unit trust with a single subscriber, purchaser or contributor is not a "unit trust".

5. The Commissioner will continue to apply this position until she finalises her technical view through the process described in this paper. If there is a change in position, it will be published in a public ruling or other type of public item.

6. Any change in position will be applied prospectively, for example, from the date any public item is published. The Commissioner will not challenge positions taken in previous years.

7. If the Commissioner changes her position from that taken in BR Pub 95/5A, transitional measures for taxpayers who have adopted structures under the previously understood legal position will be worked through so that taxpayers have time to adjust their arrangements where necessary.

Background

8. In the commentary to BR Pub 95/5A – *Relationship between the "unit trust" and "qualifying trust" definitions* the following statement appeared:

> The [unit] trust must have more than one unit holder. The use of the plural when referring to "subscribers, purchasers, or contributors" in the definition [of unit trust] supports this interpretation.

9. BR Pub 95/5A and its commentary were concerned with the issue of whether a unit trust is taxed as a trust or a company. The issue arose because a unit trust could potentially be within the definition of "qualifying trust" and also treated as a company under the ITA. The Ruling concluded that the company rules apply. The statement that the definition of "unit trust" requires more than one unit holder was not central to the discussion and conclusion. However, it does represent the Commissioner's published view on that point. It reflects the plural

language of the definition and perhaps the commonly understood nature of unit trusts as collective investment vehicles.

10. BR Pub 95/5A applied from the 1997/98 income year to the 1999/2000 income year. In *Tax Information Bulletin* Vol 12, No 5 (May 2000): 4, the Commissioner stated:

> The Commissioner has determined that upon expiry the above-referenced public ruling [BR Pub 95/5a] will not be re-issued.
>
> It is considered that the legislation on the subject matter covered by the ruling is clear.
>
> The non-renewal of the ruling should not be taken as indication of change to the interpretation of the legislation as set out in the ruling. The Commissioner's view on the issue remains the same.

11. The Commissioner has been asked to reconsider whether a unit trust requires more than one unit holder.

Summary of analysis

12. From an ordinary reading of the statutory definition, it seems clear that the focus is on whether a scheme or arrangement is made for the purpose, or has the effect, of providing facilities for subscribers, purchasers or contributors. The definition does not simply refer to subscribers, purchasers or contributors, but to a scheme or arrangement that provides facilities for subscribers, purchasers or contributors.

13. It is necessary therefore to identify the correct approach for establishing whether a scheme or arrangement has the requisite facilities. Once the correct approach is identified, it can be determined whether that approach would result in single subscriber schemes or arrangements being within the definition.

14. There are differing views on the correct approach for establishing whether a scheme or arrangement has the requisite facilities. Some approaches suggest that, provided the facilities exist, the number of subscribers is of little relevance. Other approaches take the view that, as the definition is concerned with collective investment vehicles, situations may exist where it is possible to have just one subscriber, purchaser or contributor and still be within the definition, but these situations would be limited.

15. One approach is to examine the constituting documents and legal relations to see whether the facilities exist. There are arguments based on the purpose of the legislation that support the interpretation that merely having the facilities would be sufficient.

16. Some proponents of this view argue it would not matter whether in fact there were one or many subscribers. All that would matter is whether the facilities for many exist. This approach is less concerned with the actual number of subscribers, and more concerned with the legal form.

17. Others argue that while the legal relations are an important consideration, an entity must still essentially be a collective investment vehicle to be a "unit trust", even if it is possible under the constituting documents that there may at times be only one subscriber, purchaser or contributor. An approach that looks at the constituting documents seems reasonably arguable as it is consistent with the choice of wording in the definition, which looks to whether facilities are provided for a particular purpose or effect, and not to whether in fact there are multiple subscribers, purchasers or contributors.

18. A different approach is to take all of the facts into account. This approach relies in part on the purpose of the legislation. It seems reasonable to assume that Parliament had in mind collective investment vehicles. Therefore, it is argued, an interpretation that looks at all of the circumstances to see whether a scheme or arrangement provides facilities for multiple subscribers, purchasers or contributors, would be more consistent with that purpose. Under this view, generally multiple subscribers would be required, though there may be situations where an entity would still be within the definition if it had a single subscriber. A significant argument against this approach is that entities could potentially fall in and out of the definition as circumstances change, leading to what would seem to be unintended tax effects, a lack of certainty, and compliance issues, such that the interpretation seems unlikely.

19. Another argument this paper examines is whether the "numbers rule" in the Interpretation Act 1999 applies. The numbers rule applies if words expressed in the plural can be read in the singular, if the context requires. In other words, it applies only if the result of applying the rule would be within the purpose of the legislation. The result of the rule applying would be that the definition of "unit trust" would include an entity with facilities for a single subscriber. Some of the same considerations of Parliament's purpose referred to in the previous paragraph would be relevant to the issue of whether the numbers rule applies. As these purpose considerations do not strongly point either way, it is not clear that the numbers rule would apply.

20. Because the definition refers to whether certain facilities are provided, and not to a multiple number of subscribers, purchasers and contributors, it is possible that an entity could have a single subscriber and still be a "unit trust" within the definition under each of the various approaches. The Commissioner's preliminary view is that it is possible for a single subscriber trust to be within the definition. It seems there is some doubt that the statement in the commentary to BR Pub 95/5A that a "unit trust must have more than one unit holder" is correct. However, uncertainty exists over the right approach to interpreting the definition of "unit trust". The various issues and arguments are canvassed in the body of this paper. The Commissioner's preliminary view is that the better approach to interpreting the definition is to consider whether the requisite facilities exist by examining the legal relationships entered into, and not to consider intention or to assess the facts of how a unit trust actually operates over time.

Questions for submitters

Any conclusions in this paper are the Commissioner's considered but preliminary views. To assist with our further consideration of these issues we are inviting submissions from interested parties. Submissions may relate to legal interpretation, practical aspects or the appropriate policy outcomes.

The Commissioner welcomes submissions on the following questions, and on any further considerations not dealt with in this paper:

- Is an entity within the definition of "unit trust" in the ITA if it has only one subscriber, purchaser or contributor?
- To resolve this issue, is the better view to look at just the legal relationships entered into, or should intention and other factual matters be taken into account? Under such a test, could the uncertainty and compliance issues that it would raise be dealt with in practice?
- If the test is to look only at the legal relationships, is there a point at which the facilities are so clearly provided for only one investor that the entity would not be within the definition of "unit trust"? How would that point be ascertained and described?
- Which of the various arguments outlined in this paper are the most convincing for any particular position? Are there any other arguments that should be considered?
- Are there any implications beyond tax with treating single subscriber unit trusts as unit trusts for tax purposes?
- Are there policy issues if a particular interpretation is favoured?

Issues

21. The main issue is:

    - Does the statutory definition of "unit trust" require more than one subscriber, purchaser or contributor?

    Within this main issue, there are the following sub-issues:

    - The definition of "unit trust" requires that a scheme or arrangement has the facilities for subscribers, purchasers or contributors. Is the definition satisfied provided the facilities exist, irrespective of how many subscribers, purchasers or contributors the scheme has?
    - What does the purpose of the legislation tell us about whether it is sufficient if a scheme or arrangement has the requisite facilities?

Analysis

22. To consider these issues, this paper will use the following structure:

    - An examination of the words in the definition of "unit trust". This inquiry includes considering whether the "numbers rule" in the

Interpretation Act 1999 applies so that the words "subscribers, purchasers or contributors" can be read in the singular.

- The paper then considers the purpose and context of the definition of "unit trust" to help reach a view on the correct interpretation. This analysis considers:
    - The original statutory context in 1960, when the definition of "unit trust" was first inserted into the Land and Income Tax Act 1954 (LITA 54) to buttress the classical system of company taxation that had been introduced in 1958.
    - The broader legislative context in 1960, which included the enactment of the Unit Trusts Act 1960 (UTA).
    - A discussion of the purpose of the legislation, in the sense of what Parliament intended to achieve.
    - The subsequent legislative history and context, including the introduction of the imputation system in 1988 (which replaced the classical system of company taxation).
    - The current legislative context and, in particular, ss HM 3(1)(b)(iii) and HM 9(c). These provisions are predicated on the understanding that a "unit trust" must have more than one subscriber.

23. For ease of reading, the paper will sometimes just refer to "subscribers" when meaning to refer to "subscribers, purchasers or contributors".

24. Before beginning the analysis, it will be helpful to understand the legal description of a unit trust, the roles involved and the relationships of the parties involved. Dr Andrew S Butler explains unit trusts as follows in *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009):

> **39.4 Unit trusts**
>
> 39.4.1 Description of unit trust
>
> Under a unit trust, a series of contracts are entered into by a trustee, fund manager and investors whereby it is agreed that assets are provided by the investors to the trustee, with the trustee holding the assets on trust and the fund manager investing them. In return, the investors receive a notional share of the pooled assets. The investors' share is represented by units, each of equal notional value. Ownership of a unit does not give a unit holder a direct property interest in the assets held by the trustee. Rather, a unit holder has a contractual right (the terms and conditions of which will be regulated by the trust deed or a separate contract) to be paid a sum of money which represents a proportion of the net value of the trust fund from time to time. As a result of the unit trust arrangement, the trustee of a unit trust will usually owe both contractual and fiduciary obligations to the unit holders, while the manager will owe contractual and fiduciary obligations to both the trustee and the unit holders. The trust deed sets out the rights, powers and duties of the trustee, the unit trust manager and the unit holders. It is important to note that a unit trust is not a separate legal person.
>
> Unit trusts emerged in the 19th century and were then known as "management trusts". They were used to manage the property of investors for mutual benefit and gain.

25. There is also a common commercial understanding of what a unit trust is. In *The Language of Money* (George Allen & Unwin, Sydney, 1996), Edna Carew explains unit trusts as follows:

> **Unit trust** an investment product which enables small investors to pool their funds and earn a greater return than if each investor had acted individually. The

> investors hold units which may fluctuate in value depending on the market performance of the underlying assets. The three components of a unit trust are:
>
> - The trustee (custodian)
> - The management company
> - The unitholders
>
> The success of a unit trust depends on the expertise and experience of the management company which makes the trust's investments. Unit trusts operate under a trust deed between the management company and a trustee company which holds the trust's assets and distributes income to unitholders.

26. As can be seen from this outline, unit trusts are a type of trust. They can be set up at law and are not created by any legislation. There is legislation that applies to tax and regulate them. The commercial understanding of them is that they are a means for small investors to pool their funds to earn a potentially greater return.

27. Unit trusts were first regulated in New Zealand with the enactment of the Unit Trusts Act 1960. Changes were made to the Income Tax Act to explicitly provide for the treatment of unit trusts around the same time.

Provisions of the Act concerning the definition of a "unit trust"

Relevant definitions in Subpart YA

28. The term "unit trust" is defined in s YA 1 as follows:

> **unit trust—**
>
> (a) means a scheme or arrangement that is made for the purpose or has the effect of providing facilities for subscribers, purchasers, or contributors to participate, as beneficiaries under a trust, in income and capital gains arising from the property that is subject to the trust; and
>
> (b) does not include—
>
> (i) a trust for the benefit of debenture holders:
>
> (ii) the Common Fund of Public Trust:
>
> (iii) a group investment fund established by Public Trust:
>
> (iv) the Common Fund of the Maori Trustee:
>
> (v) a group investment fund established under the Trustee Companies Act 1967:
>
> (vi) a friendly society registered under the Friendly Societies and Credit Unions Act 1982:
>
> (vii) a superannuation fund:
>
> (viii) an employee share purchase scheme:
>
> (ix) a fund that meets the requirements of section CW 45 (Funeral trusts):
>
> (x) any other trust of any specified kind that is declared by the Governor-General, by Order in Council, not to be a unit trust for the purposes of section HD 13 (Unit trusts)

29. The term "unit holder" is defined in s YA 1 as follows:

> **unit holder**, for a unit trust, means a person who holds a beneficial interest in the property that is subject to the trust

30. Section YA 1 also contains the following relevant definitions:

> **company—**
>
> …
>
> (b) includes a unit trust:
>
> …

> **share—**
>
> …
>
> (c) includes a unit in a unit trust:
>
> …
>
> **shareholder—**
>
> (a) includes—
>
> (i) a holder of a share; and
>
> …

31. One effect of these definitions is that the ITA treats a unit trust as a company, a unit as a share, and a unit holder as a shareholder for income tax purposes.

Analysis of the words of the legislation

32. The issue is whether the definition of "unit trust" in the ITA would include an entity that has one subscriber, purchaser or contributor. This issue involves a question of statutory interpretation. The Supreme Court in *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] 3 NZLR 767, summarised its approach to statutory interpretation as follows:

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

33. The primary rule of statutory interpretation is that the meaning of an enactment is always to be found from its text and in the light of its purpose. Accordingly, the meaning of a definition is found from the text in light of the purpose of the definition.

34. This paper will first examine the text of the definition of "unit trust" and then will consider the purpose of the definition.

Interpretive issues in the definition of a "unit trust"

35. Paragraph (a) of the definition of "unit trust" provides:

> **unit trust** -
>
> (a) means a scheme or arrangement that is made for the purpose or has the effect of providing facilities for subscribers, purchasers, or contributors to participate, as beneficiaries under a trust, in income and capital gains arising from the property that is subject to the trust;

36. The following requirements in the definition are relevant to the issue of whether a unit trust must have more than one unit holder:

- the unit trust must be made for the purpose or effect
- of providing facilities
- for subscribers, purchasers, or contributors to participate

37. Some comments can be made after an initial reading of the definition. The first observation is that the definition does not contain any express requirement concerning the number of subscribers or any requirement that there must be, in fact, one or more subscribers before a scheme or arrangement is a "unit trust".

38. The next point is that the definition only requires that a scheme or arrangement *provides facilities* for subscribers, purchasers or contributors to participate in a trust. It does not refer to a scheme or arrangement for subscribers, purchasers or contributors. This means the interpretive question is not quite as straightforward as asking whether a unit trust can have a single subscriber. As a consequence, this paper will discuss arguments concerned with whether there simply needs to be the provision of facilities — irrespective of whether there needs to be one or multiple subscribers, purchasers or contributors.

39. Another point is that the definition uses the plural words "subscribers, purchasers, or contributors", which would seem to be a definite choice in drafting the section. The legislature could have chosen to use these words in the singular, or in both the singular and the plural. The implication might be that a "unit trust" is an entity with multiple subscribers. A contrary argument, which is discussed later in this paper, is that these words can be read in the singular.

"Made for the purpose or has the effect"

40. The first part of the definition that raises an interpretive issue is the phrase "made for the purpose or has the effect". The ITA does not define the words "purpose" or "effect" or the expression "made for the purpose or has the effect".

41. The Concise Oxford Dictionary (12th ed, Oxford University Press, New York, [2011]) ("COD") defines "made" as the past tense and past participle of "make". The verb "make" means:

> 2 bring about or perform; cause • cause to be, become or seem

42. "Purpose" is defined as:

> The reason for which something is done or for which something exists.

43. One view would be to understand "purpose" as necessitating an identification of the reasons why a unit trust is set up, and would include ascertaining the intention of those setting up the entity. Objective as well as subjective reasons would be included. This view would find further support from the inclusion of the word "made". Grammatically, the sentence would make sense without the word "made", suggesting it was included for a purpose. Arguably, the word "made" alludes to the intention of those who set up or run the scheme or arrangement. As will be discussed later, this view might give different results as to what entities are within the definition than a view that looked only to objective evidence.

44. A different view would be that this is a purely objective test that looks at whether the requisite facilities exist. While it might be argued that the phrase "made for the purpose" suggests intention is relevant, the definition is also satisfied if the scheme or arrangement "has the effect" of providing the requisite facilities. The words "has the effect" arguably require looking only at objective factors. It might also be argued that the phrase "made for the purpose" directs the inquiry to how an entity is established, and so is more consistent with looking at the constituting documents rather than at how the entity subsequently operates in practice.

45. Support can be found in case law on the words "purpose" and "effect" in another context. In New Zealand's tax avoidance jurisprudence, the meaning of the phrase "purpose or effect" and the approach to

determining the "purpose or effect" of an arrangement is settled law. "Purpose", in the context of tax avoidance, means the intended effect the arrangement seeks to achieve and not the motive of the parties. The courts have distinguished between purpose and effect by referring to the purpose of the arrangement as the "**intended** effect" (*Ashton v CIR* (1975) 2 NZTC 61,030 (PC)) or the purpose as "the effect which [the arrangement] **sought** to achieve" (*Tayles v CIR* (1982) 5 NZTC 61,311 (CA)). "Effect" means the end accomplished or achieved by the arrangement. Although there are these subtle differences in meaning, in almost all cases the purpose and effect of an arrangement will be the same. The intended aim of the arrangement (the objective purpose), if successfully achieved, will be the arrangement's effect. However, there may be instances where the purpose of the arrangement is not achieved or the arrangement does not achieve the intended effect, and therefore the effect is different from the purpose.

46. Tax avoidance cases on these words are clear that the purpose of an arrangement must be determined objectively. The subjective motives and purposes of the parties are irrelevant. An arrangement's purpose is determined by considering (objectively) the effect it has had — what it has achieved — and its effect must be taken to have been the arrangement's purpose. In *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 359, the Supreme Court said:

> [38] Once you put the purpose of the parties to one side and seek by objective examination to find the purpose of the arrangement, you must necessarily do that by considering the effect which the arrangement has had — what it has achieved — and then, by working backwards as it were from the effect, you are able to determine what objectively the arrangement must be taken to have had as its purpose.

47. The phrases "purpose or effect" and "made for the purpose or has the effect" would seem to be materially indistinguishable. It is possible, therefore, that a court would construe the phrase "purpose or has the effect" in the definition of "unit trust" in the same way as it has construed the phrase "purpose or effect" in the definition of "tax avoidance arrangement". That is, it would do so by considering the objective features of the arrangement rather than the motivations of its participants.

48. In summary, the words "made for the purpose or has the effect" could be read as directing and confining the inquiry to the legal relations entered into when the entity is established, or they could be interpreted as requiring an examination of all the facts, including the intention of the settlor, trustees or managers. Avoidance law would potentially support the former.

Absence of clear wording requiring many subscribers, purchasers, or contributors

49. The definition of "unit trust" requires the provision of facilities for subscribers, purchasers, or contributors to participate. The legislature could instead have referred to a "scheme or arrangement 'for' subscribers, purchasers, or contributors", or one that " …'involves' subscribers, purchasers, or contributors". Instead, it chose to refer to "facilities" for subscribers, purchasers, or contributors. It could also have chosen to refer to a collective investment vehicle, or in some other way made it clear that the definition was only to include a scheme or arrangement that had multiple subscribers. These observations suggest the definition could include unit trusts with only one unit holder.

Facilities

50. The Oxford English Dictionary (online ed, 3rd ed, Oxford University Press, accessed 12 November 2014) (OED) contains no separate entry for "facilities" but provides the following relevant definitions for "facility":

> facility, n.
>
> 2.
> a. Opportunity, esp. of an unlimited kind, *to* do something; capability, ability, provision; an instance of this. Also with *for*, *of*.
> b. Freq. in *pl*. Favourable conditions or circumstances for the easy or easier performance of something. Also in *sing*., esp. in ***every facility***.
> c. orig. *U.S*. In *pl*.: the physical means or equipment required for doing something, or the service provided by this; freq. with modifying word, as ***educational facilities***, ***postal facilities***, ***retail facilities***, etc. In *sing*.: a service or feature of a specified kind; (also) a building or establishment that provides such a service.

51. There do not seem to be any relevant cases on the meaning of "facilities". From the dictionary definition, the word "facilities" in the definition of "unit trust" might be said to refer to the provision of an 'opportunity' for subscribers to participate in the income and capital gains of the trust, or conditions or circumstances that will assist in achieving an objective. The definition of "unit trust" in the ITA does not specify any particular requirements as to the form of the facilities. However, the ITA gives some guidance as to what form is envisaged and, so, what facilities Parliament had in mind. The ITA defines a "unit holder", for a "unit trust", as meaning "a person who holds a beneficial interest in the property that is subject to the trust" and defines a "share" to include "a unit in a unit trust". In the context of the meaning of "unit trust", for facilities to exist, a unit trust would be expected to provide a trust deed, trust property, a trustee and a trust manager. In addition, the beneficial interests in that trust property would be divided into units and those units would be able to be held by unit holders.

52. If the view is taken that the inquiry is an objective one, the scheme or arrangement would require analysing to determine whether the legal rights and obligations created by it provide facilities of the necessary kind. If, instead, the view is taken that all the circumstances must be taken into account, relevant considerations would include how the unit trust operates, and the intention of the settlor, trustees or managers in setting up and running the unit trust.

Trust

53. There must also be a trust for the definition of "unit trust" to apply. "Trust" is defined in s YA 1:

> **trust**, in the definitions of **superannuation scheme** and **unit trust**, has the meaning given by the Trustee Act 1956.

54. The definition of "trust" in the Trustee Act 1956 does not define a trust. Instead, the definition sets out specific inclusions and exclusions from the definition. Therefore, it is necessary to turn to the common law for the meaning of "trust". Greg Kelly and Chris Kelly in *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) define a "trust" at 3 as follows:

> A trust is an equitable obligation under which a person (the 'trustee') has control of property but is bound to deal with that property either:
>
> (a) for the benefit of definite persons (that trustee may be one of them) and any one of them may enforce the obligation; or

(b) for some object or purpose permitted by law.

55. At 8, the authors state there are four essential elements of a trust:

> (a) There must be a *trustee*, who is the nominal owner of the trust property. …
>
> (b) There must be *property* of a nature capable of being settled on a trust. … The property may be real or personal. The legal title to the property is usually, but not necessarily, vested in the trustee.
>
> (c) There must be a *beneficiary* or *beneficiaries*. …
>
> (d) There must be *an obligation on the trustee* to deal with the trust property for the benefit of the beneficiaries. …

56. Thus, there are four essential elements of a trust. There must be a trustee, trust property, a beneficiary and trustee obligations.

Subscribers, purchasers, or contributors to participate

57. The ITA does not define the words "subscribers", "purchasers", or "contributors" and therefore they are each to be taken to have their ordinary meaning.

58. The COD states that the word "subscriber" is the noun derivative of the word "subscribe" and provides the following (relevant) definition of the word "subscribe":

> **subscribe v. 1** (usu. **subscribe to**) … ▪ contribute or undertake to contribute a sum of money to a project or cause ▪ apply to participate in ▪ apply for an issue of shares …

59. The OED provides the following relevant meanings of "subscriber":

> **subscriber n.**
>
> **2.**
>
> **a.** A person who subscribes to a specified object or institution, the funds of a company.
>
> **b.** A contributor. *Obs. nonce-use.*
>
> **3.**
>
> **a.** A person who makes regular payment in return for entitlement to receive a periodical, membership of a society, access to a commercially provided service, etc.

60. The meanings of "subscriber" in 2. and 3. of the OED definition above suggest a subscriber is a person who signs up or joins something, often in return for money.

61. The COD states that the word "purchaser" is the noun derivative of the word "purchase" and provides the following (relevant) definition of the word "purchase":

> **purchase v. 1** buy (something) … **n. 1** the action of buying … ▪ Law the acquisition of property by one's personal action rather than by inheritance.

62. The OED provides the following relevant meaning of "purchaser":

> **purchaser, n.**
>
> **4.** A person who purchases something with money (or an equivalent); a buyer. Now the usual sense. Also *fig.* and in extended use.

63. The COD states that the word "contributor" is the noun derivative of the word "contribute" and provides the following (relevant) definition of the word "contribute":

> **contribute v.** give in order to help achieve or provide something ▪ (**contribute to**) help to cause or bring about.

64. The OED provides the following definition of "contributor":

> **contributor, n.**
>
> **a**.One that contributes or gives to a common fund; one that bears part in effecting a result.
>
> **b**.One who pays tribute. *Obs.*
>
> **c**.One who contributes literary articles to a journal, magazine, or other joint literary work.

65. Having regard to the dictionary definitions, the words "subscribers, purchasers, or contributors" in the definition of "unit trust" seem to be used in the sense of meaning a person who provides money (or its equivalent) in exchange for receiving something of value. While there are variations in the meaning of the three terms, a person only needs to be within the meaning of a single term for the purposes of the "unit trust" definition.

66. As pointed out earlier, a significant consideration for the issue of whether a unit trust must have more than one unit holder is that all three words, "subscribers, purchasers, or contributors", are stated in the plural and not in the singular. A deliberate intention to include only unit trusts with more than one unit holder could be inferred from this use of the plural.

The words "participate" and "contributors" in the definition of "unit trust" suggest plurality

67. Three of the words in the definition — "subscribers", "participate" and "contributors" — seem to suggest the need for multiple subscribers.

68. The meaning of "subscriber" could be seen to include a component of participation along with others:

> **subscriber n.**
>
> **2.**
>
> **a.** A person who subscribes to a specified object or institution, the funds of a company.

69. It would seem a natural use of language to view a subscriber as someone who would participate with others in, among other possibilities, the funds of an entity. On the other hand, the word "purchaser" — also within the definition of "unit trust" — does not have this element.

70. The ITA does not define the word "participate" and therefore it is taken to have its ordinary meaning. The COD provides the following (relevant) definition:

> **participate v.1** (often **participate in**) be involved; take part;

71. The OED definition of "participate" relevantly provides:

> **participate, v.**
>
> **1.**
>
> **a.** *intr.* To take part; to have a part or share with a person, *in* (formerly also *of)* a thing; to share. Cf. PARTAKE *v. 1b.*
>
> **b.** *trans* To take or have a part or share of or in; to possess or enjoy in common *with* another or others; = PARTAKE *v.* 1a. *Obs.*

72. The underlined phrases give a flavour of plurality in meaning in the sense of taking part or sharing with others. However, it is not clear what alternative verb could be substituted for "participate" in the definition of "unit trust" that would not also suggest plurality.

73. The relevant definition of "contributor" in the OED provides:

> **contributor a.** One that contributes or gives to a common fund; one that bears part in effecting a result.

74. The use of the word "contributors" in the definition of "unit trust" appears to import a sense of plurality into that definition. This is because the definition of "contributor" speaks in terms of a person that contributes or gives to a "common fund" or "bears part" in effecting a result. In relation to a "common fund", the word "common" relevantly means (as defined in the OED) "shared by two or more people or things". Therefore the notion of a "common fund" carries with it the sense that the fund is composed of contributions from two or more people. Similarly, the phrase "one that bears part" in the definition of "contributor" imports a sense that the one (who bears part) is one of two or more persons who effect a result.

75. However, "contributors" was inserted into the "unit trust" definition in 1988. The original words included just "subscribers" and "purchasers" and so any sense of plurality attributable to the use of the term "contributors" could not have been within Parliament's purpose when it originally enacted the "unit trust" definition in 1960. Nevertheless, the word "contributors" is part of the current definition and for that reason is interpretively relevant. (The reason for including "contributors" in the definition was to do with international tax rules, as explained below at [172].)

Entities specifically included suggest more than one member

76. There is another contextual argument based on the specific entities excluded from the definition of "unit trust". The definition provides:

> **unit trust—**
>
> (a) means a scheme or arrangement that is made for the purpose or has the effect of providing facilities for subscribers, purchasers, or contributors to participate, as beneficiaries under a trust, in income and capital gains arising from the property that is subject to the trust; and
>
> (b) does not include—
>
> (i) a trust for the benefit of debenture holders:
>
> (ii) the Common Fund of Public Trust:
>
> (iii) a group investment fund established by Public Trust:
>
> (iv) the Common Fund of the Maori Trustee:
>
> (v) a group investment fund established under the Trustee Companies Act 1967:
>
> (vi) a friendly society registered under the Friendly Societies and Credit Unions Act 1982:
>
> (vii) a superannuation fund:
>
> (viii) an employee share purchase scheme:
>
> (ix) a fund that meets the requirements of section CW 45 (Funeral trusts):
>
> (x) any other trust of any specified kind that is declared by the Governor-General, by Order in Council, not to be a unit trust for the purposes of section HD 13 (Unit trusts)

77. The implication of the entities listed in (b) being excluded is that they would otherwise be within the definition of "unit trust" in (a). Many or most of the entities listed in (b) would have more than one member, for example, the Common Fund of the Public Trust, and a group investment fund. A trust for the benefit of debentures holders in (i) is expressed in the plural. Some of the listed entities might conceivably have one

member, such as a superannuation fund set up for one person, but the usual understanding of all or most of these entities is that they would have multiple members. Therefore, as it seems all of them would otherwise be within the definition in (a), this suggests that the definition in (a) is capturing entities that have multiple subscribers. The argument is not a particularly strong one, as the fact that some entities are excluded from (a) does not tell us what entities are included in (a). Also, as has been observed, the entities listed might have only one subscriber. However, it is an argument worth considering and one that should form part of the overall analysis.

How to analyse whether a unit trust is within the definition

78. Drawing on what has been suggested so far, it seems established that an entity is a unit trust within the definition if the entity is for the purpose or has the effect of providing facilities — ie the means or opportunities — for persons to hold units in the entity, and for those units to represent a beneficial interest in the trust property.

79. When examining the words in the definition, this paper has identified two approaches that might be taken in reaching a view as to whether an entity has provided the requisite facilities. These two approaches, and their implications, are examined next. The question is which of these two approaches is correct.

Legal relationships test – only objective evidence

80. One approach examines the legal relations entered into, usually by looking at the establishing documents, to see whether, objectively speaking, the entity provides facilities of the specified kind. A scheme or arrangement "made for the purpose" or "having the effect" of providing facilities for multiple subscribers is one where the scheme or arrangement is set up and undertaken, objectively speaking, to provide facilities for multiple subscribers to participate in the income or capital gains arising from the trust property. As already noted, the words "made for the purpose" and "providing facilities" seem directed at how an entity is set up. There is case law that establishes that the legal relationships entered into are examined to see whether this is so. When examining the tax treatment of a transaction, the first step is to ascertain the transaction's true nature: (*Buckley & Young v CIR* (1978) 3 NZTC 61,271 (CA)). As was said in *Re Securitibank* (No 2) [1978] 2 NZLR 136 (CA), the true nature of a transaction can only be found by careful consideration of the legal arrangements actually entered into and carried out. In the case of a legal vehicle such as a unit trust, arguably this would generally be done by examining the documents that establish the unit trust.

81. Therefore, determining whether the definition was satisfied would require an analysis of the scheme or arrangement to establish whether the legal rights and obligations created by it provide facilities of the necessary kind. This approach seems consistent with the choice of words that simply requires the provision of "facilities". This seems to suggest that all that needs to be identified is the provision of facilities of the right type, and that it need not involve any wider inquiry.

82. Under this approach, the relevant inquiry is not a factual one to determine whether, in fact, persons are actually participating in the facilities provided. Therefore, an entity could be a unit trust within the definition if there is only one subscriber, provided there were facilities for multiple subscribers.

The test should take account of intention

83. The second approach looks not only at the legal relations, but at all of the information available, particularly the intention of the trustees of the unit trust, and at what actually happens in practice. As was discussed above, the use of the words "made for the purpose" seem to suggest that intention is relevant (although it was also noted that "effect" is less suggestive of intention).

84. This approach is based on the premise that the purpose or effect of a scheme or arrangement is not limited to the terms of the trust deed. Arguably, the effect of the scheme or arrangement is its result, outcome, or end product. The fact that the trust deed says it is possible for the trust to have multiple subscribers participating does not establish that the arrangement is made for the purpose of multiple subscribers participating, or that it has the effect of enabling multiple subscribers to participate, if an overall assessment of the facts establishes that no such opportunity for multiple subscribers to participate was actually provided (or intended to be provided) by the scheme or arrangement. To take some examples, applying this approach would result in the following conclusions:

- The trust deed provides for multiple subscribers, but the facts establish that there was never any intention to have more than one unit holder and there has not been more than one for, say, 10 years. This trust would not be a "unit trust".
- A trust is set up for multiple subscribers, but the person setting up the trust changes their mind and decides not to seek any other subscribers and runs the trust (from its inception) as a single beneficiary trust. This trust would not be a "unit trust".
- There is a single subscriber, but there is a clear intention that it will have multiple subscribers. This trust would be a "unit trust".
- A trust has had multiple subscribers, but at present, for commercial reasons such as a downturn in the market, it has only one subscriber. There are plans to have more subscribers. This trust would be a "unit trust".

85. Therefore, under this approach, if a scheme or arrangement provides the requisite facilities for multiple subscribers, and the facts establish that the intention is to operate as a vehicle for multiple subscribers, the entity will be a "unit trust" within the definition. The implication for the issue this paper deals with is that under this approach there may be some situations when an entity will be a "unit trust" even though at that time there is only one unit holder. However, this would not be the norm.

86. However, involving intention as part of the test to establish whether a trust is a "unit trust" would raise some questions and uncertainties about how such a test would work. Real uncertainty would arise as to whether a number of scenarios were within the definition. How would the rule work if there was an initial intention to have many subscribers, but for various reasons that did not come about? If the intention changes over time, would that mean a trust would cease to be a "unit trust"? What if the intention was to have only one subscriber, but a standard multi-investor precedent deed was used to set up the trust? It would seem that an entity could fall in and out of the definition as events changed. Entities that were similar in all respects apart from the intention of the trustees or managers could be treated differently. As will be discussed

later when looking at the context of the definition in the ITA (at [182]), if a scheme falls in and out of the definition, this would mean that different tax regimes would apply at different times, and would likely result in adverse and seemingly unintended tax effects. These considerations show there would be real doubt over the technical position under such an approach, which suggests that it cannot be correct. The effect on compliance with both the UTA and the ITA requirements also suggest that the interpretation cannot be correct.

87. In the Commissioner's tentative view, these implications are such that they would throw doubt on whether an approach that involves establishing intention from time to time was the legislative intent.

Objective, intention and other factors

88. A variation on the second approach is one that would take all the facts into account, and would include intention as just one of the factors in reaching a view. Both the second approach and its variation start from the position that a unit trust is in most cases an investment vehicle for many subscribers. Both understand, however, that there may be instances when, for whatever reason, there is only one subscriber, and a decision has to be reached whether it is a "unit trust" within the definition. It might be thought that a court might consider such unit trusts within the definition if the circumstances were that having one unit holder was not a permanent feature. Factors a court might consider would be whether there was the prospect of more unit holders, whether there had been more unit holders in the past, whether measures had been taken by the trustees or manager to secure more subscribers, and whether there were commercial reasons why at a particular time there was only one unit holder. The settlor's intention in setting up the unit trust could be relevant too, and also how reasonably held that intention was.

89. However, the same uncertainties would arise under this variation as one based primarily on intention. Again, that would raise doubts over whether this can be the right interpretation, and the Commissioner tentatively concludes that there is doubt over whether this approach is correct.

The numbers rule: whether the context requires the words in the plural in the definition of a "unit trust" to include the singular

90. In considering the words of the legislation, thought needs to be given to whether there are any relevant legislative or case law principles of interpretation. The rule in s 33 of the Interpretation Act 1999 about plural and singular language seems potentially relevant. The paper now examines whether this rule would apply so that the words in the definition of "unit trust" can be read in the singular. If this rule applies, the definition would be satisfied if there is a facility or facilities for only one subscriber.

The Interpretation Act 1999

91. Section AA 3 sets out the role of definitions that appear in Part Y of the ITA and the role of the Interpretation Act 1999 (IA 99):

> **AA 3 Definitions**
>
> *Role of Part Y*

> (1) Definitions of terms that apply generally for the purposes of this Act, and general provisions on the interpretation and construction of this Act, appear in Part Y (Definitions and related matters).
>
> *Role of Interpretation Act*
>
> (2) The Interpretation Act 1999 also contains definitions of terms, including in particular the term **person**, and other provisions that apply to the interpretation and construction of this Act.

92. Section AA 3(2) makes clear that the provisions of the IA 99 apply to the interpretation and construction of the ITA.

93. Section 4 of the IA 99 provides:

> **Application**
>
> (1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless—
>
> (a) the enactment provides otherwise; or
>
> (b) the context of the enactment requires a different interpretation.
>
> (2) The provisions of this Act also apply to the interpretation of this Act.

94. Section 33 (which is in part 5 of the IA 99) contains a rule concerning numbers (the numbers rule):

> **33 Numbers**
>
> Words in the singular include the plural and words in the plural include the singular.

95. The combined effect of s AA 3(2) of the ITA and ss 4 and 33 of the IA 99 is that, unless the context requires a different interpretation, words in the ITA in the singular include the plural and words in the plural include the singular.

96. The result of substituting the singular for the plural in para (a) of the definition of "unit trust" is as follows:

> **unit trust**—
>
> (a) means a scheme or arrangement that is made for the purpose or has the effect of providing [a facility] for [a subscriber], [purchaser], or [contributor] to participate, as [a beneficiary] under a trust, in income and capital gains arising from the property that is subject to the trust;

97. The issue is whether the context requires that the words in the plural in the definition not include the singular. The following paragraphs discuss case law on when the context of a provision requires that a particular interpretive rule not apply, and then summarise the principles that can be drawn from this case law. The principles are applied to the definition of "unit trust" in the conclusion section in this paper.

Numbers rule – case law

Overseas decisions

98. *Blue Metal Industries v Dilley* [1969] 3 All ER 437 (PC) is a leading case on the application of the numbers rule. The Privy Council held that the singular "transferee company" in the section they were concerned with did not include the plural. Their Lordships considered s 185 of the Companies Act, 1961-1964 (NSW), properly construed, did not apply to a scheme or contract involving the transfer of shares in a company to two other companies jointly, notwithstanding the numbers rule in s 21(b) of

the Interpretation Act 1897 (NSW). Instead, s 185 only applied to a scheme or contract involving the transfer of shares to another single company.

99. The Board recognised that the language of s 185 was consistently phrased in the singular. However, the Board also observed that at 441:

> But the mere fact that a word in the singular is used does not in any way solve the problem which now arises. It merely gives rise to it.

100. The Board then set out its approach at 441:

> But this reflection affords no complete answer to the argument presented by the appellants. By s. 21 of the Interpretation Act 1897 (NSW) it is enacted that in all Acts, unless the contrary intention appears, words in the singular shall include the plural and words in the plural shall include the singular. Such a provision is of manifest advantage. It assists the legislature to avoid cumbersome and over-elaborate wording. Prima facie it can be assumed that in the processes which lead to an enactment both draftsman and legislators have such a provision in mind. It follows that the mere fact that the reading of words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears. But in considering whether a contrary intention appears there need be no confinement of attention to any one particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole. (See *Sin Poh Amalgamated (H.K.) Ltd. v. Attorney-General of Hong Kong*) In that case a test was indicated which often may be helpful. In the judgment of the Board delivered by Lord Pearce it was said ([1965] 1 All ER at p 228, [1965] 1 WLR at p 67):
>
> "The Interpretation Ordinance was intended to avoid multiplicity of verbiage and to make the plural cover the singular except in such cases as one finds in the context of the legislation reason to suppose that the legislature, if offered such an amendment to the bill, would have rejected it."

101. The Board made the following observations regarding a provision like s 33:

- Such a provision is of manifest advantage as it helps in avoiding cumbersome and over-elaborate wording.
- It can be assumed that in the process leading up to an enactment that both the drafters and Parliament have the provision in mind.
- It therefore follows that the mere fact that the reading of the words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality (and vice versa).

102. This is the effect of the combination of ss 4 and 33 of the IAct 99. Words in the singular include the plural and words in the plural include the singular (s 33) unless the context of the enactment requires a different interpretation (s 4).

103. The Board then set down its view on the process to follow in determining whether a contrary intention exists. The Privy Council referred to a test developed by the Board in an earlier case (*Sin Poh Amalgamated (H.K) Ltd* [1965] 1 All ER 225 (PC)) where Lord Pearce said when speaking of an equivalent provision to s 33:

> "The Interpretation Ordinance was intended to avoid multiplicity of verbiage and to make the plural cover the singular except in such cases as one finds in the context of the legislation reason to suppose that the legislature, if offered such an amendment to the bill, would have rejected it."

104. Applying the test developed by the Board in *Sin Poh Amalgamated (H.K) Ltd* to the current situation, the question is whether, in the context of the

definition of a "unit trust", if Parliament had been offered an amendment to the definition to include a single unit holder trust, it would have rejected it.

105. In *Blue Metal Industries* it was noted that, in effect, the relevant policy considerations in giving the compulsory acquisition powers were not identical for a single transferee company and a group of companies acting jointly. In that situation the Board considered that Parliament would not rely on the provision of the Interpretation Act to achieve such a result. As the Board noted, the Interpretation Act is not to be expected to be used so as to change the character of legislation.

New Zealand decisions illustrating the application of the numbers rule

Tax decisions

106. A number of reported New Zealand tax decisions have referred to the numbers rule. However, these decisions generally mention the numbers rule in passing.

107. In *Case F25* (1983) 6 NZTC 59,674 Bathgate DJ decided that, in the context of deciding whether a taxpayer had a fixed place of work, "place" included the plural. The court in *Alliance Group Ltd v CIR* (1995) 17 NZTC 12,066 (HC) focused on the policy and purpose of the section to determine if the numbers rule should apply. It concluded that there was no policy reason why the numbers rule should not apply, and in fact the purpose of the legislation supported the application of the rule.

108. *CIR v Nicholson* [2005] NZFLR 385 (HC) concerned an appeal by the CIR under the (CIR administered) Child Support Act 1991 from a decision of the Family Court. The issue was whether a single period should be looked at in deciding who was the principal provider of care, or whether all the periods during a year should be looked at. The High Court found that the numbers rule did not apply in the context of s 12 of the Child Support Act and, taking account of the objects of the Act, "periods" should not be read as "period". All of the periods in the year should be looked at.

Non-tax decisions

109. New Zealand courts have frequently considered the numbers rule in a non-tax context. Each decision depends on its own particular statutory context, so these cases may not be particularly helpful in reaching a view on whether the numbers rule applies to the words in the definition of "unit trust". In *McDonald & Anor v Australian Guarantee Corporation (NZ) Ltd* [1990] 1 NZLR 227 (HC), the High Court, applying the approach from *Blue Metal Industries Ltd*, held all the indications in the Corporations (Investigation and Management) Act 1989 were that the words "the corporation" in s 65 did not include the plural.

110. *R v Cara* [2005] 1 NZLR 823 (HC) is an instance where the High Court held the plural includes the singular. An important point from *R v Cara* is that, in determining whether the context required departure from the numbers rule, the court considered a broad range of extrinsic and intrinsic matters to determine Parliament's purpose for the relevant provision.

111. In *R v K* [1995] 3 NZLR 159 (CA), the Court of Appeal held that words in the plural did not include the singular. In this case, the court considered that importing the singular into the plural words of the section would

change the nature of the section from one concerned with on-going criminal activity to one encompassing an isolated crime. This would amount to a rewriting of the statutory provision, and so the numbers rule could not apply in this context.

Overseas cases

Floor v Davis

112. In *Floor v Davis* [1979] 2 All ER 677 (HL), one of the issues for determination by the Special Commissioners was whether the word "person" in para 15(2), Sch 7, of the Finance Act 1965 included the plural "persons". The majority of the House of Lords agreed with the Court of Appeal that "person" included "persons".

113. In delivering the judgment of the majority, Viscount Dilhorne observed, at 683, that it must be borne in mind that the Interpretation Act applies unless a contrary intention is established. It is not the case that an intention that the Act applies has to be shown for it to apply. His Lordship distinguished the case before him from *Blue Metal Industries* on the basis that construing the singular "person" to include the plural "persons" did not change the character of para 15(2) nor make it unworkable nor produce a result Parliament could not have intended.

114. Both the dissenting judges applied essentially the same test as the majority, which was that laid down in *Blue Metal Industries*. However, they reached different conclusions about the purpose and application of the provision.

Summary

115. The following principles about the approach to be applied to the numbers rule can be taken from the case law:

- The question is ultimately one of statutory interpretation – did Parliament intend for the words in a provision to be read in the singular or plural? Accordingly, the purpose of the provision, its text and its context in the enactment are all relevant – *Blue Metal Industries*.
- There is an assumption that legislative drafters and Parliament, when drafting and enacting legislating, do so with knowledge of the numbers rule – *Blue Metal Industries*.
- It follows from this assumption that the mere fact that the reading of words in a section suggests an emphasis on singularity is not enough to exclude plurality (and vice versa). Words in the singular include the plural unless a contrary intention appears – *Blue Metal Industries*; *McDonald & Anor v Australian Guarantee Corporation (NZ) Ltd*.
- The numbers rule assists the legislature to avoid cumbersome and over-elaborate wording.
- An Interpretation Act may contain rules that can achieve drafting convenience in other legislation. It is not to be expected that drafters and the legislature would use the numbers rule in an Interpretation Act to change the character (and legal consequences) of legislation. A contrary intention would therefore appear if the application of the numbers rule would change the policy underlying the legislation – *Blue Metal Industries, Floor v Davis, R v K* and

McDonald & Anor v Australian Guarantee Corporation (NZ) Ltd, *Muir Electrical Co Pty Ltd& Ors* (2003) 8 VR 200.

- If there is a careful choice between the use of singular and plural expressions, that would suggest there is a contrary intention to reading words in the singular to include the plural (and vice versa) – *Muir Electrical Co Pty Ltd.*
- The effect of applying the numbers rule to the particular provision must be considered. If the application produces uncertainties in the provision's application, or suggests that the drafter would have drafted parts of the provision differently if the inclusion of the plural or singular had been intended, then this is evidence of a contrary intention.
- In considering whether the context requires departure from the numbers rule, a broad range of extrinsic and intrinsic material can be considered – *R v Cara.*

Application of the numbers rule to the legislative provision relating to unit trusts

116. The case law on the numbers rule establishes that the rule applies if, when examining the purpose and context of the provision, Parliament would have intended to include the singular, but wanted to avoid cumbersome wording. The rule does not apply if it would change the character of the legislation. Applying the rule to the interpretive question of whether the definition of "unit trust" can be read as including a facility or facilities for a single subscriber, purchaser or contributor will involve considering the same or similar considerations to those considered when examining the meaning of words in light of the purpose of the legislation. The purpose is discussed below, and so the paper will consider arguments about whether the numbers rule would apply to the definition of "unit trust" after identifying relevant purpose considerations.

Summary of analysis of the words of the definition of "unit trust"

117. Some aspects of the wording of the definition might indicate Parliament is concerned with an entity that provides for multiple subscribers, though none of these answer the question whether an entity can have a single subscriber and still be within the definition. It is clear that the definition does not simply refer to a scheme or arrangement for subscribers, purchasers or contributors, but to the "provision of facilities" for subscribers, purchasers or contributors. The inquiry then moves to considering the correct approach to understanding whether, having provided the requisite facilities, a "unit trust" could have one subscriber.

118. One approach is that, provided the facilities exist, there can be any number of subscribers, including only one. This approach looks just to the objective evidence, usually the constituting documents, to establish whether the requisite facilities have been provided. Another approach is that it is not sufficient for the legal structure to provide facilities; the facts also have to reflect the existence of a vehicle providing for multiple subscribers.

119. The numbers rule may apply to the definition so that the words in the plural can be read in the singular. This rule applies unless the context otherwise requires. As the context and purpose will be considered next, this paper will draw any conclusions about whether the numbers rule applies after the discussion of context and purpose.

Legislative Context and purpose

120. The discussion now turns to consider the legislative context and purpose of the definition of "unit trust". Section 5 of the IA 99 requires that the meaning of the text of an enactment must be ascertained in the light of its purpose. In determining purpose, both the immediate and general legislative context are considered, and it may also be relevant to consider the social, commercial, or other object of the statute — *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36.

121. It is helpful to begin by examining the legislative history of the definition in the ITA. As will be explained, the definition was enacted in 1960, at the same time as legislation was first enacted regulating unit trusts. The discussion on the legislative history will look first at the ITA history and then the Unit Trusts Act history.

Original statutory purpose

Introduction of the classical taxation system in 1958

122. The Land and Income Tax Act 1954 (LITA 54) came into force on 1 April 1955. Section 86(1)(i) provided that dividends were exempt income for individuals and companies.

123. Section 6 of the Land and Income Tax Amendment Act (No 2) 1958 amended s 86(1)(i) of the LITA 54 by removing the exemption for dividends derived by an individual. In short, s 6 of the 1958 Amendment Act introduced the classical tax system of company taxation. Under the classical system, a company is taxed on its income and individual shareholders are taxed on dividends received without reference to the tax paid at the company level on the same income.

124. The 1958 Amendment Act also introduced an excess retention tax. This was an anti-avoidance measure to counter companies retaining profits to avoid the dividend tax on individuals.

125. The introduction of the classical tax system for companies created a tax advantage for trusts and their beneficiaries because (unlike companies) they were taxed only once between them on the same income – either at the trustee or the beneficiary level (s 155 LITA 54).

Enactment of "unit trust" definition in 1960

126. The "unit trust" definition was inserted (as s 153B) into the LITA 54 in 1960 by s 20 of the Land and Income Tax Amendment Act 1960. As discussed below, the definition appears to originate from the definition of a "unit trust" in the Unit Trusts Act 1960. As originally enacted, the definition (in s 153B(1)) provided:

> "Unit trust" means any scheme or arrangement, whether made before or after the commencement of this section, that is made for the purpose or has the effect of providing facilities for the participation, as beneficiaries under a trust, by subscribers or purchasers, in income and gains (whether in the nature of capital or income) arising from the money, investments, and other property that are for the time being subject to the trust; but does not include - …

127. Section 153B(2) of the LITA 54 provided (among other matters) that for the purposes of the LITA 54:

- Every unit trust shall be deemed a company and the term "company" where used in the LITA 54 shall be deemed to be extended accordingly.

- The interests of the unit holders in the unit trust shall be deemed to be shares in the company.
- The unit holders shall be deemed to be shareholders in the company.

128. Deeming a unit trust to be a company meant (among other matters) that:

- The assessable income of the unit trust was subject to classical taxation. The income of the unit trust was taxed at the level of the unit trust (as a deemed company) and then taxed at the unit holder (shareholder) level on payment of a distribution (dividend).
- A unit trust was subject to the loss carry forward rule for companies in s 137(3). In summary, the rule provided that the Commissioner must be satisfied that the shareholders of the company on the last day of the year in which the loss was incurred were substantially the same as the shareholders on the last day of the income year immediately preceding the year of assessment. Substantially the same meant not less than two-thirds of the paid-up capital and not less than two-thirds of the nominal capital had to be held by the same persons.
- The excess retention tax provisions applied to unit trusts.

129. It seems reasonable to infer that deeming a unit trust to be a company was directed at the mischief of subscribers using unit trusts to avoid the impost of tax at both the company and shareholder level.

Parliamentary debates – Land and Income Tax Amendment Bill 1960

130. In introducing the Land and Income Tax Amendment Bill 1960 to the Whole House, the Minister of Finance observed that unit trusts had just developed in New Zealand, it was necessary to have a provision to deal with them and the proper way to do this was to treat them as companies – (7 September 1960) 324 NZPD 2156.

131. During the second reading, the Minister of Finance repeated that unit trusts had only come into operation in New Zealand earlier in the year (1960). He explained that it had been considered desirable to introduce legislation (the Unit Trusts Bill) dealing specifically with unit trusts to avoid some of the abuses that had arisen in connection with unit trusts in overseas countries – (7 October 1960) 324 NZPD 2846. The Minister then went on to explain the purpose of cl 20 of the Land and Income Tax Amendment Bill – (7 October 1960) 324 NZPD 2846:

> This measure provides that unit trusts shall be treated as companies. Legislation has been passed in the United Kingdom this year providing that for taxation purposes unit trusts are to be treated as companies, the trustees are to be treated as directors, and the unit holders are to be treated as shareholders. Apparently they receive some allowance for management expenses without becoming liable for profits tax. Legislation [Unit Trusts Bill], as I have said, has already been introduced dealing with the general control of units trusts. I would emphasise that this particular clause deals only with the taxation of these trusts, and in general the principle is that they will be treated as companies for the purpose of the law.

132. Opposition members were opposed to unit trusts being treated as companies. Their main reason was that interest income would be subject to classical taxation and this would discourage unit trusts from investing in Government stock and local body debentures and would result in unit trusts investing in company shares because of the inter-corporate dividend exemption.

133. It can be inferred from the Parliamentary debates that Parliament had a general understanding that unit trusts were similar to widely held investment vehicles (ie, similar to public investment companies). The illustration of this is contained in a passage of the Hon J T Watts during the committee stage debate on the Unit Trusts Bill 1960, which Parliament was considering in parallel with the Land and Income Tax Amendment Bill 1960. That passage is set out at [138] below as part of the discussion of the Unit Trusts Act 1960.

134. It seems from the Parliamentary debates on the Land and Income Tax Amendment Bill 1960 that Parliament's primary concern was with the new development in New Zealand of the use of widely held investment trusts. Parliament's purpose for the definition of a "unit trust" and the related provisions was for unit trusts to be taxed as companies rather than trusts. This was to ensure that unit trusts could not be used to avoid the double taxation of a company's investment income under the classical system and was based on a perceived similarity between companies and unit trusts as investment vehicles. In particular, both unit trusts and companies involve the member providing money to the vehicle in return for an interest (ie, shares or units) in that vehicle's property and income.

135. The debates do not indicate that Parliament expressly considered whether the provision of facilities of the necessary kind is sufficient to satisfy the definition of "unit trust", or whether the facilities need to be for more than one subscriber. On the other hand, the Commissioner accepts that the debates seem to indicate an underlying understanding of unit trusts as collective investment vehicles.

The purpose of the Unit Trusts Act 1960

The enactment of the Unit Trusts Act

136. As noted above, Parliament enacted the "unit trust" provisions into the LITA 54 in parallel with the enactment of the Unit Trusts Act 1960 (UTA 60).

137. The Attorney General, in moving that the Unit Trusts Bill be committed to the Committee of the Whole House, explained that unit trusts were beginning to appear in New Zealand. He said that there was a positive duty on Parliament to take notice of the development and enact legislation to regulate unit trusts to protect the investing public from possible misconduct and unscrupulous or reckless management – (19 October 1960) 325 NZPD 3086–3088.

138. The comments of the Minister of Finance when introducing the Land and Income Tax Amendment Bill 1960 to the Whole House were referred to above. His comment was that unit trusts had just developed in New Zealand. During the committee stage debate on the Unit Trusts Bill 1960, the Hon J T Watts, the opposition member for Fendalton, said that he was personally interested in two unit trusts and explained that the drafting of the Bill had occurred over a 12 to 18 month period and that there were, at that time, four unit trusts in existence – (19 October 1960) 325 NZPD 3090:

> The New Zealand legislation has been carefully drawn over the last year or 18 months. I saw an early draft of the Bill and made some comments on it, and those interested in promoting unit trusts gave their representations to the Justice Department. As a result, I think we have a practical Bill for regulating the operation of this form of investment. There are at present four unit trusts in existence – two in Wellington, one in Auckland, and one in Christchurch. As the House knows, for I disclosed it when discussing the Land and Income Tax

> Amendment Bill, I am connected with the two unit trusts in Wellington, in which over £1 million has been invested. That sum has come in to those two trusts in the last four or five months, and there are about 8,000 to 9,000 different investors having that amount of money invested in industry in New Zealand and Australia through these two trusts.

139. The unit trusts the Hon J T Watts referred to had a large number of subscribers. That suggests that at least this Member of Parliament had in mind trusts with large numbers of subscribers in introducing legislation to regulate such entities.

The overall purpose of the Unit Trusts Act

140. The long title to the UTA 60 states that it is "[a]n Act to provide for regulating operations of unit trusts". The purpose of the UTA 60 could therefore simply be to regulate unit trusts. From this, it could be argued that the government's need to regulate is more consistent with the entity being one that invested money for a number of subscribers, rather than it being an entity that invested money for one person. On the other hand, it could also be concluded that regulation was required for trusts involving subscriptions from the public, but that the same regulation was not necessary when that was not the aim of a unit trust, for example, a unit trust that is part of a corporate group. Unit trusts are not established by legislation, only potentially regulated by it. Therefore, it is not inconsistent with the existence of the UTA 60 that single subscriber "unit trusts" could exist. Tax rules would apply in the same way to unit trusts taking subscriptions from the public and unit trusts with private subscriptions, including even unit trusts with a single subscriber.

Similarity of the definitions

141. The definition of "unit trust" in the LITA 54 is nearly identical to the definition of "unit trust" in the UTA 60. Given this, it is reasonable to conclude that Parliament had in mind the UTA 60 when enacting the definition in the LITA 54. Cases and material on the meaning of a "unit trust" in the UTA 60 would also seem to be relevant to its meaning in the ITA. The following discussion on the UTA 60 and its purpose may therefore help to shed light on the meaning of "unit trust" in the LITA 54 and in subsequent Income Tax Acts.

142. For completeness, it can be noted that the unit trust provisions in the LITA 54 did not impose any requirement that a scheme or arrangement must satisfy any (or all) of the requirements contained in the UTA 60 for the scheme or arrangement to be a "unit trust" for tax purposes.

143. There is one difference in wording between the definitions in the UTA 60 and ITA. The difference is that the UTA 60 definition requires that the scheme or arrangement have the purpose or effect of providing facilities for the participation by subscribers or purchasers as "members of the public". Under the ITA there is no reference to members of the public. As originally enacted, the definition of "unit trust" in the UTA 60 provided:

> "unit trust" means any scheme or arrangement, whether made before or after the commencement of this Act, that is made for the purpose or has the effect of providing facilities for the participation, as beneficiaries under a trust, by subscribers or purchasers **as members of the public**, in income and gains (whether in the nature of capital or income) arising from the money, investments, and other property that are for the time being subject to the trust; but does not include - …
>
> [Emphasis added]

144. *Re Mortgage Management Ltd & Another* [1978] 1 NZLR 494 (SC) is the only reported New Zealand decision to consider the meaning of "unit trust" as that term is defined in the UTA 60. The court made some general comments about the definition of "unit trust", as well as a comment on the difference in wording between the UTA 60 and the income tax definitions.

145. The issue in the case relevant to this paper was whether a contributory mortgage was a unit trust. The court observed, at 511, that the definition of "unit trust" in the UTA 60 has some resemblance to the definition of "unit trust" in the Prevention of Fraud (Investments) Act 1958 (UK). The UK Act defined "unit trust scheme" as:

> any arrangements made for the purpose, or having the effect, of providing facilities for the participation by persons, as beneficiaries under a trust, in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever.

146. The court made comments in passing about the tax implications. It stated that an implication of being a unit trust was that it would be taxed as if it were a company. This comment implied the court considered that an entity that was a unit trust under the UTA 60 would also be a unit trust under the definition in the Land and Income Tax Act. Barker J said that the tax definition was wider. At 512, his Honour observed that the reason for the omission of the words "members of the public" from the definition of "unit trust" in s 153B of the LITA 54 is not clear. Barker J said that this difference in wording could mean that something that was not a "unit trust" under the UTA 60 might still be a "unit trust" for taxation purposes.

147. It might be thought that it can be inferred from the omission of the phrase "as members of the public" from the LITA 54 definition of "unit trust" that Parliament wanted to ensure that private unit trust arrangements (ie, arrangements not involving offers to the public) were treated as unit trusts for taxation purposes.

Applying purpose considerations to the different interpretations of "unit trust" in the ITA

148. When the legislative wording was discussed earlier, support was established for the view that an entity with one subscriber can be within the definition. That discussion identified two possible approaches for that view. One approach is that, provided the facilities exist, there can be any number of subscribers, including only one. This approach looks just to the objective evidence, usually the constituting documents, to establish whether the requisite facilities exist. Another approach is that it is not sufficient for the legal structure to provide facilities; the facts also have to reflect the existence of a vehicle providing for multiple subscribers, purchasers or contributors. Under this second approach, some would put particular weight on the intention of the trustees, and others would look at the whole factual picture.

149. The purpose considerations that follow examine first whether the purpose supports the view that an entity with one subscriber can be within the definition. Next, the two approaches are considered in light of the purpose.

Purpose considerations about whether having facilities for multiple unit holders is sufficient

150. The use of the word "facilities" can be seen to be reflecting a unique feature of unit trusts, compared with trusts generally. Unit trusts provide subscribers with a means to enter and exit the trust through the ability to buy and sell units that represent a share in trust property. That ability can be contrasted with trusts, where the beneficiary remains a beneficiary unless the trust comes to an end and has little ability to control the release of trust funds. This recognition in the definition of "unit trust" of a key feature of unit trusts (being the ability to trade interests in a unit trust) suggests that providing facilities for multiple subscribers is sufficient, and the purpose of the legislation is not particularly concerned with whether in fact there are multiple subscribers. The focus is more on the ability of a subscriber to be able to enter and exit the fund. All that is needed, arguably, is a structure that would enable one – or many – subscribers, purchasers or contributors to participate in the profits.

151. On the other hand, it could be argued that the feature of having tradable units is more consistent with the unit trust having multiple subscribers. If an entity is directed towards providing for a single subscriber, there would not seem to be the same need to have tradeable units. The single subscriber would have the beneficial ownership of all of the trust's assets, and could just hold them outright and sell the assets rather than units representing ownership of the assets. This argument is not an especially strong one, however, as the feature of having tradeable units can be consistent with there being only one unit holder.

152. Another argument, also focusing on the word "facilities", looks to some features of the UTA 60 that arguably support the view that a "unit trust" need only have facilities for multiple subscribers, but does not actually have to have more than one subscriber. The argument is based on the fact the UTA 60 caters for the situation when there are not yet any subscribers. As originally enacted, this regulation included compliance with (among other matters) the following requirements:

- The issuing of a prospectus before any interest in a unit trust was issued or offered to the public – s 7.
- The approval of the trust deed by the Registrar of Companies and the lodging of an authenticated copy of the trust deed with the Registrar before public offer or issue of any interest in the unit trust – ss 8 and 9.

153. A scheme or arrangement that provides facilities of the requisite kind will be subject to the pre-public offer regulatory requirements in the UTA 60. In contrast, a definition of "unit trust" that requires multiple subscribers before a unit trust exists would mean there would be no unit trust to regulate before a number of subscribers had joined. This would appear to defeat the purpose of regulating the pre-public offer operations of unit trusts. On the other hand, the fact that the UTA 60 provides for a setting-up phase when there are not yet subscribers would not seem to rule out the possibility that, in general, a unit trust would have multiple subscribers. Also, it would be an easy matter for the manager to be a nominal subscriber in the setting-up phase.

154. In summary, some of the background to the introduction of the definition of a "unit trust" suggests that the existence of facilities for multiple unit

holders is sufficient, and that multiple unit holders themselves are not required.

155. For completeness, it is noted that the UTA 60 is to be repealed, as from 1 April 2017 or on an earlier date to be appointed by Order in Council, by s 4(1)(e) of the Financial Markets (Repeals and Amendments) Act 2013 (2013 No 70). In the future, unit trusts will be regulated by the Financial Markets Conduct Act 2013.

Purpose considerations relating to whether a unit trust needs to in fact have multiple unit holders

156. The legislative history was set out above. It would seem from the history that the legislation was introduced to deal with the taxation and regulation of unit trusts. The "unit trust" definitions in both the Income Tax Act and the Unit Trust Act were introduced in 1960 to deal with the practical matters of the regulation and operation (including tax) of unit trusts. In particular, the income tax rules were Parliament's response to pre-existing unit trusts, which were a form of trust that operated in New Zealand prior to the enactment of this law, and it can be inferred that the definition chosen was designed to describe the essential attributes of such trusts.

157. There appears to be a common view as to the purpose and features of unit trusts. As noted earlier, Edna Carew in *The Language of Money* said that a unit trust is structured to allow small subscribers to pool their money, which enables them to earn a greater return than if each subscriber had acted individually. She said the three components of a unit trust are:

- the trustees (custodian)
- the management company
- the unitholders.

158. Nicky Richardson, in *Nevill's Law of Trusts, Wills and Administration*, (11th ed, LexisNexis, Wellington, 2013), says at p [17]:

> *Unit trusts*. These trusts allow subscribers to purchase "units" in the trust property. They are a popular means of investing in a wide range of property.

159. In discussing legislation that impacts on trusts, the Law Commission's Review Of Trust Law In New Zealand: Introductory Issues Paper (IP 19) described unit trusts as follows at 1.6:

> … the Unit Trusts Act 1960 deals with unit trusts, established to hold and invest assets on behalf of a pool of investors for mutual gain; …

160. Dr Butler's description was set out at [24] above. Dr Butler went on to discuss their advantages:

> 39.4.2 Advantages of unit trusts
>
> Unit trusts offer a number of advantages to investors:
>
> a. A unit trust enables a unit holder to participate in an investment pool and achieve a level of investment diversification which he or she might not be able to achieve by investing on his or her own;
>
> b. Because unit holders are able to sell their interests to a third party and also (usually) able to sell their units back to the trustee/manager, unit trusts provide investors with a level of liquidity that they would often not have if they acted alone; and
>
> c. Unit trusts are usually managed by professional investment managers, thereby permitting unit holders to benefit from access to professional experience and knowledge.

161. G E Dal Pont in *Equity and Trusts in Australia and New Zealand*, (2nd ed, LBC Information Services, 2000) explains unit trusts in a similar way:

> **1. FEATURES OF THE UNIT TRUST**
>
> The principal feature of the unit trust is that the beneficiaries (usually referred to as "unit holders") have a *fixed* interest in the property of the trust. A unit held under a trust deed is fundamentally different from a share in a company. A share confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property. But a unit under the trust deed confers a proprietary interest in all the property which for the time being is subject to the trust of the deed. The trustees of a traditional unit trust are not conferred a discretion as to the selection of beneficiaries or the quantum of their interest. Hence, the unit trust is properly described as a fixed trust.
>
> Each unit entitles the holder to an undivided share in the income of the trust and a fixed proportion of the trust property on dissolution. The extent of this interest is determined by the proportion of the total units issued held by the unit holder.
>
> …
>
> **2. USE OF THE UNIT TRUST**
>
> …
>
> A commercial unit trust can enjoy all the advantages of limited liability protection (by using a company as trustee) yet provide great flexibility in management without many of the legal structures of management required in an incorporated company. Importantly, the government regulation and onerous statutory duties imposed on companies apply less strictly to trusts (although this varies according to the type, purpose and size of the trust). For these (and other) reasons, the unit trust remains a popular means of effecting joint investment and a method of carrying on business.
>
> **The unit trust as a vehicle for investment**
>
> Through the unit trust, investment by a large number of smaller investors is facilitated. The sums contributed for investment are pooled together, with the advantage that large investments can be made with lower administration costs. The contributor is given *units* representing the investor's entitlement to annual distributions of the unit trust's income and the investor's interest in the assets of the trust.

162. It seems a unit trust is generally understood as being a collective investment vehicle, being a vehicle by which individual subscribers can pool money and achieve a level of investment diversification that the person might not be able to achieve by investing on his or her own. Given the general understanding of what a unit trust is, it can be argued that it would be reasonable to assume that the collective nature of such trusts was therefore intentionally reflected in the definitions.

163. As has been pointed out, the definition of "unit trust" first enacted for tax purposes was very similar to the definition in the UTA 60. Both definitions seem to preserve this notion of a group of subscribers pooling their money with the aim of a greater return, and this seems to have been intended. A unit trust was, and is, commonly known as a collective investment vehicle and, the argument would conclude, Parliament has reflected that notion in its choice of plural language.

164. Some other features of the UTA 60, from which the ITA definition was clearly derived, point to a "unit trust" having a collective nature. Section 3(2)(b) of the UTA 60 states that the trust manager, among other things " [S]hall have the function (whether as principal or by an agent) of issuing or offering interests in the unit trust to the public for subscription or purchase, or of inviting the public to subscribe for or purchase such interests, or both of those functions". Such a requirement on a trust manager makes no sense in the context of a single beneficiary trust. It should be noted, however, that this provision relates to unit trusts open

to the public, and the definition in the ITA is not restricted to schemes or arrangements offered to the public.

165. A further consideration is that there seems to be a significant practical difference between a trust with the facility for multiple subscribers to participate in the income and capital gains arising out of trust property and a trust where such a facility is actually only used by a single subscriber. If Parliament had in mind collective investment vehicles, but wanted to extend the rules it was enacting for unit trusts to single beneficiary trusts, it might be thought it would do so by making that explicit. Others would argue, however, that it did make it explicit by simply referring to "facilities" for subscribers, purchasers or contributors, and not just to subscribers, purchasers or contributors.

166. While there are reasonable grounds for concluding that Parliament seemed to have collective investment vehicles in mind, it does not necessarily follow that there must therefore be more than one subscriber before the definition can apply. A single subscriber entity can potentially carry on the same type of investment activity as an entity with multiple subscribers, and the rules Parliament enacted in the UTA 60 and the ITA might appropriately apply to such an entity.

Mischief considerations

167. In considering the purpose of the legislation, it is relevant to identify any mischief Parliament intended to overcome by enacting the provisions. When originally enacted in 1960, the purpose of the definition was to prevent the mischief of subscribers using unit trust structures (in the place of investment companies) to avoid the classical system of taxation that applied to companies. The original statutory purpose would be defeated if the words "subscribers or purchasers" (as the definition was originally enacted) were construed as excluding the singular. On such a construction, a scheme or arrangement for a single beneficiary to participate in the income and capital gains of a trust would not be taxed as a company (and the beneficiary not taxed as a shareholder), notwithstanding that the beneficiary was, in fact, a subscriber.

168. At the time, under company law a company had to have at least two shareholders. However, the mischief that was intended to be overcome by including unit trusts within company taxation rules was relevant to entities with one or multiple shareholders (or subscribers). In any event, the Companies Act 1993 changed the former requirement in the 1955 Act so that companies now can have just one shareholder. Consequent tax changes were made to incorporate changes made under the Companies Act 1993, but there was no change to the ITA as a result of companies (including unit trusts) being able to have one shareholder. It would seem that the intention was to continue to apply the same tax rules to companies with one shareholder. Unit trusts continued to be treated as companies for tax purposes. As companies can have one shareholder, there would not seem to be any reason from a taxation perspective why single subscriber trusts could not be treated as companies.

169. However, despite the fact that the mischief intended to be countered might arise both with single and multiple subscriber entities, the view could also be taken that, given the type of trust Parliament was concerned with at that time was collective investment vehicles, the mischief it had in mind was that such collective investment vehicles were not being taxed as companies.

Subsequent legislative history

Income Tax Act 1976

170. On enactment of the Income Tax Act 1976 (ITA 76), the definition of "unit trust" was in the same form as the LITA 54 definition.

171. From the income year commencing 1 April 1988, the definition was amended by s 22(1)(a) of the Income Tax Amendment Act (No 5) 1988 by substituting the words "subscribers, purchasers, or contributors" for the former words "subscribers or purchasers". The effect of the amendment was to expand the definition of "unit trust" to persons who were "contributors" to a unit trust.

172. The same Amendment Act inserted Part 4A (the FIF regime) into the ITA 76. It seems that the intention of expanding the definition of "unit trust" to include "contributors" was so that the FIF regime would apply to a person who contributed to a foreign unit trust where that unit trust was a superannuation scheme. It seems that the addition of the word "contributors" to the definition does not shed any light on whether facilities or actual subscribers are required.

173. The imputation system was introduced with effect from 1 April 1988 and replaced the classical tax system of company taxation. The imputation system allows companies (including unit trusts) to pass the full benefit of tax paid at the company level on to shareholders (unit holders) with their dividends (distributions). The replacement of the classical system substantially reduced the difference between companies and (non-unit) trusts from a taxation point of view. Relevantly, the imputation system largely removed the tax advantage previously enjoyed by (non-unit) trusts under the classical system, because imputation had the effect in broad terms that a company and its shareholders are taxed only once between them.

174. However, there are differences in the tax treatment of trusts and companies, so there continues to be relevant purpose considerations in reaching a view on how unit trusts are taxed. For example, there may be a benefit in using a trust where the top personal tax rate is higher than the trust tax rate (as the tax on income from a trust can be capped at the trust rate), or where a person's marginal tax rate is lower than the company tax rate, or the person is exempt or in losses (due to the non-refundability of imputation credits). Some other rules in the ITA apply differently to trusts and companies.

175. Consequently, statutory purposes still exist in taxing unit trusts as companies rather than trusts post imputation, although these purposes are significantly less important than when the definition was introduced.

Securities Act 1978, the Financial Reporting Act 1993, and the Companies Act 1993

176. Unit trusts are covered by other Acts. It is worth considering these, in case they assist with understanding the purpose of the UTA 60 and the ITA regarding unit trusts. However, none of these Acts seem to help with the issue. They are concerned with regulating activities a unit trust may carry out, as follows:

- The Securities Act 1978 (SA 78) applies to units offered by an issuer to the public. The definition of "unit trust" in the SA 78 incorporates, by reference, the definition of "unit trust" in s 2(1) of the UTA 60.

- The Financial Reporting Act 1993 (FRA 93) applies to every manager of a unit trust (within the meaning of s 2 of the UTA 60) in which securities have been allotted pursuant to an offer of securities to the public within the meaning of the SA 78 – s 4(1)(b) FRA 93.

177. The Companies Act 1993 (CA 93) dispenses with the distinction (under the Companies Act 1955) between private companies. Under the CA 93, a company can have only one shareholder. It might be thought that this is a relevant consideration, given that unit trusts are treated as companies under the ITA. Arguably, as the ITA rules for companies will apply to companies with one shareholder, the rules would be just as applicable to a unit trust with one subscriber. However, the fact that unit trusts are taxed as companies does not mean they are like companies in every respect, and so this does not necessarily shed any light on whether unit trusts can have only one subscriber.

Income Tax Act 1994 and Income Tax Act 2004

178. The definition of "unit trust" in the Income Tax Act 1994 (ITA 94) and the Income Tax Act 2004 (ITA 04) was in the same form as the definition, as amended, in the ITA 76.

Income Tax Act 2007

179. The definition of "unit trust" in the ITA is in rewritten form. However, the intention is that the rewritten definition has the same effect (and meaning) as the corresponding definition in the ITA 04, because the rewritten definition is not an identified policy change – ss ZA 3(3) & (5). There do not seem to be any material differences between the definition in the ITA and the definition in the ITA 94 and the ITA 04.

Current legislative context (the context of the ITA)

180. Unit trusts do not have their own regime in the ITA. Therefore, there are not many provisions concerned exclusively with unit trusts that can be analysed to assist in understanding Parliament's purpose. Instead, as already mentioned, unit trusts are included in the definition of "company", and so the rules applying to companies apply to unit trusts.

181. There are two relevant considerations though that might help in understanding Parliament's purpose for unit trusts:

- the workability of the particular interpretations in the context of the continuity provisions; and
- the effect of certain rules in the PIE regime, which deem a trust to be a unit trust in certain circumstances.

Workability of the different interpretations

182. Considering the 'workability' of the legislation is relevant to countering the view that unit trusts cannot have a single unit holder and must actually have multiple unit holders. There is a presumption that Parliament intends to legislate in a manner that produces a practical, workable, and sensible result (*The Laws of New Zealand* Statutory Interpretation (online ed, accessed 24 October 2014) at [177]). A statute must, if possible, be construed in the sense that makes it operative and that does not defeat the manifest intentions of the legislature. In cases where a provision may have several possible meanings, the courts look for the one that produces a practical result.

Examples of cases where this presumption has been applied include *CIR v Alcan New Zealand Ltd* [1994] 3 NZLR 439 (CA)*;* and *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA).

183. The issue of the workability of legislation seems to arise with an interpretation of "unit trust" that requires there to be, in fact, multiple unit holders. A scheme may commence with multiple unit holders and due to the trading in (or redemption of) units reduce to having a single unit holder and then due to further trading (or subscription for new units) continue with multiple holders. This might particularly happen with 'closely held' private unit trust arrangements. A construction requiring multiple unit holders would mean that the scheme for tax purposes would:

- commence as a unit trust and be deemed a company and subject to the company tax rules (because it has two or more holders);
- become a trust and be subject to the trust rules (when it had a single unit holder); and
- revert to being a unit trust (when it retuned to having multiple unit holders).

184. It seems unlikely that Parliament would have intended for a trust to fall in and out of the regime as its investor base fluctuated. The results seem even more likely to be outside Parliament's purpose when thinking about the tax consequences that would result. The unit trust would forfeit any imputation credits and other company-specific tax entitlements. Further, it could result in a continuity loss, as the trust will no longer be looked through to its ultimate owners upon ceasing to be a unit trust.

185. Such an outcome is arguably not sensible or workable and this points against a construction of "unit trust" that requires there to be, in fact, multiple unit holders.

186. In contrast, a construction that determines whether a scheme is a unit trust on the basis of whether the scheme provides facilities of the requisite kind does not give rise to the possibility that the scheme may enter and exit the company and trust rules. If the scheme provides facilities of the requisite kind, arguably it will be (and will continue to be) a "unit trust", irrespective of whether it has one or multiple unit holders.

The PIE rules in the ITA

187. The PIE rules contain provisions that suggest a trust must have multiple, actual unit holders, rather than mere facilities for unit holders.

188. Parliament passed the Taxation (KiwiSaver and Company Tax Rate Amendments) Bill 2007 on 17 May 2007. On the same day, the Policy and Advice Division of Inland Revenue released a special report on the Bill. The special report explained that the amendment to s HL 5 would allow foreign investment vehicles to hold their investments through other entities. Of particular relevance because it related to trusts, the changes ensured that a vehicle would be within the rules if it held its investments through trusts where the foreign investment vehicle was the sole beneficiary of the trust. At 12:

> **Foreign investment vehicles will be able to invest through other foreign investment vehicles**
>
> Section HL 5 is being amended to allow a foreign investment vehicle to own more than 20% of another foreign investment vehicle. This will allow a foreign investment vehicle to hold investments through other foreign investment vehicles.

> Section HL 5 will also allow foreign investment vehicles to hold their investments through trusts where the foreign investment vehicle is the sole beneficiary.

189. Subpart HM of the ITA contains most of the rules concerning PIEs. Sections HM 3 to HM 6B contain the introductory provisions to the PIE rules. Section HM 3(1) provides a general definition for a "foreign PIE equivalent". Section HM 3(1) relevantly states:

> **HM 3 Foreign PIE equivalents**
>
> *General definition*
>
> (1) A **foreign PIE equivalent** means an entity that—
>
> …
>
> (b) is—
>
> …
>
> (iii) the trustee of a trust that would be a unit trust if it had more than 1 subscriber, purchaser, or contributor participating as beneficiaries under the trust; and
>
> …

190. Sections HM 8 to HM 20 contain the rules that an entity must meet to be a PIE. Section HM 9(c) relevantly states:

> **HM 9 Collective schemes**
>
> The entity must be—
>
> …
>
> (c) the trustee of a trust that would be a unit trust if there were more than 1 subscriber, purchaser, or contributor participating as beneficiaries under the trust:

191. The use of the phrase "that would be a unit trust if there were more than 1 subscriber, purchaser, or contributor" in ss HM 3(1)(b)(iii) and HM 9(c) suggests that these sections are predicated on the understanding that a unit trust must have two or more subscribers. The use of this phrase might be thought to provide a dispensation from a perceived requirement that a unit trust, in fact, must have at least two subscribers. Sections HM 3(1)(b)(iii) and 9(c) therefore provide, at first glance, contextual support for the view that to satisfy the definition of "unit trust" a scheme or arrangement must have, in fact, two or more actual subscribers, rather than merely facilities for them.

192. Against this, it can be argued that an inference cannot be drawn about the definition of "unit trust" from the wording used in these other provisions. Arguably the approach used in ss HM 3(1)(b)(iii) and HM 9(c) (with reference to subscribers) does not modify the definition of "unit trust". Rather, the sections could be read as asking for an assumption to be made as to the number of subscribers in the context of the PIE rules, with no bearing on the interpretation of the definition of "unit trust". This is particularly given that the words of the definition seem to be satisfied simply with facilities for many subscribers.

193. Another argument against inferring anything from these provisions is that in drafting and enacting this legislation it is likely Parliament and the drafters had in mind the Commissioner's published position in BR Pub 95/5A. If that is the case, not much can be drawn from these words about the correct interpretation of the definition of "unit trust". There is some case law that establishes that if Parliament makes a mistaken assumption about the law, this is not enough to make that interpretation the law – *IRC v Dowdall O'Mahoney & Co Ltd* [1952] AC 401 (HL), *Birmingham City Corp v West Midland Baptist (Trust) Association (Inc)*

[1970] AC 874 (HL), and *West Coast ENT Incorporated v Buller Coal Ltd & Ors* [2013] NZSC 87.

The current distinction in the ITA between companies and trusts

194. Another way of testing any conclusion is to consider the consequences, and to see from that whether the interpretation would give effect to Parliament's purpose. If an entity is treated as a unit trust for tax purposes, it would be taxed as a company rather than a trust. If an entity with only one unit holder is within the definition, profits would be taxed at the company rate (currently 28%), and imputation credits could attach to distributions to the unit holder and the unit holder would be taxed at its marginal rate and could use any imputation credits to satisfy tax liabilities. If it were instead treated as a trust, the trust would be taxed on trustee income (income not paid to or vested in the single beneficiary) at the trustee rate (currently 33%), and beneficiary income would be taxed at the beneficiary's rate. Subsequent distributions of amounts previously taxed as trustee income would not be taxed further in the beneficiary's hands. Although these differences in taxation between companies (including unit trusts) and trusts exist, these follow from the different regimes and do not seem to lead to a preference for any view. If anything, there does not seem to be any issue from a taxation point of view in treating a single subscriber trust as a unit trust.

Conclusion on ordinary meaning, context and purpose

195. The issue this paper deals with is whether a single subscriber trust is within the definition of "unit trust" in the ITA. It seems relatively clear that, based on the ordinary meaning of the definition of "unit trust" in s YA 1, a trust only needs to have provide *facilities* for purchasers, subscribers or contributors to participate in the trust's property. The issue then is whether provision of facilities of the requisite kind is sufficient to satisfy the definition of "unit trust" in the ITA, or whether more than one subscriber is required.

196. Starting with the words of the definition, one view is that as the statutory focus is on the provision of "facilities" and contains no express statutory requirement that a scheme or arrangement must have multiple subscribers, the definition will be satisfied if the facilities exist and there is one subscriber.

197. On the other hand, some aspects of the wording of the definition might indicate Parliament is concerned with an entity that provides for multiple subscribers. The words "subscribers, purchasers, or contributors" are in the plural, and the words "subscribers", "contributors" and "participate" are suggestive of multiple subscribers. The entities specifically excluded from the definition would generally be thought to be providing for multiple subscribers. However, none of these indications in the wording when viewed alone seem to answer the question whether an entity can have a single subscriber and still be within the definition.

198. There are different approaches to how to determine whether a scheme or arrangement provides such facilities. One approach is that the test requires an analysis of the scheme or arrangement to determine whether the legal rights and obligations created by it provide facilities of the necessary kind. Under this approach, the essential feature of a "unit trust" is the provision of the facilities for subscribers to participate, and that nature is not altered by there being only one subscriber.

199. Another approach is that all of the facts are looked at. This approach is influenced by the consideration that it seems likely Parliament had in mind the common understanding of a collective investment vehicle, and that an entity that has a single subscriber is significantly different from this such that it would not be within the definition. Under this approach, some would look particularly at intention, and others would treat intention as one factor amongst all the facts. This approach argues that a court is unlikely to accept that an entity is a unit trust if there is no likelihood or prospect of an entity having more than one subscriber. However, the potential resulting uncertainty and the possibility of a scheme falling in and out of the tax rules with consequential tax effects seems to make it an unlikely interpretation.

200. Some information can be found in the legislative history. There is evidence that Parliament may have had collective investment vehicles in mind, although there is no interpretively persuasive material to establish that. It seems that Parliament did not expressly turn its mind to this issue when it enacted the definition.

201. Some arguments for different views can be made looking at the legislative context. One contextual factor in support of the view that all that is needed is facilities for subscribers, and not multiple subscribers, is the reliance on the UTA 60 definition and what that required. The definition of "unit trust" in the LITA 54 (and subsequent Income Tax Acts) was based on the definition contained in the UTA 60. As discussed, it appears that it was necessary to define a "unit trust" for the purposes of the UTA 60 in terms of the legal rights and obligations (ie, facilities) a scheme or arrangement provides. This ensured that the scheme or arrangement was subject to the pre-public offer regulatory requirements contained in the UTA 60. It seems a sensible interpretation under both Acts that includes schemes or arrangements in their start-up stage.

202. It might seem significant that some provisions in the PIE rules seem to be predicated on the understanding that a "unit trust" must have two or more unit holders. On the other hand, it could be that that assumption was necessary just for the purposes of the PIE rules. It could also be that in enacting ss HM 3(1)(b)(iii) and HM 9(c) Parliament did so on the basis of the Commissioner's published position in BR Pub 95/5A, and so the wording of these provisions would not have any bearing on the proper construction of the definition of "unit trust".

203. This paper discussed Parliament's purpose for unit trusts in both the UTA 60 and the ITA. When the definition of "unit trust" was first enacted in 1960, it appears there was a commonly held view that a unit trust was a form of collective investment vehicle (where property is held on trust for the benefit of multiple subscribers). It could be argued Parliament would not have anticipated the definition applying to a scheme or arrangement that provided facilities for only a single subscriber. Therefore, arguably, this view must inform the interpretation of the definition and its use of the plural "subscribers, purchasers, or contributors". It is also arguable that a unit trust is an entity that, by its nature as a collective investment vehicle, can be assumed to have multiple subscribers.

204. Under the current tax treatment of unit trusts, they are taxed as companies rather than trusts. If a single subscriber trust is not within the definition of "unit trust" in the ITA, it would be taxed as a trust, whereas all other unit trusts would be taxed as companies. While a difference in taxation treatment does not seem to give rise to any mischief, it seems more likely that the intention is that all unit trusts be taxed in the same

way. There does not seem to be any issue from a taxation point of view in treating a single subscriber trust as a unit trust.

205. Further, it can be argued that as the essence of a unit trust is a trust in which subscribers can hold units, all that is required to be a "unit trust" is to provide the facilities for multiple subscribers, and it is irrelevant whether in fact there are multiple subscribers. A "unit trust" can exist at law without multiple unit holders. Arguably all Parliament was intending to achieve with the UTA 60 was regulation of certain investment vehicles. It was not intending to comprehensively define unit trusts at law, but to provide a definition of those investor trusts it wanted to regulate. Parliament's original specific purpose for inserting a very similar definition in the LITA 54 was to ensure the classical system of taxation applied to unit trusts. Later, when the classical system was replaced with the imputation system for companies, and therefore unit trusts, Parliament's purpose was arguably simply that unit trusts continue to be taxed as companies. It seems counter to this intention to treat unit trusts as companies if some schemes that were in all respects unit trusts – apart from having a single subscriber – were not taxed in the same way as other unit trusts, particularly as companies can have a single shareholder. Arguably, Parliament would have been indifferent as to whether there was one or multiple subscribers.

206. However, even with a view that looks only to whether the requisite facilities exist as established by the legal relationships, it must be acknowledged that Parliament had in mind investment vehicles with multiple subscribers. That might mean that at some point some types of vehicles would not be "unit trusts". If there is no possibility of an entity including more than one subscriber, such an entity might be thought not to have the defining characteristics of a unit trust. It could not be described in ordinary language as being "a scheme or arrangement that is made for the purpose or has the effect of providing facilities for subscribers, purchasers, or contributors to participate, as beneficiaries under a trust, in income and capital gains arising from the property that is subject to the trust". Situations where it would not be possible to have more than one subscriber, purchaser, or contributor would include if the deed provided facilities for only one subscriber and prohibited further subscribers, or at least provided no ability for more subscribers to invest. Another situation would be where entry of a further subscriber was contingent upon some event that is not possible, or highly unlikely.

207. Earlier this paper discussed the numbers rule in the Interpretation Act. Put shortly, that rule is that words in the plural can be read in the singular, provided reading them in the singular would not be inconsistent with the context of the legislation. Parliament may have had in mind the numbers rule and intended the words "subscribers, purchasers or contributors" to be read in the singular, as to list them also in the singular would have resulted in cumbersome wording. The question is whether the context would require not reading the words in the singular, and whether reading the words to include the singular would be consistent with Parliament's purpose. As has been discussed, it seems likely Parliament had in mind vehicles set up for many subscribers and legislated the UTA 60 to regulate them. Parliament then used a very similar definition of "unit trust" in the ITA, arguably continuing to have in mind collective investment vehicles. On the other hand, if single subscriber trusts are included within the definition of "unit trusts", there does not seem to be a result that is clearly contrary to Parliament's purpose. Inclusion of unit trusts where there is temporarily a single

subscriber may give better effect to Parliament's purpose for other provisions such as the loss and imputation provisions, which require commonality of 'shareholders'.

208. In summary, under most approaches to the interpretive issues, it seems that having one subscriber, purchaser or contributor will not necessarily mean that the entity is not a "unit trust" within the definition in the ITA. Under most approaches some instances of single person investor trusts would be within the definition. The issue is to reach a view on which approach to take, and then establish how that approach states the test for determining when a single subscriber trust is within the definition.

209. In summary, the plural wording and the commonly understood collective nature of unit trusts supports an interpretation that there must generally be multiple subscribers. However, a significant issue for an approach that makes an assessment on the basis of intention and whether an entity has the characteristics of a "unit trust" is that it brings with it uncertainty and compliance issues. This raises doubts about whether it can be the correct approach. On the other hand, the use of the words "made for" and "facilities" in the definition, and the fact that an interpretation that included single subscriber trusts would not seem to be particularly contrary to any purpose of the ITA, supports the interpretation that a single subscriber trust is included in the definition, provided the requisite facilities exist.

Closing comments

210. This paper discusses some of the uncertainties with a view to focusing attention on them and offering possible approaches to reduce the level of doubt and confusion. As mentioned at the beginning, although this paper represents the Commissioner's preliminary view, the purpose of an issues paper is to stimulate discussion and invite submissions from interested parties. Therefore, the Commissioner will form a final view after considering submissions, and will likely state that view in a future public statement, which would be consulted on in the usual way.

Appendix – Legislation

Income Tax Act 2007

1. "Unit trust" is defined in s YA 1 as follows:

> **YA 1 Definitions**
>
> In this Act, unless the context requires otherwise,—
>
> ...
>
> **unit trust—**
>
> (a) means a scheme or arrangement that is made for the purpose or has the effect of providing facilities for subscribers, purchasers, or contributors to participate, as beneficiaries under a trust, in income and capital gains arising from the property that is subject to the trust; and
>
> (b) does not include—
>
> (i) a trust for the benefit of debenture holders:
>
> (ii) the Common Fund of Public Trust:
>
> (iii) a group investment fund established by Public Trust:
>
> (iv) the Common Fund of the Maori Trustee:
>
> (v) a group investment fund established under the Trustee Companies Act 1967:
>
> (vi) a friendly society registered under the Friendly Societies and Credit Unions Act 1982:
>
> (vii) a superannuation fund:
>
> (viii) an employee share purchase scheme:
>
> (ix) a fund that meets the requirements of section CW 45 (Funeral trusts):
>
> (x) any other trust of any specified kind that is declared by the Governor-General, by Order in Council, not to be a unit trust for the purposes of section HD 13 (Unit trusts)

2. The term "unit holder" is defined in s YA 1 and provides:

> **unit holder**, for a unit trust, means a person who holds a beneficial interest in the property that is subject to the trust

3. Section YA 1 also contains the following relevant definitions:

> **company—**
>
> …
>
> (b) includes a unit trust:
>
> …
>
> **share—**
>
> …
>
> (c) includes a unit in a unit trust:
>
> …
>
> **shareholder—**
>
> (a) includes— –
>
> (i) a holder of a share; and
>
> …