

Civil and Administrative Tribunal
New South Wales

Case Name: Enlace Pty Ltd ATF Enlace Trust v Chief Commissioner of State Revenue

Medium Neutral Citation: [2025] NSWCATAD 253

Hearing Date(s): 11 August 2025

Date of Orders: 08 October 2025

Decision Date: 8 October 2025

Jurisdiction: Administrative and Equal Opportunity Division

Before: J Sullivan, Senior Member

Decision: The assessments to surcharge land tax for the 2022, 2023 and 2024 tax years are confirmed.

Catchwords: TAXATION AND REVENUE – surcharge land tax – amendment to trust deed to exclude distributions to foreign persons

Legislation Cited: Administrative Decisions Review Act 1997 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)
Corporations Act 2001 (Cth)
Duties Act 1997 (NSW)
Foreign Acquisitions and Takeovers Act 1975 (Cth)
Land Tax Act 1956 (NSW)
Land Tax Management Act 1956 (NSW)
State Revenue Legislation Further Amendment Act 2020 (NSW)
Taxation Administration Act 1996 (NSW)

Cases Cited: Commissioner of Taxation v Ryan (2000) 201 CLR 109
Feng v Chief Commissioner of State Revenue [2024] NSWCATAD 56
Godecke v Kirwan (1973) 129 CLR 629
Khalil & Associates Pty Ltd ATF The George Khalil Family Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 23

Monisse v Chief Commissioner of State Revenue
[2023] NSWCATAP 27
Watertite Investments Pty Ltd ATF Isgrove Trust v Chief
Commissioner of State Revenue [2023] NSWCATAD
274
Zhong v Guan [2024] NSWCA 300

Texts Cited: J D Heydon, Heydon on Contract (The General Part)
(2019, Lawbook Co)

Category: Principal judgment

Parties: Enlace Pty Ltd ATF Enlace Trust (Applicant)
Chief Commissioner of State Revenue (Respondent)

Representation: Counsel:
D Allen (Applicant)

Solicitors:
Catalyst Legal (Applicant)
Crown Solicitor (Respondent)

File Number(s): 2025/00132761

Publication Restriction: None

REASONS FOR DECISION

- 1 The Applicant is Enlace Pty Ltd, in its capacity as trustee for the Enlace Trust (“the Trust”). The Trust is a discretionary trust.
- 2 The Respondent (the Chief Commissioner of State Revenue) has assessed the Applicant to surcharge land tax (“SLT”) for the 2022 to 2024 land tax years. The Respondent acknowledges that amendments were made to the Trust Deed, but says they didn’t satisfy the requirements in the legislation and, as a result, the Applicant was a “foreign person” and liable to SLT as assessed.
- 3 For the reasons which follow, the Tribunal affirms the assessments to SLT.

Materials before the Tribunal

- 4 References to “TB” are to the Tribunal Book. It contained the application to the Tribunal and the evidence and submissions filed before the hearing, including the documents required by s 58 of the *Administrative Decisions Review Act 1997* (NSW) (“ADR Act”).

- 5 The Respondent also filed a Bundle of Authorities prior to the hearing.
- 6 The Applicant was represented by Mr Allen of counsel. He said he had only been recently briefed, and his instructing solicitor (Mr Foate of Catalyst Legal) was unavailable to attend. Mr Allen handed up a bundle of documents which I marked "A1", being:
 - (1) a 3 page typed document listing six authorities, and an outline of oral argument; and
 - (2) copies of the referenced authorities.

Relevant Facts

The Deed establishing the Enlace Trust

- 7 By deed dated 20 June 2013 but executed on 26 June 2013 titled "*Discretionary Trust Deed establishing the Enlace Trust*" ("Deed" at TB10-32), the Trust was established as a discretionary trust, with Enlace Pty Limited as its trustee. The Settlor was Aaron Charles Jupp and the Appointor was Cameron Drake-Brockman.
- 8 Relevantly:
 - (1) The Deed contained clauses numbered 1 to 79, together with a Schedule and execution page.
 - (2) Clause 1 of the Deed provided that the trust commenced "on the day this deed is executed".
 - (3) The Schedule to the Deed provided that the following were beneficiaries of the trust:
 - (a) Named beneficiaries: Kristie Drake-Brockman;
 - (b) Classes of eligible beneficiaries:
 - (i) The spouse of a named beneficiary;
 - (ii) The parents of a named beneficiary;
 - (iii) The children of the named beneficiaries;
 - (iv) The grandchildren of the named beneficiaries;
 - (v) The brothers and sisters of the named beneficiaries;
 - (vi) The nieces and nephews of the named beneficiaries;
 - (vii) The uncles and aunts of the named beneficiaries and the children of those uncles and aunts;
 - (viii) The spouses of any children of the named beneficiaries;

- (ix) The spouses of any grandchildren of the named beneficiaries;
 - (x) The spouses of any brothers and sisters of the named beneficiaries;
 - (xi) The spouses of any nieces and nephews of the named beneficiaries;
 - (xii) Schools, universities, colleges and other educational bodies of any kind either within or outside Australia;
 - (xiii) Companies of which any beneficiary is a shareholder or director;
 - (xiv) Trustee of any trusts in which any of the beneficiaries has any interest;
 - (xv) Partners in any partnerships in which any of the beneficiaries is a partner;
 - (xvi) Charities the trustee nominates;
 - (xvii) Other legal entities the trustee nominates.
- (4) The Deed provided that the Trustee had an absolute discretion to decide to distribute any part of the income of the trust fund (cl 6) or any part of the trust fund (cl 10) to any beneficiaries.
- (5) Clause 54 of the Deed provided:
“Trustee may vary this deed
- 54 The trustee may vary this deed at any time before the vesting day, even to the extent of revoking all the trusts it establishes, but only with the consent of the appointor. The trustee must do so by executing another deed. That deed may reserve this power of variation.”
- (6) Cameron Drake-Brockman executed the Deed in his capacity as the sole director and sole company secretary of Enlace Pty Limited, under s 127(1) of the *Corporations Act 2001* (Cth).

The Amending Deed

- 9 A new clause 80 was inserted into the Deed by a “*Deed of Amendment*” dated 9 April 2020 (“Amending Deed” at TB59-60). It said:

THIS DEED OF AMENDMENT is made the 9th day of April 2020

PARTIES:

- A. **ENLACE PTY LTD** [details and address] (the “Trustee”); and
- B. **CAMERON DRAKE-BROCKMAN** of [address] (the “Appointor”)

RECITALS

1. By a deed of trust dated 20 June 2013 (the “Trust Deed”), the Settlor, Aaron Charles Jupp and the Trustee created a trust fund known as the ENLACE TRUST (the “Trust”).

2. Pursuant to Clause 54 of the Trust Deed the Trustee may, with the consent of the Appointor, amend the provisions of the Trust.

3. The Trustee is desirous of amending the Trust in the manner contained in the attached schedule, and the Appointor consents to the amendment by their execution of this Deed.

OPERATIVE PART

1. The Trustee in exercise of the powers conferred upon it by the Trust Deed and by the Trustee Act, 1925 (NSW) HEREBY AMENDS the Trust in accordance with that specified in the Schedule.

2. The Appointor consents to the amendment as evidenced by his execution below.

3. In all other instances the Trustee affirms the remainder of the Trust Deed.

SCHEDULE

Insert new Clause 80:

80. Foreign Persons or Entities

80.1 Notwithstanding any other provision contained within this Deed to the contrary, the Trustee is prohibited from effecting any distribution under this Deed to any person and/or entity who would be considered to be a foreign person and/or foreign entity by Revenue NSW (or the requirements of any other state revenue authority).

80.2 Despite any other provision of this Deed, this Clause 80 is irrevocable and may not be removed or amended.”

- 10 The two parties were, as noted above, Enlace Pty Limited and Cameron Drake-Brockman.
- 11 The execution block for Enlace Pty Limited was signed by Cameron Drake-Brockman “in accordance with Section 127 of the Corporations Act”. He was the sole director and company secretary of Enlace Pty Limited at the time.
- 12 Cameron Drake-Brockman did not sign the deed a second time in his capacity as the Appointor. Kristie Drake-Brockman wrote her name in the second execution block which said “Signed Sealed and Delivered by Cameron Drake-Brockman in the presence of”. She signed her name on the line for “Witness”.

Background to these proceedings

- 13 On 22 July 2024, the Applicant lodged a Land Tax Registration Return, declaring the Trust was a discretionary trust and excluded foreign beneficiaries (TB33). The return referred to the Deed, but not to the Amending Deed.

14 On 19 August 2024, the Respondent emailed the Applicant advising that it had issued a Land Tax Assessment Notice which assessed the Applicant to land tax and SLT for the 2022, 2023 and 2024 tax years (TB26-34).

- (1) The land tax assessed is not in dispute.
- (2) The SLT assessed was \$2,685.55 (2022), \$17,231.10 (2023) and \$20,677.80 (2024), totalling \$40,594.45.
- (3) No penalties or interest were imposed on those assessments.

15 On 28 November 2024, following discussions with the Respondent, the Applicant filed a land tax variation return and uploaded a copy of the Amending Deed (TB49, 74).

16 On 10 December 2024, the Respondent wrote to the Applicant advising that the Amending Deed did not irrevocably exclude foreign beneficiaries in accordance with s 5D of the LTA (TB50, 74).

17 On 18 December 2024, the Applicant lodged an objection against the assessments to SLT in respect of the 2022, 2023 and 2024 tax years (TB56-58). The objection said:

“The director of Enlace Pty Ltd has been dealing with Wendy N of your office in relation to the attached Deed of Amendment. We have been asked to lodge this objection on his behalf.

The attached Deed of Amendment contains a generic deeming clause that has been accepted by your office for many years. Could you kindly review the decision of Wendy N to deny its efficacy.”

18 On 5 February 2025, the objection was disallowed in full. The Objection Decision (TB67-70) also referred to SLT assessed for the 2025 tax year but that assessment issued on 9 January 2025 (TB62), after the objection was lodged. The parties confirmed that the only years under review in these proceedings were the 2022, 2023 and 2024 tax years, and no separate objection had been lodged for the 2025 tax year.

19 The Objection Decision said:

“Having reviewed both the Trust Deed of 20 June 2013 (“Trust Deed”) and the Deed of Amendment, the Chief Commissioner is not satisfied that the “no foreign beneficiary requirement” has been met.

No foreign beneficiary requirement

Although you argue that the definition of “foreign person” and “foreign entity” within subclause 80.1 of the Deed of Amendment has been accepted

previously by Revenue NSW, I consider any such determination to be incorrect at law and subject to reassessment. The Land Tax Act does not make reference to, nor prescribe any flexibility in defining a “foreign person”.

I refer you to section 2A of the Land Tax Act which prescribes the definition of foreign person as consistent with chapter 2A of the *Duties Act 1997* (NSW) (“Duties Act”). Section 104J(1) of the Duties Act states that a “foreign person” means a person who is a foreign person within the meaning of the *Foreign Acquisitions and Takeovers Act 1975* (Cth), as modified by this section.

Any divergences from this particular prescribed definition, as informed by section 2A of the Land Tax Act, being the source legislation for the application of surcharge land tax in NSW, is therefore not in accord with the intended definition of “foreign person”, and consequently does not satisfy section 5(3)(a) of the Land Tax Act. On this basis alone, the Trust is not regarded as preventing a foreign person from being a beneficiary for the Relevant Years.

While it is acknowledged that there may have been a genuine intention to exclude foreign persons as beneficiaries of the Trust, this does not negate the necessity for the Trust Deed, together with subsequent Deeds of Amendment, to meet the specific requirements outlined in subsection 5D(3) of the Land Tax Act. The incorporation of the definition of “foreign person” in the manner prescribed within the Land Tax Act would have ensured that the Trust Deed had complied with the meaning of “foreign person” within section 5D. An intention to comply through the implementation of an unprescribed or generic definition does not achieve these requirements.”

Relevant Legislative Provisions

- 20 Surcharge land tax is charged for the 2017 and subsequent land tax years on residential land owned by “foreign persons”: LTA, s 5A.
- 21 Section 5D of the LTA was introduced on 24 June 2020 by the *State Revenue Legislation Further Amendment Act 2020* (NSW). It (relevantly) provides (my emphasis in italics):

5D Surcharge land tax—discretionary trusts

- (1) The trustee of a discretionary trust is taken to be a foreign person in that capacity for the purposes of section 5A *if the trust does not prevent a foreign person from being a beneficiary of the trust.*
- (2) If a discretionary trust prevents a foreign person from being a beneficiary of the trust, the trustee is not in that capacity a foreign person for the purposes of section 5A.
- (3) A discretionary trust is considered to prevent a foreign person from being a beneficiary of the trust *if (and only if) both of the following requirements are satisfied—*
 - (a) no potential beneficiary of the trust is a foreign person (the **no foreign beneficiary requirement**),
 - (b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the **no amendment requirement**).

Note--: Under the transitional arrangements for this section in Schedule 2 to the Principal Act, the no amendment requirement does not apply to a trust that satisfies the no foreign beneficiary requirement immediately before the commencement of this section.

(4) A person is a *potential beneficiary* of a discretionary trust if the exercise or failure to exercise a discretion under the terms of the trust can result in any property of the trust being distributed to or applied for the benefit of the person.

Note--: A potential beneficiary is not limited to persons named in the trust instrument and extends to the members of any class of persons to whom or for whose benefit trust property can be distributed or applied pursuant to the discretions of the trust.

(5) For the removal of doubt, a person is not a potential beneficiary of a discretionary trust if the terms of the trust prevent any property of the trust from being distributed to or applied for the benefit of the person.

(6) In this section, “**property**” includes money, and a reference to the distribution or application of property includes a reference to the payment of money.

(7) Chapter 11A (Tax avoidance schemes) of the *Duties Act 1997* applies in respect of the avoidance of surcharge land tax in connection with the operation of this section in the same way as that Chapter applies in respect of the avoidance of duty under that Act, and for that purpose –

(a) a reference in that Chapter to duty is to be read as including a reference to surcharge land tax, and

(b) a reference in that Chapter to “this Act” is to be read as a reference to the *Land Tax Act 1956* and the *Land Tax Management Act 1956*.

22 It is not in dispute that s 5D applied to all relevant land tax years here in dispute.

23 Critically, s 2A of the LTA defines “foreign person” as having the same meaning as in Chapter 2A of the *Duties Act 1997* (NSW) (“Duties Act”). And s 104J in Chapter 2A of the Duties Act defines “foreign person” as having the same meaning as in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (“FATA”) (with certain modifications set out in that section).

24 Section 4 of the FATA defines:

(1) “foreign person” as meaning:

(a) an individual not ordinarily resident in Australia; or

(b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

(c) a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or

(d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

(e) the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or

(f) a foreign government; or

(g) any other person, or any other person that meets the conditions, prescribed by the regulations.

(2) “substantial interest” as follows:

substantial interest: a person holds a substantial interest in an entity, trust or unincorporated limited partnership if:

(a) for an entity or unincorporated limited partnership—the person holds an interest of at least 20% in the entity or partnership; or

(b) for a trust (including a unit trust)—the person, together with any one or more associates, holds a beneficial interest in at least 20% of the income or property of the trust.

Note 1: see also sections 17 (meaning of *interest* and *aggregate interest* of a specified percentage in an entity or unincorporated limited partnership) and 18 (rules relating to determining percentages of interests in entities).

Note 2: For when a person *acquires* a substantial interest in an entity, see section 20.

25 Section 18 of the FATA sets out rules for determining percentages of interests in entities; and s 18(3) provides:

Discretionary trusts

(3) For the purposes of this Act, if, under the terms of a trust, a trustee has a power or discretion to distribute the income or property of the trust to one or more beneficiaries, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or property of the trust that the trustee may distribute to that beneficiary.

26 Section 5 of the FATA provides when an individual who is not an Australian citizen is ordinarily resident in Australia. That section provides:

5 Meaning of *ordinarily resident*

(1) An individual who is not an Australian citizen is ***ordinarily resident*** in Australia at a particular time if and only if:

(a) the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and

(b) at that time:

(i) the individual is in Australia and the individual’s continued presence in Australia is not subject to any limitation as to time imposed by law; or

(ii) the individual is not in Australia but, immediately before the individual's most recent departure from Australia, the individual's continued presence in Australia was not subject to any limitation as to time imposed by law.

(2) Without limiting paragraph (1)(b), an individual's continued presence in Australia is subject to a limitation as to time imposed by law if the individual is an unlawful non-citizen within the meaning of the *Migration Act 1958*.

The parties' submissions

27 The following matters submitted by the Applicant were not relevantly disputed:

- (1) That the Trust Deed of the Enlace Trust enabled amendment, the regime for amendment in cl 54 of the Deed was followed, and there was no issue that the amendment made could be irrevocable; and
- (2) that the principles of construction of contracts are also applicable to the construction of a deed.

The Practice Note

28 The Applicant originally submitted (written submissions dated 4 June 2025 at TB83-85) that the Applicant relied on the "Revenue NSW Practice Note CPN004 – Foreign surcharges and discretionary trusts" in preparing the Amending Deed. The practice note was said to be issued on 5 June 2018 and attached to the submissions. Attachment A was version 2 of CPN004, which was issued on 1 July 2020, effective from 24 June 2020 (TB86-91). Version 1 of CPN004 was issued on 5 July 2018.

29 At the hearing, Mr Allen withdrew reliance on the practice note, saying there was no nexus between the practice note and the execution of the Amending Deed. He also confirmed there was no dispute regarding the relevant provisions as set out in the Respondent's submissions (and referenced above in these reasons).

"Certainty"

30 The Respondent's written submissions at [35]-[42] stated that the Amending Deed did not comply with the requirements of s 5D(3)(a) of the LTA as "it was not sufficiently certain to exclude all foreign persons from being beneficiaries of the Trust" by reference to the relevant statutory requirements, and concluding that the deficiencies arising from the uncertainty could not be overcome by the assertion of the Applicant that it intended to amend the Deed to exclude foreign beneficiaries.

31 The Applicant's oral submissions dealt with the "certainty" arguments in various respects.

(1) First, the Applicant said that the courts will strive to uphold contracts (and, therefore, deeds) in the face of uncertainty. Mr Allen referred the Tribunal to J D Heydon, *Heydon on Contract (The General Part)* (2019, Lawbook Co), which said, inter alia (at [3.310]) in respect of "unclear terms":

"To assert that there is a want of contractual clarity is to assert that the contractual language is so obscure or imprecise that it does not reveal any particular contractual intention."

(2) Second, the Applicant said that the parties can include a formula in the Deed, and also incorporate the terms of a statute or leave it to the vendor's solicitor to include reasonable terms, citing *Robertson on Contract* at [6.35] and *Godecke v Kirwan* (1973) 129 CLR 629.

(3) Ultimately, the Applicant submitted that:

"17. Clause 80 is certain as it obliges the trustee to ascertain by reference to the legislation governed by the Commissioner to ensure that no distributions can be made to a foreign person and then prohibits the trustee from including them as an object of the trust.

18. This is the objective intention of the trustee and appointor (the parties to the Amending Deed) and meets the purpose of the Amending Deed which is to avoid the land tax surcharge."

32 In other words, the Applicant submitted that cl 80 was sufficiently clear on its own terms to comply with the requirements of s 5D(2) and (3) of the LTA.

Objective Intention

33 The Applicant said it was also clear that the *objective intention* was to comply with s 5D(2) and (3) of the LTA and avoid surcharge land tax by excluding "foreign persons" as beneficiaries of the Trust.

34 The Respondent submitted that objective intention is not the subjective intention, nor the assumed intention. And although there was a reference to Revenue NSW in clause 80, there was no evidence of the objective intention. There was nothing in the recitals to the Amending Deed, nor the terms of the Amending Deed, that referred to the LTA, the Duties Act or the FTA. Nor was there anything in the s 58 documents or other evidence before the Tribunal that provided any evidence of the objective intention. The Respondent pointed to *Watertite Investments Pty Ltd ATF Isgrove Trust v Chief Commissioner of State Revenue* [2023] NSWCATAD 274 where the Tribunal stated:

“60. The rules for construction of contracts also apply to trusts: *Byrnes v Kendle* [2011] HCA 26 at [102]. The proper interpretation of a document is not ascertained by extrinsic evidence as to the subjective intentions of its parties, but rather by an objective construction of the words used by the parties. The fundamental rule of interpretation is to ask “what is the meaning of what the parties have said?”, not to ask “what did the parties mean to say?”: *Byrnes v Kendle* per Gummow and Hayne JJ at [53]. Contractual construction depends on finding the meaning of the language of the contract – the intention which the parties expressed, not the subjective intentions which they may have had, but did not express: *Byrnes v Kendle* per Heydon and Crennan JJ at [98].

...

62. There is no evidence before the Tribunal of the trustee’s intention and even if it could be inferred that the trustee was attempting to comply with s 5D of the LTA, I cannot accept the proposition that, because the trustee was attempting to comply with the conditions of s 5D of the LTA, the deed should be read as though it did comply with that provision even though in its terms it does not.”

“foreign person” / “foreign entity”

- 35 There was quite a bit of discussion at the hearing regarding the dual references in cl 80 to a “foreign person and/or foreign entity”. The Respondent said that although the words “foreign person” were used in cl 80, they were not (and should have been) defined by reference to the applicable sections of the LTA or any of the other relevant provisions. The words had a specific definition and the reference to the alternative “foreign entity” introduced a concept that was not defined in the Duties Act or the LTA. It was noted that using the term “foreign entity” in cl 80 also caused issues; that term was defined in s 4 of the FATA [Tab 2(a) of the Bundle of Authorities] but not regarding the definition of “foreign person”. A “foreign entity” is a corporation or a unit trust that is not an Australian corporation or unit trust. Accordingly, it is conceivable that a corporation and unit trust may not be a foreign person but may be a foreign entity (or vice versa). This, the Respondent said, gave rise to the difficulty referred to in *Khalil & Associates Pty Ltd ATF The George Khalil Family Trust v Chief Commissioner of State Revenue* [2024] NSWCATAD 23 (“*Khalil*”). In short, it was not possible to determine it applying the relevant legislation.
- 36 The Applicant said that the reference in cl 80 to “Revenue NSW” made it clear that the wording of “foreign person” was grounded in the relevant legislation, because Revenue NSW (i.e. the Chief Commissioner of State Revenue) was required to administer the law and apply the relevant legislation. Accordingly,

due to the very complexity raised by the Tribunal in *Khalil*, it was a “clear and convenient shorthand way” of ensuring that the Trustee would always refer to those same provisions as if it stood in the place of the Respondent, and would thereby understand it was prohibited from making any distribution (whether capital or income) to any such person who was a “foreign person” as defined.

37 The Respondent countered this submission by saying that Revenue NSW does not determine who is a foreign person. Rather, it was a matter determined by the legislation.

38 The Respondent also noted that every state has different requirements, and the NSW legislation was not the same as in, for example, Victoria (as was confirmed by copies of the relevant provisions provided to the Tribunal).

Consideration

39 As the assessments were the subject of objections, the Tribunal has administrative review jurisdiction to determine this matter under s 96 of the *Taxation Administration Act 1996* (NSW) (“TA Act”) and s 9 of the ADR Act.

40 The Applicant bears the onus of proving its case on the balance of probabilities: s 100(3) of the TA Act.

41 Accordingly, the Applicant must establish that it is not liable for SLT, having regard to the relevant statutory criteria.

42 The question for this Tribunal is not whether cl 80 is void for uncertainty. And in my view, the cases raised by the Applicant which referred to a determination by a third party raised different circumstances.

43 In this case, the question is whether the trustee (i.e. Enlace Pty Ltd in its capacity as the trustee of the Enlace Trust) was a “foreign person” for the purpose of s 5A of the LTA, and thereby liable to SLT as assessed in respect of each of the relevant years.

44 More specifically the issue is whether the wording of cl 80 (read with the other provisions of the Trust Deed) satisfies the “no foreign beneficiary requirement” in s 5D(3)(a), because:

- (1) the trustee will be “taken” (deemed) to be a foreign person under s 5D(1) *unless* s 5D(2) is satisfied;

- (2) relevantly, s 5D(2) then requires the "no foreign beneficiary requirement" in s 5D(3)(a) to be satisfied; and
- (3) that requires a review of the "terms of the trust".

45 I agree with the parties that the legislation is a "complicated web", a term used by the Tribunal member in *Khalil*. The Applicant submitted that it was "patently clear" that the amendment was made to deal with surcharge land tax and that the wording of clause 80 was "a very practical means" of dealing with that complexity. When asked by the Tribunal, however, the Applicant could not say whether or not clause 80 was intended to deal also with surcharge purchaser duty for the purpose of the Duties Act.

46 The relevant findings in *Khalil* were brief, and stated (my emphasis in italics):

"31. First, the regulatory context is one that involves a complicated web of interacting and intersecting statutes. Words are often defined, such as in this case and are not given their ordinary dictionary meaning. *It is critical therefore to use precise words as defined.* I accept the applicant's submission that the bold reference to 'the no foreign beneficiary requirement' in s 5D(3)(a) is intended to summarise or characterise the words 'no potential beneficiary of the trust is a foreign person'. However in this particular case the state of the evidence is such that I am not able to draw any inference about the objective intention of the applicant. This is because there was not evidence before the Tribunal about what is the meaning of what the applicant wrote in the Amending Deed.

32. The applicant relied on decisions about 'correction of obvious mistakes' but relied on no evidence that a mistake was made in the preparation of the Amending Deed. As such, in the absence of evidence, the Tribunal is unable to accept the applicant's submission that the Amending Deed was prepared in 'good faith' with the purpose and object of complying with ss 5D(3)(a) and (b) of the LT Act.

33. I accept the respondent's submission that there is uncertainty about whether the words 'foreign person' has the same meaning as 'foreign beneficiary' in this case. Taking into account the evidence before the Tribunal and the relevant law, I am not satisfied that the Amending Deed complies with s 5D(3)(a) or s 5D(3)(b) of the LT Act."

47 I have some sympathy with the Applicant's position but I consider that the wording of cl 80 was insufficient. In short, the solicitor did not give sufficient attention to the drafting of the clause and it went "awry" – a description used by the NSW Court of Appeal in *Zhong v Guan* [2024] NSWCA 300, which is somewhat instructive for the matter we are considering here. In that case, it was argued that a Deed granted one of the parties a charge over property as security for a loan, "either as a matter of construction or because the Deed should be rectified [by the Court] to make that clear". Kirk JA made reference at

[31]-[33] to applicable principles in order to identify the objective intention if required to interpret the words – “the objective standard of what a reasonable person in the position of the parties would understand the [joint intentions] to be”; before setting out the position to be adopted at [38] as follows:

“38. ... it is possible to construe a written contract in a manner which departs from some particular words or punctuation employed. This is an exercise in objective, purposive, contextual construction, giving effect to the court’s assessment of what the parties have actually agreed consistent with basic principles of construction. It is not a matter of rectifying – rewriting – the contract to prevent one party’s unconscionable behaviour by correcting a mutual mistake in the parties’ expression of their actual agreement. This constructional step will only be taken if it is clear, first, that the terms lead to absurd results or are inconsistent or manifest some obvious mistake as established by permissible evidence and, second, if the position intended to be agreed is clear. These matters may overlap. The greater the departure from the language employed then in general the more difficult it will be for the argument to be made out.”

- 48 Justice Kirk went on to say (at [39]) that it was important for the taxpayer to identify the construction advocated for. In this case, the Applicant suggests there is nothing wrong with the wording, and that it is quite clear – indeed “obvious” - that the reference to Revenue NSW and “foreign person” means that the Trustee would know they were precluded from making any distributions to such a person, and would have regard to the legislation.
- 49 That is, unfortunately, insufficient. Regardless of whether a trustee would decide to interpret it that way, that is not what the clause provides. And it is the wording – objectively construed - which comprises the relevant “terms of the trust”.
- 50 As highlighted by the Respondent, the Amending Deed and new cl 80 does not refer, at all, to the statutory framework. The reference to “Revenue NSW” and “foreign person” (undefined) does not remedy the lack of clarity.
- (1) If the intention was to refer to the relevant legislation it should have been referred to. Given that it is a complicated scheme of legislation, it should not be implied.
 - (2) Nor was there any attempt made by the Applicant to explain the mechanics by which (or whether), in a practical sense, the trustee would ascertain and record what Revenue NSW “considered” the position to be.

(3) Clause 80 is also “muddled” by the reference to other states, and to the term “foreign entity”. This causes the text to stray away from the specific requirements in s 5D(3)(a).

51 The legislation required that the “*terms of the trust*” met the requirements. In adopting the shorthand form they did, the terms of the trust did not do so.

52 I accept that no “foreign person” actually received distributions from the Trust, and it was likely that no-one else within the description of individuals ever actually would.

53 But, unfortunately for the Applicant, the Amending Deed was deficient. Despite being professionally prepared, the words used did not satisfy the “no foreign beneficiary requirement” in s 5D(3)(a) of the LTA. There was no sufficient incorporation of the definition of “foreign person” as prescribed by s 2A of the LTA (which in turn pointed to Chapter 2A of the Duties Act) to preclude the making of distributions to such persons.

54 I agree with the Objection Decision that an intention to comply through the implementation of an unprescribed or generic definition does not achieve the requirement. The Tribunal declines to engage in a speculative redrafting exercise.

55 As the Applicant has not met the requirements of s 5D(3)(a), s 5D(2) is not satisfied.

56 As a result, the Applicant is taken to be a foreign person by s 5D(1), and is subject to SLT under s 5A of the LTA.

57 The Tribunal has no discretion under the legislation to reduce or waive the liability to surcharge land tax: *Monisse v Chief Commissioner of State Revenue* [2023] NSWCATAP 27 at [33]. As said in *Feng v Chief Commissioner of State Revenue* [2024] NSWCATAD 56 at [49]:

“The Tribunal has repeatedly emphasised that the factors contributing to an applicant’s failure to satisfy a statutory requirement are irrelevant (unless, of course, the statute itself says otherwise): *Lawrence v Chief Commissioner of State Revenue* [2022] NSWCATAD 266 at [38]; *Song v Chief Commissioner of State Revenue* [2023] NSWCATAD 301 at [80]. Also, the Tribunal has no overriding discretion to waive tax that is otherwise payable: *Chu v Chief Commissioner of State Revenue* [2021] NSWCATAD 238 at [30].”

58 Accordingly, no remedy is available for the Tribunal to currently relieve the Applicant of the obligation to pay the SLT. As submitted by the Respondent, liability to SLT is created by direct operation of the LTA, and notions of fairness or “justice” do not apply when the statutory provision contains no relevant discretion: *Commissioner of Taxation v Ryan* (2000) 201 CLR 109.

59 The Respondent, and in review proceedings this Tribunal, is required to apply the law in accordance with its terms.

Conclusion

60 At each of the relevant taxing points, being midnight on 31 December in 2021, 2022 and 2023, the “no foreign beneficiary requirement” in s 5D(3)(a) of the LTA was not met. As a result, s 5D(2) did not apply and s 5D(1) deemed the trustee to be a foreign person for the purpose of s 5A.

61 The correct and preferable decision is that SLT was payable by the Applicant for the 2022 to 2024 years as assessed.

Order

62 I make the following order:

- (1) The assessments to surcharge land tax for the 2022, 2023 and 2024 tax years are confirmed.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar