



Industry Education Webinar:

Appointment of New Trustees
(Pursuant to Part 5 of the
Trustee Act 1936)





About our Land Services SA Team

This Industry Education Webinar was prepared by LSSA's Subject Matter Experts. Our staff have years of experience and are well respected in the Industry.

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Why use an Appointment of New Trustees (Pursuant to part 5 of the Trustee Act 1936)



If Land held in trust is to be divested and vested in a new trustee or trustees (solely or jointly with a continuing trustee) – four available procedures:

1. by Transfer under s 96 of the Real Property Act 1886
2. Using the **vesting provisions contained in Pt 5 of the Trustee Act 1936**
3. Vesting order can be made by the Supreme Court (s 37 of the Trustee Act 1936)
4. Supreme Court can make an order appointing person to convey the land (s 40 of the Trustee Act 1936).

Complex documents – each application for New Trustees will have a different set of circumstances which vary

- Procedure of appointing new trustees under Part 5 of the Trustee Act 1936 (low lodgments but commonly used)
- Able to effectively disclose the trusteeship
- Registered proprietor of the land need not necessarily execute the documentation under Part 5 (Unlike a Transfer to vest trust property in new trustees)
- Documentation is executed by the person in whom the power of appointing new trustees is vested - 'The Appointor'
- Often used when all registered proprietors/trustees are deceased
- Not necessary to register the deaths of any deceased trustees. Fact of death can be recited in the Memorandum of Appointment, noting evidence of death not required





Circumstances

Circumstances when New Trustee may be Appointed

Grounds for **removal of an existing trustee** and **appointment of a new trustee** may be specified in instrument creating the trust.

Example,

- Trustee a natural person – becoming of unsound mind, bankrupt, being convicted for an offence of dishonesty
- Trustee a body corporate - the appointment of a liquidator, receiver and manager, administrator or other external controller

If all existing registered trustees are deceased,

- A transfer under s 96 of the Real Property Act 1886 would not be utilised
- Normal procedure would be to use the provisions under Part 5 of the Trustee Act 1936

By **s14 of the Trustee Act 1936**, a new trustee may be appointed in place of an existing trustee who:

- Is dead
- Remains out of the State for more than twelve months
- Desires to be discharged from all or any of the trusts or powers reposed in or conferred upon them
- Refuses to act
- Is unfit to act
- Is incapable of acting

Note: Section 14 applies only if and as far as a contrary intention is not expressed in the instrument (if any) creating the trust and has effect subject to the terms of that instrument and to any provisions contained therein.

Other scenarios

- Appointment (Where Power of Appointment Exercised by a Meeting of Members of a Church or Association)
- Appointment, Suspension and Removal of Trustees of Superannuation Funds





The Appointor

The Appointor

‘The person in whom the power to appoint a new trustee is vested’

Appointor is:

- Nominated by the instrument creating the trust; or
- If no such person is nominated or that person is unable or unwilling to act – this is specified in ss 14, 14A and 14B of the Trustee Act 1936

Under s 14, if no such person is nominated or that person is unable or unwilling to act, the power of appointing a new trustee to replace an existing trustee is vested in:

- The surviving, continuing trustee (or trustees); or
- If that person is deceased, the legal personal representative (executor or administrator) of the last surviving continuing trustee

Summary of order of appointors:

1. The person(s) nominated in the instrument,
2. The surviving, continuing trustee, and
3. The personal representative of the last surviving continuing trustee

The appointor may appoint themselves as a new trustee in place of an existing trustee.





New Trustees

The New Trustee(s)

Unless there are prohibitive provisions in the trust deed/instrument, **on the appointment** of a new trustee:

1. The number of trustees may be increased;
2. Non-obligatory to appoint more than one new trustee where only one trustee was originally appointed;
3. Non-obligatory to fill up the original number of trustees where more than two trustees were originally appointed. The trust deed may provide that there need only be one trustee; and
4. A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property.





Format

The Format

The format required for lodgement of an Appointment of New Trustees **comprises four separate components**, being

1. 'The Appointment of New Trustees',
2. the "Memorandum of the Appointment of New Trustees"
3. Verifying declaration or Affidavit
as prescribed in schedules 1, 2 and 3 of the Trustee Act 1936 and
4. Certification block





Format: The Appointment

First - The Appointment of New Trustees as prescribed in schedule 1 of the Trustee Act 1936.

Appointment of New Trustees (Pursuant to Part 5 of the *Trustee Act 1936*)

PRIVACY COLLECTION STATEMENT: The information in this form is collected under statutory authority and is used for the purpose of maintaining publicly searchable registers and indexes. It may also be used for other authorised purposes in accordance with Government legislation and policy requirements.

APPOINTMENT OF NEW TRUSTEES

Pursuant to Part V of the *Trustee Act 1936*, I, AB of *[insert address and occupation]* being the person entitled to exercise and exercising the power of appointing new trustees of the trust hereinafter referred to appoint CD of *[insert address and occupation]* to be a new trustee *[if so, "jointly with" and insert names, addresses and occupations of the old continuing trustees]* of the trust constituted under *[here set out shortly particulars of the instrument creating the trust, including its date, and the name of the person by whom the trust was created]* and I the said CD accept the said trusteeship.





Format: Memorandum of the Appointment of New Trustees

Secondly - Memorandum of the Appointment of New Trustees as prescribed in schedule 2 of the Trustee Act 1936.

MEMORANDUM OF THE APPOINTMENT OF NEW TRUSTEES

Pursuant to Part 5 of the Trustee Act 1936 it is hereby certified as follows:

1. The trust is constituted under a certain Trust Deed (or will) etc., dated the day of 20..... and made by [include the names of the person(s) by whom the trust was created].
2. The trust estates consist of:
REAL ESTATE
An estate in fee simple in the whole of the land comprised in Certificate of Title Register Book Volume Folio
PERSONAL ESTATE
100 shares in [insert name of company]
Cash in [insert name of financial institution and account details]
Memorandum of Mortgage No registered over the whole of the land comprised in Certificate of Title Register Book Volume Folio
3. The names, addresses and occupations of the trustees on the constitution of the trust or (whichever shall last happen), on the last appointment of trustees dated the day of 20..... were [here set out names, addresses and occupations].
4. The said [insert name of previous trustee] is now deceased and the said [insert name of other previous trustee] has been absent from the State for several years [or insert other reason for the need to appoint a new trustee].
5. The power of appointing new trustees is vested in "AB" by virtue of the provision in that behalf contained in section 14 of the Trustee Act 1936 (or contained in the Trust Deed and of which the following is a copy: [here set out a copy of the relevant provision]).
6. The power of appointing new trustees of the said trust has been law fully exercised by the persons entitled to exercise the same by the appointment of the new trustees mentioned in the next paragraph.
7. The persons in whom the trust estates will become vested on compliance with the provisions of Part 5 of the Trustee Act 1936 are as follows:
First, Old Continuing Trustees:
[insert full names, addresses and occupations of old trustees (if any). If none insert "nil"]
Secondly, New Trustees:
[insert full names, addresses and occupations of new trustees].



Describe Real Estate



Describe Personal Estate where applicable e.g. estate as Mortgagee. Referring to cash and shares etc. is optional



Copy of provision required but often omitted. The power of appointing details and reference to the relevant provision contained in the Trust Deed needs to be set out e.g. clause 15.1etc.



Format: Certification block and Verifying declaration (or affidavit)



Thirdly certification and Fourthly as prescribed in schedule 3 of the Trustee Act 1936.

DATED.....

CERTIFICATION *Delete the inapplicable*

*The Certifier has taken reasonable steps to verify the identity of the **Appointor and New Trustee** or his, her or its administrator or attorney.

*The Certifier holds a properly completed Client Authorisation for the Conveyancing Transaction including this Registry Instrument or Document.

*The Certifier has retained the evidence to support this Registry Instrument or Document.

*The Certifier has taken reasonable steps to ensure that the Registry Instrument or Document is correct and compliant with relevant legislation and any Prescribed Requirement.

Signed By:

<Name of certifying party>
<Capacity of certifying party>

for: <company name>

On behalf of the **Appointor and New Trustee**

VERIFYING DECLARATION

I, AB, of [insert address and occupation] the person signing the Memorandum of the Appointment of New Trustees above written, solemnly and sincerely declare as follows, that is to say:

1. The statements contained in the said Memorandum are true in every particular.

2. I am the person entitled to exercise and exercising the power by which the new trustees are appointed.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act 1936.

Declared and subscribed at
[insert locality] by the said
[insert name of declarant]
This day of 20....
before me:

} [Signature of "AB"]

[signature and capacity of authorised functionary]

Reference to verifying the identity of the 'applicant' must be replaced by verifying the identity of the 'Appointor(s) and New Trustee(s)'



'On behalf of the.....' must also refer to 'Appointor and New Trustee'.



Required by section 80 of the Trustee Act 1936





Current requirements

1. Prepared on Approved Panel Form B2
2. The standard four certification statements made by the representing practitioner (replace Executions for the appointment and memorandum formerly required prior to 2016).
3. The verifying declaration is required to be made by the appointor.
4. Reference to verifying the identity of the 'applicant' must be replaced by verifying the identity of the 'Appointor(s) and New Trustee(s)' – you must verify and have client authorisation from both. Similarly, at the bottom of the certifications 'On behalf of the.....' need to refer to 'Appointor and New Trustee'.
5. Occupations - Although occupations are set out in the Schedules of the Trustee Act, the Registrar-General does not insist on their inclusion.
6. If more than three persons are entitled to exercise and did exercise the power of appointment, by any three of those persons
7. All relevant trust deed copies must be produced along with any copies of probate or letters of administration granted in respect of a person, when the power of appointment is vested in the personal representative of the trustee, or of a nominated appointor.
8. The dealing cannot be fully examined until required evidence is sighted. Note, these supporting deeds may be emailed if preferred (mailto: customersupport@landservices.com.au).
9. Revenue SA ID number required. Even if exempt, it is a requirement that Appointment of New Trustee dealings have a Revenue SA ID number for stamp duty purposes.
10. Base registration fee





TIPS TO REMEMBER

1. Appointment of New Trustees cannot be used to simply remove a trustee. Such a document lodged must be **fully withdrawn**. To be registrable, a new trustee must be appointed
2. If the appointment of new trustees already occurred via a change of trustee deed, then the conveyance of land into the names of the trustees should usually therefore have been in the form of a transfer pursuant to the deed. However, if not possible, this document will be accepted provided that details are amended to reflect this document being a 'Confirmation of the appointment' rather than a new appointment.
3. If an executor or administrator of a deceased estate assumes the role of a trustee before dying, their executor or administrator could potentially appoint a new trustee in respect of the estate. The executor or administrator must have been registered on the certificate of title prior to their death.





Example as shown on Title

On registration of the “Memorandum of the Appointment of New Trustees”, the trust property vests in the new trustees either solely, jointly, or jointly with any old continuing trustees.

Multiple trustees registered in this way hold as joint tenants: they cannot be tenants in common.

Pursuant to Appointment under Part 5 of Trustee Act 1936
Estate Type FEE SIMPLE Registered Proprietor LANDHOLDER TRUST PTY. LTD. (ACN: 654 896 910) OF 101 GRENFELL STREET ADELAIDE SA 5000 PURSUANT TO TRUSTEE ACT, 1936 Registered Proprietor JOHN LANDHOLDER LISA LANDHOLDER OF 101 GRENFELL STREET ADELAIDE SA 5000 PURSUANT TO TRUSTEE ACT, 1936
Pursuant to transfer under s 96 of the Real Property Act 1886
Estate Type FEE SIMPLE Registered Proprietor JOHN LANDHOLDER LISA LANDHOLDER OF 101 GRENFELL STREET ADELAIDE SA 5000 WITH NO SURVIVORSHIP

Non-disclosure of Trusts

Section 162 of the Real Property Act prohibits the Registrar-General from making any entries in the Register Book of “the particulars of any trust





Summary of Key Points

Appointor

Registered proprietor need not necessarily execute documentation under Part 5 (Unlike a Transfer).

Documentation is executed by person in whom the power of appointing new trustees is vested - 'The Appointor'

New Trustees

Unless prohibited in the deed, number of trustees may be increased;
without obligation to appoint more than one new trustee where only one was originally appointed or to fill up original number of trustees where more than two trustees were originally appointed.

Common Circumstance

Often used when all registered trustees are deceased.

Not necessary to register deaths of deceased trustees. Fact of death can be recited in the Memorandum of Appointment.

Format

The format required for an Appointment of New Trustees comprises four separate components.

Evidence

All relevant trust deed copies must be produced along with any applicable copies of probate or letters of administration granted.



Grounds
Removal of an existing trustee and appointment of new trustee may be specified in instrument creating trust. Note: Section 14 applies only if not expressed in the instrument (if any) and has effect subject to terms of that instrument and to any provisions contained therein.

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An aerial photograph of a suburban neighborhood with numerous houses and trees, overlaid with a semi-transparent green filter.

Live Q&A Session





Q&A Session

When the power to appoint falls upon a Personal representative of the last surviving trustee who is deceased, is it necessary to produce copies of probate or letters of administration?

- If an appointor has not been personally nominated by deed, and instead the role has vested in the 'personal representative' of the trustee or nominated appointor - the probate or letters of administration are required to be produced. This so the Registrar-General can be satisfied that the person claiming the power of appointment is so entitled. It's rare that that an application under Part 5 of the Trustee Act is acceptable without.

Being that the representing practitioner provides certification on behalf of the new trustees and appointors, is the Verifying declaration or Affidavit still needed?

- Yes, the format required for lodgement comprises three parts, being "The Appointment", the "Memorandum of the Appointment of New Trustees" and a "Verifying declaration" or affidavit by the appointor(s), in addition to the certification block. The declaration as prescribed in schedule 3 of the Trustee Act is still required under section 80 of the act.