

NOTARY

WORLD



DECEMBER 2024



WELCOME TO - NOTARY WORLD

Notary World is C.L.A.N.'s flagship publication for members and is full of articles and news designed to continually inform and educate.

Please do not hesitate to send in your feedback and if you want to contribute to Notary World, contact Ken Lord, Editor.

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EDITORIAL

NOTORIAL STANDARDS

Notarial practices may differ from notary to notary as well as between countries, but differences ought not to diminish notarial standards. In this issue of Notary World, we set out to contribute to both standardisation and improvement of notarial standards. Articles are supplied by Common Law Association of Notaries (C.L.A.N.) President Kate Roome, Professor Peter Zablud, Author, Notary, and Director of Notarial Studies at Victoria University, Melbourne, Past President of C.L.A.N. and international franchise law expert Stewart Germann, Executive Governor of The Australia and New Zealand College of Notaries Paul Cariss, Trustee/Hon. Secretary of the recent Supreme Court of Nigeria formally endorsed Nigerian Society for Notaries Public, Muyiwa Ayojimi, Author of Brookes Notary and scrivener notary Nigel Ready, well-respected respected Commercial Property Lawyer/Trustee/Notary Public from Wellington New Zealand, Michael Scannell, and C.L.A.N. Vice-President Anthony Northey.

In the spirit of Notarial Standards we reinclude Peter Zablud's Practice Note: Notarising American Documents Sent From The USA

Notarial Act defined

In Professor Peter Zablud's soon to be updated tome Principles of Notary Practice describes an act is defined as an instrument recording a fact or something that has been said, done or agreed, and a notarial act as

an act prepared in either authentic or private form, the contents of which have been authenticated by a notary as evidenced by the subscription of the notary's signature and the affixing of his or her official seal" (Zablud 51).

Some notable words of this definition are 'prepared', 'authenticated', 'subscription', 'notary's signature', and the 'affixing of his or her official seal'. Prepared refers perhaps not just to the drafting of a notarial certificate but to pre-appearance measures undertaken by notaries which are important precursors to enable a notary public to achieve the standards for which office is internationally renowned. From the moment an appearer requests a notarial service notaries assess an abundance of information before being able to have the confidence of preparing a notarial certificate. Receiving copies of documents, passports of appearers, verifying the validity of documents, forming an opinion as to the mental competence of the appearers, and ensuring appearers have proof of authority from a principal if signing

as an agent for an entity, are just some precursors that come to mind. To authenticate is to "prove that something is real, true, or what people say it is" (Cambridge Dictionary). The word subscription involves more than a mere signature. Defined formally as a "short piece of writing at the end of a document" (Oxford English Dictionary), it is the act of signing one's name in the context of "attesting or witnessing a document". In that context I believe the document or a copy of an original must be bound to the notarial act in a manner that makes fraud well-nigh impossible – rivet, ribbon to which a seal is affixed, or sewing. It seems evident to me that to merely sign a document falls below notarial standards. Once all the elements of a notarial act have been collated and bound together to make it a document to be relied upon in the country of origin, the notarial seal may be affixed or impressed on each page. In phrasing I love to quote, and I have in mind here only the commonwealth notary's drafting of a notarial certificate, notaries have always

enjoyed a special relationship to the truth. They were expected to witness noteworthy acts, from the spectacular – like Columbus's seizure of Guanahani - to the humble and mundane: the promise of a dowry, an apprenticeship, or a loan. It then fell to notaries to shape the messy specifics of each event into the proper form to be committed truthfully to the page ... Notaries were thus truth's alchemists, mixing the singular into the formulaic in accordance with prescribed recipes to produce the written, duly witnessed, and certified truth (Burns 352).

The UK Legal Services Board's Notaries Practice Rules 2019 define a notarial act as "any act that has validity by virtue only of its preparation performance authentication attestation or verification by a notary and includes any such act carried out by electronic means". This definition is replicated in the New Zealand Society of Notaries Code of Notarial Practice. The essential elements of a notarial act are evident in Brookes Notary edited by the erudite Nigel Ready as he writes that

A notarial act is the act of a notary public authenticated by his signature and official seal, certifying the due execution in his presence of a deed, contract or other writing, or verifying some fact or thing of which the notary has certain knowledge (Brooke and Ready 53).

Common to all definitions above are the concepts of authentication, signature or attestation, and sealing. Sadly, there are differences in notarial practice which in some cases evidence an inadequate notarial standard in my view. Where a notary simply rubber stamps a document without recording anything else about what has happened, observers are

denied the opportunity of understanding the background to the notary signature, and are unable to assess with any confidence why they should rely on it as being the truth. The elements in a notarial act meeting that meet acceptable notarial standards internationally appear to be preparation, authentication, subscription (including binding), signature and the affixing of notary seals on each page of the whole document including the notary certificate. Once standards are met notaries can relax and render reasonable fees, satisfied that everything possible has been done to create a notarial act to be relied as the patent, incontrovertible, and absolute truth.

Works Cited

Brooke, Richard and Nigel P. Ready. *Brooke's Notary: By N.P. Ready*. Stevens & Sons, 1988.

Burns, Kathryn. "Notaries, Truth, and Consequences." *The American Historical Review*, vol. 110, no. 2, 2005, pp. 350–79. JSTOR, <https://doi.org/10.1086/531318>. Accessed 24 July 2023



Ken Lord, Editor

Email: kjl16@uclive.ac.nz

Ken joined Parry Field Lawyers in 1980 and became a partner that same year. Fully retired from the law he remains a Notary Public. Ken's focus while in practice was on Property and Personal law including trusts and asset planning with strong interests in issues relating to the charitable sector, assisting the elderly and charitable trusts. He is a Notary Public and one of the authors of the LexisNexis Law of Trusts, having written and reviewed the chapter devoted to charity law, as well as chapters in the LexisNexis publication The Law and Practice of Charities in New Zealand.

Ken has served, or is still serving, on many boards including YMCA Christchurch, Christian Resource Centre International, CRY For the World Foundation, Hagar New Zealand, Living Springs Trust, Garden City Rotary Charitable Trust, La Vida Youth Trust and Parry Field Charitable Foundation. He is an active member of the Rotary Club of Garden City (President in 2002) as well as a keen musician and road cycling racer, chairing The Papanui Cycling Club Incorporated.

Graduating LLB from the University of Canterbury in 1977, Ken has completed both a BA and BAhons in English and Russian literature and is now completing a master's degree on The Legal Language of Shakespeare in The Merchant of Venice and Measure for Measure. He took an active part in the New Zealand Law Society, having spoken at Law Society Conferences, been a member of property law committees, seminar/conference organisation and committees, and has served as Convenor for the Trusts and Wills Committee and member of the Canterbury Westland NZLS Standards Committee, as well as a Mediator

PRESIDENTS REPORT

Greetings Fellow Notaries!

It is my great honour to act as your new Common Law Association President. This is an exciting time for CLAN as we continue a growth trajectory.

Firstly, must express my gratitude to past president, Stewart Germann, for his diligent and energetic leadership. To take the helm of an organization with forward, positive momentum is a true pleasure.

2024 has proved to be a productive year for CLAN with the welcoming of a number of new member Notariats. The Gambia, Nigeria, Northern Ireland, Guernsey and Jersey have joined us. We were able to put faces to names at our latest Zoom meeting, held November 20th. Representatives from the new members are as follows; Mr. Seedy Jallow from The Gambia, Mr. Kevin Neary from Northern Ireland, Mr. James Tee from Guernsey, Mr. Wale Adekola from Nigeria and Mr. Shaun Ryan from Jersey (Mr. Ryan was unable to join us but his colleague Ms. Natalie Sullivan was able to sit in for him). We had a dynamic meeting with great ideas coming forward for our continued work.

The Council continues to reach out to prospective member notariats. I thank Council members Anthony Northey and Andrew Johnson for their continued dedicated efforts to recruit potential members.

Other ongoing activities of the Council include work on introducing a member's area to the website (containing member resources), exploration of a global conference and the ongoing presentation of webinars and educational material to the membership.

We are optimistic for an in-person AGM in the Spring, location still to be determined. Our latest in person gathering in Henley was a wonderful way to connect and work together.

May this issue of Notary World find you and yours thriving and enjoying the holiday season. I look forward to a 2025 filled with exciting moments for Common Law Notaries all over the globe.



**Kate Roome
President**

Kate is a Notary Public in and for the Province of BC, running a small but mighty practice, Heartwood Notary Group, in Duncan.

Formerly an award-winning Realtor she now provides her community with non-contentious legal services. Kate also enjoys participating in not-for-profit work, sitting on many local boards over the years.

She currently sits on the boards of the BC Notaries Association and Common Law Association of Notaries. Pathologically curious, Kate loves to learn about and participate in anything novel. She is an avowed intersectional feminist who loves to read, hike,

NOTARIAL STANDARDS



It must be clearly stated and fully understood by Notaries that the documents they deal with are of great importance to the appearer. Whether the documents are, for example, Authorisations, Powers of Attorney or Certification of copies or Certificates of good standing, they all need to be treated with the utmost care. Notaries are not functionaries who simply witness documents. They are much more than that. Notaries, as a general rule, need to prepare a Notarial Certificate. To use the words of Professor Peter Zablud in his Practice Note "Notarial Certificates and when that are required";

A Notarial Certificate records the fact of the Notary's intervention and evidences the authentication by the Notary of one or more aspects of the document to which it relates such as:

- Its genuine nature or validity
- Its legal status
- Its legal consequences
- Its execution; and
- The verification of
the identity
the capacity; or
the authority

Unfortunately, use of words such as "I hereby notarise this document" and "produced to me duly signed by" is totally unacceptable and meaningless. Again referencing the practice note of Professor Zablud referred to above, "Bad practice is simply that. Apart from other considerations, it is unprofessional and unworthy of the holder of an internationally recognised office of trust and fidelity".

It is vitally important that Notaries acknowledge the importance of the work they do. Jurisdictions in countries around the world rely on the thoroughness of the work of Notaries and the expectation that the Notarial Certificates prepared by them are authentic.

In particular, Civil Law Notaries in Europe prepare their documents with the utmost care and thoroughness and it is their expectation that the documents they see from Common Law Notaries receive the same treatment.



Paul Cariss

Paul Cariss was admitted as a Barrister and Solicitor of the State of Victoria and of the High Court of Australia in 1971. He also practises from his home at 7A Wolseley Crescent Deepdene / Balwyn – (9816 9906). He is always available on his mobile 0418 544 590.

For email, please contact me on notarypublic@bigpond.com

Paul was appointed a Notary Public by the Archbishop of Canterbury in 1985 and reappointed by the Supreme Court of Victoria in 2002. He is a member of the Law Institute of Victoria, The Society of Notaries of Victoria, the Australian and New Zealand College of Notaries. He is an Associate Member of the Notary Society of England & Wales.

Paul is a Life Member and a past President of The Society of Notaries of Victoria (2012-2015). He is also a former Executive Governor and Secretary of the Australian and New Zealand College of Notaries and a former Director of Common Law Association of Notaries (formerly World Organisation of Notaries).

THE IMPACT OF RISK ON CROSS-BORDER AGREEMENTS AND NOTARIAL ASSISTANCE

From New Zealand: Past President Stewart Germann's article Notaries and Franchising.

Franchising is happening globally and expanding at a fast rate. When a mature franchisor is looking to expand and sell their brand overseas, the impact of risk and compliance must be carefully assessed. A franchisor looking to expand into a foreign territory must conduct significant and thorough risk and compliance assessments. A franchisor cannot import the system they have into another country without looking at the following:

- Assess the system and be clear on what it is and what it is offering.
- Researching the country and its laws. Do not pick a country and then try to force the system through. Be careful about employment laws, privacy laws, etc.
- Decide on the structure of the relationship – eg area developer/master franchisor/joint venture.
- Adapt your system including suppliers (look at the recipes, the brand, the methods, the whole system).
- Check if the Franchise Agreement needs to be adapted for the target company.
- Be realistic about the costs involved.
- Engage expert counsel in the target country.

A consequence of risk and compliance is that the franchisor will need to adapt the franchise system (including products and the name itself) in order to be successful in the other country.

If a franchisor does not conduct the due diligence and assess the impact of risk and compliance on their system and expanded too quickly into a country perceived to bring big rewards, the brand name has suffered and has cost the company significant amounts of money.

There are many factors to be taken into account which include the following:

- Cultural – name of franchise.
- Translation issues – translations of agreements must be rendered by lawyers knowledgeable in the local law.
- Consumer preferences – do you need to vary your system to address local preferences? For example, McDonald's offers menu items specific to the country.
- Sourcing – availability of products, fixtures and equipment. It is not just about suppliers but also

is about the franchisor's ability to protect the look and feel of the franchised business and the instant recognition of the brands.

- Products – logistical issues. It is essential to ensure that the quality and availability of products is assured. McDonald's suffered brand damage in China when their meat supplier sold expired meat.
- Measurement - you must adapt everything including unit measurement.
- Legal issues – sanctions laws/anti bribery laws, cartels, unfair contract terms dispute resolution, intellectual property issues.
- Knowledge/application of territorial preferences – for example, ethnic and political make up. If it is important to observe the ethnic and cultural make up it may be better to have the local person be the face of the brand.

A number of legal documents will be required and the services of a Notary Public sought. The execution of a Franchise Agreement or a Distribution Agreement or a Licence Agreement must be done in accordance with the laws of a particular country and the signatures must be notarised by a Notary Public authorised to operate in a particular jurisdiction.

All Notaries do not and should not explain the legal documents as they are not giving legal advice. However, a particular Notary must be satisfied that the person or persons appearing before them are the designated persons with authority to sign legal documents.

Cross-border transactions happen all the time so there is a need for Notaries to witness documents in the relevant overseas jurisdiction.



Stewart Germann
Notary Public
Auckland, New Zealand
November 2024

Stewart Germann is a Barrister and Solicitor of the High Court of New Zealand and he attended the University of Auckland. He has the qualifications of B.Com, LLB, FCIS, CFInstD, CFE and Notary Public and he specialises in franchising, licensing, sale and purchase of businesses and commercial law.

Stewart has over 40 years' experience in franchising law and has acted for many franchisors in New Zealand and overseas.

He also acts for franchisees advising them about a particular franchise and commenting on the form of franchise documents.

From 1997 to 1999 Stewart was the Chairman of the Franchise Association of New Zealand. He has spoken at

franchising conferences in New Zealand, Australia and USA and is very interested in international franchising.

He has also written numerous articles on franchising for New Zealand and international publications. He is Adjunct Professor of Law at Auckland University Law School teaching Franchise Law and is the only lawyer in NZ to hold the CFE (Certified Franchise Executive) qualification following an accreditation ceremony in Florida 2020. Stewart is a member of the International Franchise Association (IFA) based at Washington DC and of the International Bar Association (IBA). Stewart is a qualified mediator and is a member of AMINZ.

He is also on the Panel of Mediators of the Franchise Association of New Zealand.

ADVANCING NOTARIAL PRACTICE IN NIGERIA

From Nigeria - Muyiwa Ayojimi, Trustee/ Hon. Secretary of the Society for Notaries Public

Notarial practice in Nigeria has come alive and it plays a critical role in maintaining the legality and trustworthiness of public and private transactions. With recent reforms, the focus has shifted towards ensuring that the profession continues to uphold its integrity while adapting to global standards and technological advancements.

Amended Laws

Recent legal updates, such as the **Evidence Act 2023** and the **Notary Public Act 2023**, have introduced sweeping changes that aim to standardize notarial services across Nigeria. These laws provide clearer guidelines for notarial acts, emphasizing credibility and modernizing the framework through the inclusion of digital processes. The **Evidence Act 2023** allows for the recognition of electronic records in legal proceedings, advancing Nigeria's legal system and ensuring notarial services remain relevant in the digital age. Meanwhile, the **Notary Public Act 2023** outlines specific responsibilities and standards, enhancing the professionalism of notarial services in Nigeria.

Formal Launch of The Society for Notaries Public

The **Society for Notaries Public in Nigeria** despite being registered a while back with activities and campaign was formally endorsed by the Supreme Court of Nigeria

at a ceremony that admitted hundreds of notaries into membership this year. This reinforces the trustworthiness of notarial services and affirms the role of notaries in the judicial process.

Key objectives of the Society is to develop governance and best practices on Notarial works and activities in Nigeria; to position the Society for authenticity and attract the respect and recognition of Practitioners locally and Internationally through continuing education programs and; to seek collaboration and exchange programmes with other established International Notaries Societies.

Digitization of Notary Practice

As part of the ongoing modernization efforts, digitization has become a key focus for the notarial profession in Nigeria. The Evidence Act 2023 has enabled the inclusion of digital records in legal proceedings, allowing notaries to embrace new technologies while maintaining the authenticity and legality of their acts. The Society for Notaries Public collaborates with a technological company, ToNote Technologies to help lead the change towards a future where notarial services are not only accessible but also more efficient, without compromising the legality of the process.

The ultimate goal of these reforms is to protect the integrity of the notarial practice in Nigeria. Recently, the digital notary register, a co-initiative of the Society, was launched by the Supreme Court for easy identification of notaries in Nigeria and preparation for the use of remote notarization. These steps ensure that public trust in the

notarial profession remains strong while enabling Nigeria's notarial services to thrive in the modern legal landscape.

Continuing collaboration

The Society attended the 1st International Union of Notaries (IUNL) Dialogue between Legal Systems held in London in 2023 and will improve on its participation of Africa region and world association programs like the Common Law Association of Notaries and the IUNL platforms, to foster its objectives and improvement on best practices.



Mr. Muyiwa Ayojimi, LL.M., (Bournemouth) B.L., LL.B., ACI Arb, ACIS, MNIM, MSCG

Mr. Muyiwa Ayojimi is a seasoned legal practitioner with over two decades of experience in Corporate Governance, Commercial Law, and Arbitration. His career spans private practice, advisory roles, and corporate leadership, providing strategic counsel to global brands and driving transformative transactions in the Nigerian capital market, including mergers, acquisitions, and corporate restructuring.

A consumer protection advocate, Mr. Ayojimi is the convener of the Centre for Consumer Concern and a leading voice in the West Africa Committee of Consumer Advocates. He co-founded the Society for Notaries Public in Nigeria and has led transformational efforts to professionalize the practice. He serves as Executive Director at Consumertrics Nigeria, where he advises on consumer rights and protection strategies for state and federal agencies.

An Associate of the Institute of Chartered Secretaries and Administrators of Nigeria and the Chartered Institute of Arbitrators, Mr. Ayojimi is also a Fellow of the Institute of Management and a member of the Society for Corporate Governance Nigeria. A thought leader and author, and he sits on the boards of a handful of private companies.



UNITED KINGDOM – COMPANY REGISTRY REFORMS

A functioning society depends on the integrity and reliability of public registers, for example those dealing with civil status (births, deaths, marriages etc), title to property and corporate records. In the case of the latter example, Companies House, the repository of company records in the United Kingdom, has fallen well short of the standards expected of a public register.

Clearly, the UK government has a difficult balancing act to play between improving corporate transparency and avoiding excessive regulatory burdens on legitimate businesses. However, for too long, ease of incorporation¹ has led to the creation of a haven for money launderers, avoiders of sanctions and others with criminal intent.

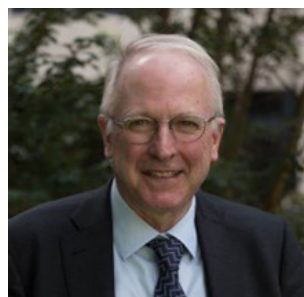
The unreliability of the register is the result of over reliance on unverified information submitted directly by companies. Certificates of good standing and the like issued by Companies House state that the Registrar cannot guarantee the accuracy and completeness of the information on the register. This embarrassing state of affairs is unacceptable to notaries and public administrations in other jurisdictions and can be a hindrance to UK businesses in their commercial dealings overseas.

The Economic Crime and Corporate Transparency Act 2023 (ECCTA), not all whose provisions are currently in force, belatedly seeks to address the manifold deficiencies in the UK company registration regime. The Registrar now has powers to query information submitted and there are new restrictions on company names. Registered offices can no longer be PO boxes: an “appropriate” physical address and an “appropriate” email address must be supplied. Furthermore, in cases where the Registrar suspects that false information has been submitted or other offence committed, he can share intelligence with other government enforcement agencies.

In future, when the relevant provisions of the Act are brought into force, directors and persons with significant control will need to have their identity verified, either directly with Companies House or using the services of an “Authorised Corporate Service Provider”, such as a notary or other professional registered with an AML supervisory body.

Subscribers of companies incorporated after 4th March 2024 must confirm that they are forming a company for a lawful purpose and all companies will be required to

confirm that their current and future activities are lawful as part of the annual confirmation statement which they are required to file. Interestingly, the Act restricts the use of corporate directors: in future, only a corporate entity with “legal personality” will be able to be appointed as director and the directors of any such corporate director will have to be natural persons whose identities have been verified. Whilst the ECCTA reforms give Companies House more powers to verify information and investigate suspicious activities, the effectiveness of these powers depends on the availability of resources. It is not certain that Companies House will have the staff, budget, or expertise to handle an increased workload. Without adequate funding and enforcement, the reforms might not fully achieve their intended goals.



Nigel Ready

Nigel read languages & law at Jesus College, Cambridge; joined Cheeswrights in 1975, admitted as a notary in 1980; partner of Cheeswrights in 1981.

Publications: editor, Tenth (1988), Eleventh (1992), Twelfth (2002), Thirteenth (2009), Fourteenth (2013) and Fifteenth (2021) editions of “Brooke’s Notary” (Sweet and Maxwell, London) and Hong Kong supplement (2005); consulting editor, Ship Registration: Law and Practice (2002); with the late Theodoros Karatzas of the Athens Bar and subsequently Governor of the National Bank of Greece, “The Greek Code of Private Maritime Law” (1982).

He is a past master (2002-2003) of the Worshipful Company of Scriveners member of the livery of the Worshipful Company of Shipwrights and a General Counsellor of the International Union of Notaries (IUNL).

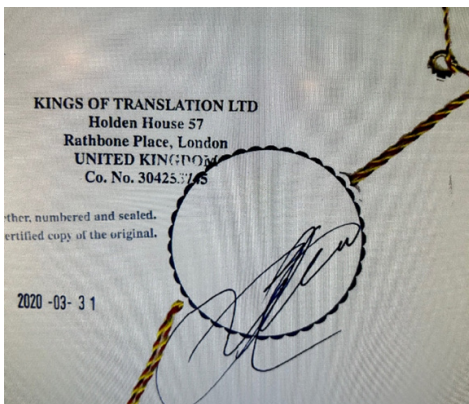
Nigel was Managing Partner of the firm from 1990 to 2009. He retired as senior partner in April 2012 but continues to be closely involved with the firm as a consultant.

NOTARIAL STANDARDS - BINDING

I recently completed a notarial task for an American applicant. Typical sale of house in US, implying various sets of closing documents. He offered up only one to me. On asking why, he advised he had them all done by another notary. The only document that he needed from me was to do one again so he could get an Apostille. The previous notary's work was rejected by the Department of Internal Affairs (DIA). They sent him off to me. I asked and obtained a copy of the failed document. It was done by an experienced notary in NZ. There was no binding, and no certificate to cover the issues of number of pages or attachments. No restriction to the laws of NZ. The NZ notary has bound themselves to the laws of perjury in California. DIA rightly rejected three loose pieces of paper. This work was revealed as the Title Insurance company in the US required him to get the Grant Deed apostilled, that is the actual transfer document (two pages) with Exhibit A (third page) to describe the land. The US applicant was relaxed and willing to pay for it to be done a second time (properly) by me. Not making any complaint nor did I get them excited about complaining. Any experienced lawyer, let alone a notary could (should) read the document and see it made no sense if an exhibit was referenced but not attached.

There is often discussion at our NZ Council over the issue of binding. I am a firm believer in binding, as it was how I was trained, followed by the UK and we are appointed by the UK. It is the common style I see with international transfer of patent trademark matters in many varied jurisdictions. It also applies even where more than one notary signs each witnessing their own countries agency that is involved in the matter.

Interestingly I came across this example being a recent version on a well-travelled translation matter.



Notary Register Example see 2024-10-17 12-34

My original notarial set up was supplied by the preferred supplier Jordans in UK.

These items also included (not in photo) a supply of red seals, and a miniature bible and precedent pad were included in a hard black plastic briefcase.

Subject: Original kit from Jordan's

- Included
- Ink stamp seal
- Imprint seal
- Red seals
- Ribbon
- Punch
- Spike for big documents



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Mike Scannell

<https://www.scannell.law/>

Whether you're considering a new property acquisition, or wish to review your existing real estate portfolio we have the knowledge and expertise to guide you through every step of the process.

Welcome to Scannell Law. We specialize in a range of property and notary services in Wellington, New Zealand, and wish to make your property-related journey smooth and stress-free.

UPDATE ON C.L.A.N. DIRECTORS MEETING

Anthony Northey C.L.A.N. Vice-President has also kindly contributed to Notary World thanks Anthony!

Anthony writes ...

Since the article that appeared in the last edition of The Notary (Can be found here https://commonlawnotary.org/wp-content/uploads/2024/12/The_Notary_Issue_98-Summer_2024_Easy_print_version-3.pdf)

about the Common Law Association of Notaries (C.L.A.N.) there has been a directors meeting at Leander Club in Henley upon Thames, Oxfordshire with the directors staying at Leander Club over the weekend of Friday the 26th April to Sunday the 28th April 2024. A highly successful Board Meeting was held on Saturday 27th April 2024, when 4 Notariats were formally welcomed as new full members of C.L.A.N, namely the Notaries Societies of Guernsey, Jersey, Northern Ireland and Gambia. There are now Notariat members in Common Law Jurisdictions in 4 out of the 5 continents. It is a great step forward to have an African country as a member of C.L.A.N. and it is hoped that as a result some other African countries who have Common Law legal systems and are properly notarially educated and trained will also join in the not-too-distant future. It is also hoped that certain other Notariats in other Common Law Jurisdictions around the world or individual Notaries in countries, where there is no Notariat, will also become members so that C.L.A.N. will be more of a global body. On Friday 26th April 2024 C.L.A.N. held a formal reception and dinner at Leander Club for the directors, their partners and invited guests. It was decided to ask local Notaries within 15 miles of Henley to join us for the reception and then the dinner afterwards at the club. In fact, there was a really great response, with 10 local Notaries coming to the reception with slightly less staying on for dinner afterwards. The many emails from them after the evening indicated how much they enjoyed the evening was and how useful they found it. A photograph of those who stayed on for the dinner appears above right. As a matter of interest a photo taken of the attenders at the Inaugural meeting in 2009 of C.L.A.N., which was then known as the World Organisation of Notaries (W.O.N.) at the same venue appears below. There are 3 people, who appear in both photos – can you name them? Admittedly they have all aged a bit over 15 years! During the weekend there was a formal handover, when Stewart Germann, who has been the President for the last few years handed over the Presidency of C.L.A.N. to Kate Roome, who is a Notary practising in British Columbia Canada. A photo of the actual handover appears below. Stewart Germann, handing over the Presidency of C.L.A.N. to Kate Roome, doing the same will create benefit on a reciprocal basis. I am sure that you are aware that it is already normal practice for countries in the West Indies and in Africa, in particular, to require Deeds and Conveyancing, Probate and other documents to be signed before a Notary. We really need to

see what we can do at our end. Finally I would refer you back to the article on the front page of the last edition of the Notary, which gave a lot of further information about C.L.A.N. and is well worth re-reading. Personally, I think we should try and encourage our Land Registry here to insist that all documents signed outside that jurisdiction of our country are signed before a Notary in the country where the document is signed. This is already the case, as you are no doubt are aware, with many of the West Indies countries and African countries. If you have any suggestions as to what C.L.A.N. can realistically do for the benefit of Notaries, whose Notariats are members of C.L.A.N., and Common Law Notaries generally and in particular, of course, our members, please let us have them by sending an email to NortheyUK@aol.com. If you have any articles etc., that you would like included in an edition of C.L.A.N.'s journal, Notary World, please send the same to the above email address.



Anthony Northey
Vice President C.L.A.N.

Anthony was appointed as a Notary Public/Notary in England and Wales in 1978.

Anthony was a solicitor, having been a partner in Sharman Trethewey, now known as Sharmans in Bedford and Ampthill and for 10 years the senior partner of that firm.

He has retired from Sharmans and ceased to practice as a Solicitor, but continues to practice as a Notary Public, being now a partner in Bedford and Ampthill Notaries (B.A.N.)

B.A.N. is a fast-expanding Notarial Practice and acts for both many commercial clients and private individuals catering for their Notarial needs throughout the world

Anthony has been on the Council of the Notaries Society (of England and Wales) for many years and was President of that Society in 2009-11. He is also a Past President of the Bedfordshire Law Society

He was a founding director of the World Organisation of Notaries (W.O.N.), which was established in 2013 and after the name of W.O.N. was changed, is now a Vice-President and a director of C.L.A.N..

During his free time, Anthony is actively involved with many organisations including the Ampthill Rotary Club and the Ampthill Business Chamber. He also enjoys gardening and travel.

PRACTICE NOTE

NOTARISING AMERICAN DOCUMENTS SENT FROM THE USA

SYNOPSIS

Australian notaries are often asked by clients to notarise personal and commercial documents, originating from a variety of American sources, that are required for use in the United States.

For the most part, the task is not difficult. However, typically instructions received from the USA are based on American notarial practice and are geared towards American notaries public. If strictly followed, those instructions give rise to various issues and practical problems for Australian notaries that are discussed in this Practice Note.

This Practice Note also includes information about obtaining official copies of U.S Vital Records and about U.S Tax Identification Numbers.

Disclaimer

The purpose of this Practice Note is to provide information to assist Australian notaries when they are requested by clients to notarise documents sent from the United States of America that are required for commercial and personal purposes in the USA.

This Practice Note is not and must not be construed as being the provision of legal or other professional advice to anyone. If legal or other professional advice is warranted or required, the service of an appropriate professional should be sought.

This Practice Note is not and does not purport to be a complete and exhaustive treatise on its subject matter. It may contain errors and omissions and information that was accurate at the time of writing, but has subsequently changed or become outdated.

To the full extent allowed by law, the author and everyone involved in the publication or distribution of this Practice Note have no liability to any person who reads or uses it or who directly or indirectly relies in any way on any part of the text.

PRACTICE NOTE

NOTARISING AMERICAN DOCUMENTS RECEIVED FROM THE USA

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A PROLOGUE

At any given time, an unknown but significant number of American expatriates living in Australia, other Australian residents and various Australian public and private sector entities and enterprises are involved in matters and transactions in the USA that require documents originating from American sources to be notarised in Australia for subsequent use in the United States.

AMERICAN CORRESPONDENTS

In this Practice Note, “**American Correspondent**” means a person in the USA who has sent one or more documents from the USA (usually accompanied by instructions as to how to complete and notarise the documents) to an Australian notary’s existing or prospective client for notarisation and return to the USA.

Depending on the origin of the document(s) to be notarised, an American Correspondent is likely to be:

- a judicial officer’s associate or a court staff member;
- an employee of a bank or title insurer;
- a federal, state, county or municipal official; or
- a private sector professional, such as a lawyer, a paralegal, an accountant, an investor advisor, a mortgage broker, a real estate agent or an insurance consultant.

Most American Correspondents are well-meaning. All of them are acquainted with the ubiquitous notarisation requirements of their respective states or territories. Unfortunately, very few are familiar with non-American notarial practice and non-American notarisation of U.S documents for production and use in the United States; thereby giving rise to the issues canvassed in this Practice Note.

COMMUNICATION

Ordinarily, **discussion and communication** about a U.S. notarisation request **should be between the client and the client's American Correspondent** and not between the Notary and the Correspondent. **It is for clients to communicate directly with their American Correspondents.**

If a client (and through the client, an American Correspondent) does not take the advice given [in writing] by the Australian notary in relation to one or more aspects of a U.S. notarisation request, the notary may properly decline to intervene. The client will then be obliged to make alternative arrangements.

RETURNING NOTARISED DOCUMENTS TO THE U.S.A.

As a rule an Australian notary's obligation is to arrange for notarised [and if applicable, apostilled] documents to be returned to the client as soon as is reasonably practicable. **Returning original notarised documents to the USA is a matter for clients.**

Particularly since COVID-19 has disrupted deliveries, Australia Post and the likes of FedEx and DHL, as well as postal authorities and local couriers in the United States, are not as reliable or efficient as they were in pre-pandemic times.

However good or important the client or however helpful a notary wishes to be, **notaries are well advised not to become involved in sending original documents abroad.**

Doing so can result in daily emails and telephone calls from anxious clients and their American Correspondents chasing the whereabouts of [suddenly] "urgent" documents; often blaming the notary for perceived delays and pressuring the notary to take [impossible] steps to hurry the delivery.

SCANNING NOTARISED DOCUMENTS TO THE USA

Given the time it currently takes DFAT to process Applications to affix Apostilles to documents and the time it takes to return notarised documents to the USA, it is always good practice for the notary to scan signed and notarised documents to the client to, in turn, scan them to the American Correspondents.

Particularly when told of the expected delay in receiving original documents, most American Correspondents and the institutions they represent will treat scans as "original" documents pending the arrival of the originals at their American destination.

AS A GENERAL RULE – FOLLOW THE AMERICAN

CORRESPONDENT'S INSTRUCTIONS

For the most part, notarising documents emanating from the United States is not difficult. Generally speaking, instructions for notaries received from clients' American Correspondents are simple, to the point and easy to comprehend. **As far as is possible, instructions should be followed, but notaries must always take care when doing so.**

Almost always, instructions are geared towards American notaries public and American notarial practice. To the extent that instructions are meant to be followed by foreign notaries, there is an implicit underlying assumption that all foreign [common law] notaries are of the same ilk as their American namesakes and that all foreign [common law] notarial practice is the same as American notarial practice.

Often, if the instructions are strictly followed, problems arise. Care must always be taken by Australian notaries not to break fundamental rules of good Australian notarial practice when undertaking notarisations for America as instructed.

Fortunately, on being notified of a particular problem or difficulty, most American Correspondents readily understand the concern(s) raised and typically, accept the solution(s) recommended by an Australian notary to resolve the problem or overcome the difficulty.

SUGGESTIONS TO ENGAGE THE SERVICES OF A U.S. NOTARY

Every so often, especially in relation to home loan and real estate closing documentation, an American Correspondent will suggest to the client that rather than approach a local [Australian] notary, it would be preferable to engage the services of a U.S. notary to notarise the documents sent from America.

Suggestions of that kind sometimes have merit. They are usually made in good faith in the belief that a foreign notary may not be up to the task and that a U.S. notary would likely have the necessary expertise and experience to properly carry out the notarisation(s).

If the client is inclined to take up the suggestion, it is not a matter for a client or an Australian notary to search for and find a qualified U.S. notary public or to make and supervise arrangements for Remote Online Notarisation ("RON").

The client should respond to the American Correspondent and request that person to:

- find an appropriate U.S. notary public who is lawfully able to conduct a RON with the client;

- make the necessary administrative arrangements with an acceptable commercial RON Service Provider; and
- confirm that the American Correspondent or his or her employer will cover all necessary costs and expenses.

AMERICAN “NOTARIAL ACTS”

In almost every U.S jurisdiction, a notarial act is a function which a notary is authorised to perform as opposed to an instrument or statement which records that which the notary certifies or has done. The state of Louisiana and the Commonwealth of Puerto Rico are the two exceptions. (1)

ACKNOWLEDGEMENTS

The quintessential notarial act in the United States is the taking of an “acknowledgement” which is formal and official evidence of the proper execution of an instrument..

An acknowledgement is:

A notarial act in which a notary public certifies that a signatory, whose identity is personally known to the notary public, or proven on the basis of satisfactory evidence has admitted, in the notary public’s presence, to having voluntarily signed a document for its stated purpose. (2)

An acknowledgement also means:

A declaration by a person that the person has executed an instrument for the purposes stated therein and if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of a person or entity represented and identified therein. (3)

An acknowledgement must be distinguished from an attestation, which is the act of witnessing the execution of a document and then signing the document as a witness. When taking acknowledgements, American notaries usually do not act as witnesses to the signing of documents. If

formal witnessing is required, that task typically falls to an independent person other than a notary.(4) In Australia, a notary will often also act as a witness to the signing of a document to be notarised.

Documents sent from the United States that are required for U.S domestic purposes, typically include pre-printed notarial acknowledgement certificates in locally prescribed forms. Forms vary marginally as between U.S jurisdictions, but subject to the various matters discussed below, U.S prescribed forms may be completed, signed and sealed by Australian notaries without being supplemented.

Most U.S states and territories have provision in their legislation to the effect that **an “out-of-state” notarial certificate may be in a form prescribed or used in the jurisdiction in which the “out-of-state” notary holds office.** Therefore, when occasionally a document required for U.S domestic purposes does not include or is not accompanied by a pre-printed notarial certificate, an appropriate “Australian” certificate may be prepared and appended to or endorsed upon the document.

If an Australian certificate is used, it must always either

- bear an appropriate venue caption (see below); or
- be absolutely clear from its terms that it has been prepared and completed in the Commonwealth of Australia, in the particular state or territory and in the specific city or town where the notary practices.

COMPLETING AN ACKNOWLEDGEMENT CERTIFICATE

All U.S acknowledgement certificates must be carefully, truthfully and accurately completed. Filling out a certificate dishonestly or indolently may not only be grounds for a negligence claim, but in some cases, may amount to misconduct.

First and foremost, people who acknowledge their signatures (“**signatories**”) must actually appear before the

(1) Unlike a number of states which were once administered by civil law colonial powers, both Louisiana and Puerto Rico continue to follow their respective French and Spanish antecedents and make the distinction between notarial acts on the one hand and the powers and duties of notaries on the other. See generally, LA Rev Stat Ann (West) Title 35, Notaries Public and Commissioners and Laws of Puerto Rico Title 4, Chapter 101, Puerto Rico Notarial Act

(2) Conn Gen Stat §3-94a Notaries Public, Definitions.

(3) Ill comp Stat Ch 5 §312/6-101 Definitions.

(4) In some U.S jurisdictions, it is possible to “prove” a deed as an alternative to obtaining a signatory’s acknowledgement. The procedure is sometimes called “probing” a deed and involves one or more of the attesting witnesses making an affidavit that the person whose signature was witnessed acknowledged the instrument in the presence of the affiant(s) and any other attesting witness(es). See eg Col Rev Stat §38-30-136(2018).

notary. In most U.S jurisdictions “in person” appearance is required. Latterly, appearance by audio-visual link has been approved in a number of states and territories. An acknowledgement cannot be taken by telephone or email.

In Australia, “in person” appearance is the preferred option. However, in Victoria for example, by virtue of the amendments recently made to relevant Victorian legislation by the Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021 (Vic), appearance by audio-visual link is allowed for various purposes. If a signatory appears before an Australian notary by audio-visual link, it is usually acceptable for the notary to adjust an acknowledgement certificate by making it clear that the signatory “lawfully appeared [before the notary] by audio-visual link pursuant to applicable Victorian legislation”.

The same applies elsewhere in Australia, where a signatory appears by audio-visual link before a local notary.

It is always critical that signatories be properly identified by the notaries before whom they appear. Save when a RON Service Provider is involved, signatory identification is a notary’s personal responsibility and must never be carried out by a third party. (5) In most cases, reference is made in the notarial certificate as to how a signatory has been identified. For example, a formulation such as the person is “known to me or satisfactorily proven to be [the named signatory]” is normally seen.

For a signatory to be “known to”, a U.S notary [or indeed to an Australian notary], a passing acquaintance with the person or a minor social interaction over a short period is insufficient. The test for “personal knowledge” of a signatory in Arizona, for example, is instructive. An Arizona notary must have

Familiarity with [the signatory] resulting from interactions with that individual over a sufficient time to eliminate reasonable doubt that the individual has the identity claimed. (6)

(5) In the United States RON has become a process conducted and effectively controlled by a handful of large nation-wide commercial service providers (SPs) that advertise and deal directly with the public. Among other things, an SP usually arranges the services of its preferred commercial “identification” service provider to investigate and confirm a signatory’s identity. In practice, in the RON process, U.S notaries have been reduced to minor but technically necessary cogs in the commercial wheel, and basic tenets of good notarial practice have fallen by the wayside.

(6) Ariz.Rev.Stat Title 41.Article2.Notaries Public §41-311.I Definitions.10

(7) An Australian notary has no liability for any false or misleading acknowledgement by a signatory that the notary certifies

(8) The average term is four years. Notaries in Louisiana and Puerto Rico hold office so long as they remain qualified to do so, which is effectively until they retire as legal practitioners.

Where applicable, an Australian notary should properly adopt that test.

In several U.S jurisdictions, “satisfactory” proof of identity may be provided by the oath or affirmation of a credible witness known to the notary. However, overwhelmingly in America, proof of identity is by the signatory producing a driver license or other government token that includes the signatory’s photograph and an embedded signature.

In Australia, where notarial identification standards are more rigorous than those in America, a “100 point” ID check involving at least one “70 point” government issued token such as an Australian passport, is normally required to satisfactorily prove identity. The oath or affirmation of a credible witness is very much a lesser method.

Documents signed by a signatory acting in a representative capacity such as an attorney-in-fact pursuant to a power of attorney, or as a trustee or an officer of a corporation can sometimes be problematic especially where the person or entity purportedly being represented is living or located in the United States. Mostly signatories are able to produce relevant documents proving their status, however obtaining official documents from America in relation to corporations is not as easy as obtaining similar documents from ASIC in Australia.

An Australian notary cannot properly complete an acknowledgement certificate that says that the signatory is “known to me to be” [for example] “the President of XYZ Corporation” without sighting documentary proof of the signatory’s status. Where necessary, the problem can be overcome if the signatory merely acknowledges his or her specific representative status. The acknowledgement certificate may then be amended appropriately. (7)

“MY APPOINTMENT IS NOT LIMITED BY TIME”

Other than in Louisiana and Puerto Rico, American notaries are commissioned for fixed, renewable terms (8) and must

American Society of Notaries (“ASN”) and the National Notary Association (“NNA”) both incorrectly assert that “SS” is an abbreviation for the [Latin] word scilicet which they say means “namely” or “in particular” or “to wit”.

Even though the usual abbreviations for scilicet are sc and scil, the assertion propounded by the ASN and the NNA has found its way into the manuals and materials published for notaries by more than a few American states.

“SS” is probably derived from a decorative flourish.

According to the editor of Black’s Law Dictionary, Professor Bryan A. Garner, it is likely that SS was merely a decorative flourish found in a 17th century book of English pleading precedents which:

an early [unknown American] formbook writer incorporated ... into his forms and ever since it has been mindlessly perpetuated by one generation after another.

U.S “HOME LOAN” DOCUMENTS

Of all the everyday U.S transactions, “home loans” and the refinancing of home loans seem to generate the most paper – significant parts of which call for a notary to administer oaths, take acknowledgements and complete an array of notarial certificates.

A sheaf of between 200 and 300 pages is not uncommon. As an indicator, in January 2022, a Texas home loan refinancing transaction involving an American expatriate client temporarily living in Melbourne, required a Victorian notary to print-out and peruse 269 pages emailed to the client by his mortgage broker in Dallas.

In addition to instructions for the notary and [compulsory] disclosure documents by the client’s broker and the Lender, the document package included:

- 42 documents to be initialled and simply signed by the client (several of which were directed to “Fannie Mae”) (see below); and
- the following 17 documents requiring notarial intervention, viz:
 - the client’s acknowledgement of receipt of Wire Transfer instructions;
 - an Identity Fraud Prevention Affidavit;

- a further Identity Fraud Prevention Affidavit;
- a Line of Credit Pay off Affidavit;
- a Texas Borrower’s Affidavit;
- a Residential Real Property Affidavit;
- a Non Homestead Affidavit;
- a Limited Power of Attorney;
- a Signature Affidavit and AKA (Also Known As) Statement;
- an Assignment and Transfer of Lien;
- a Designation of Homestead and Non-Homestead Affidavit;
- a Deed of Trust;
- an Occupancy and Financial Status Affidavit;
- verification of the biodata and facing page of the client’s U.S passport and the client’s Texas driver license;
- an acknowledgement and encroachment and hold harmless Agreement;
- a USA Patriot Act, Customer Identification Verification; and
- the Borrower’s Affidavit as to his ability to repay a “non-qualified” mortgage.

In this instance, the American Correspondent advised that Apostilles were not required to be affixed to any notarised document.

On completion, the notary scanned the documents to the client and, at the client’s request, also scanned them to the American Correspondent. The client then returned the documents (as bound together by the notary) to the U.S.A. by international courier.

A SHORT EXCURSUS – “FANNIE MAE” AND “FREDDIE MAC”

The paperwork generally required by U.S home loan lenders often includes reference and materials relating to either:

- the U.S Federal National Mortgage Association (“FNMA”), popularly known as “Fannie Mae”; or
- the U.S Federal Home Loan Mortgage Association (“FHLMC”), popularly known as “Freddie Mac”.

Fannie Mae buys and packages mortgages from major retail and commercial banks as well as mortgages insured

(11) The New Shorter Oxford Dictionary (193), entry for “scilicet”.(7) American Society of Notaries, ASN Hot Tip, May 2009 #2, and National Notary Association Notary Bulletin Hotline Tip February 07, 2012.

(12) E.g. Colorado, Connecticut, Florida, Hawaii, Idaho, Maine, Massachusetts, Missouri, Nebraska, Oklahoma, Oregon, Pennsylvania and Wyoming.

Colorado is alone in noting that “ss” is “archaic and actually has no meaning on a notarial certificate” [Colorado Notary Handbook at 21].

(13) Bryan A Garner, A Dictionary of Modern Legal Usage (New York, OUP, 2nd ed, 1995), 825.

by the U.S Federal Housing Administration and the U.S Veterans' Administration. Freddie Mac buys and packages mortgages from smaller banks, savings and loan and other communally oriented lenders.

Both organisations are supported by the U.S Treasury and both sell mortgage packages to the private and public investment markets. The entire process provides liquidity to lending institutions for fresh new home loan lending.

NOTARIAL SERVICES PROVIDED BY U.S CONSULAR OFFICERS

Pursuant to the 1963 Vienna Convention on Consular Relations, U.S Consular officers in Australia are entitled to provide a range of notarial and authentication services to Australian residents in relation to their personal and commercial affairs in the United States.

U.S Consular services are provided **strictly by appointment**

Appointments are limited and not uncommonly, may only be made some weeks in advance.

U.S Consular officers are located at:

The U.S Embassy - Canberra

Address: Moonah Place, Yarralumla, ACT, 2600.
Telephone: 02) 6214 5600

The U.S Consulate-General Melbourne

Address: 533 St. Kilda Road, Melbourne, Vic. 3004.
Telephone: (03) 9526 5900

The U.S Consulate-General Perth

Address: 4th floor, 16 St. George's Terrace, Perth, WA, 6000.
Telephone: (08) 6144 5100

The U.S Consulate-General Sydney

Address: Suite 2, 50 Miller Street, North Sydney, NSW, 2060
Telephone: 1300 139 399

Any suggestion to a client by an American Correspondent to approach a U.S consular officer to notarise substantial documentation in preference to obtaining the services of a local [Australian] notary is inappropriate and should be resisted.

(14) The Convention entered into force for the USA on 15 October 1981 and for Australia on 16 March 1995.

U.S Department Of State Foreign Affairs Manual

The U.S Department of State publishes a comprehensive Foreign Affairs Manual (FAM") which may be accessed online at <fam.state.gov/Fam/FAM.aspx>.

7 FAM 800 deals with Consular Officers' powers and duties in relation to their notarial and authentication services.

ARE APOSTILLES REQUIRED?

Australia and the United States are both party to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("the Apostille Convention")*. (14)

Australian notarial acts and signature verifications are "public documents" for the purposes of the Apostille Convention and may have apostilles affixed to them when they are required to be produced and used in the USA.

Unlike the position in the USA where it is easy to search official government websites to determine if a person purporting to be a notary is in fact commissioned as a notary in a particular jurisdiction, there is no publicly searchable government register of notaries in Australia.

For most Americans, the niceties of what is a public document for the purposes of the Apostille Convention and the function of the Convention itself are irrelevant. What is important to Americans is that an Apostille affixed to an Australian notarised document is official Australian government confirmation that the purported Australian notary actually holds office as a notary and that the notary's signature and seal on the notarisation are genuine.

Regrettably, there is no definitive overarching rule as to when an Apostille should be affixed to a document notarised by an Australian notary.

A good rule of thumb is that if an Australian notarised document

- is to be filed in an American court proceeding;
- is required for U.S federal government purposes; or
- is to be recorded in U.S state or county records or is otherwise required for state, county or municipal purposes

an Apostille should be affixed to the document by DFAT.

Frequently, U.S banks, title companies, insurers and other non-government institutions ask for notarised documents

to be apostilled, for their respective “comfort” purposes. There is no Australian or U.S law preventing them from requesting, receiving or using apostilled notarised documents for those purposes or for any other legitimate reason.

In any event, there is no need for an Australian notary to “jump the gun” and arrange for notarised documents to be apostilled without the client having first been requested to do so by the American Correspondent.

In all cases, if an American Correspondent makes no mention of any need for notarised documents to be apostilled, it is always appropriate for the Australian notary to raise the issue with the American Correspondent [via the client] in order to seek a definite response one way or the other.

If it turns out that an American Correspondent has erred in advising that an Apostille should be obtained when it was not required, no real harm is done by having the notarised document apostilled.

On the other hand, if an American Correspondent wrongly advises that an Apostille is not required (and that advice has been followed) and it turns out that the notarised document should have been apostilled, as an alternative to sending the document back to Australia to be apostilled, the matter may be rectified in the United States.

Australian consular officers located at the Australian Embassy in Washington DC and at the Australian Consulates-General in Chicago, Houston, Honolulu, Los Angeles, New York and San Francisco are authorised to affix Apostilles to Australian public documents, including Australian notarial acts and certifications of signatures. (Australia’s honorary consuls in Denver and Miami do not have that authority.)

REQUESTS FOR CONSULAR LEGALISATION OF NOTARISED DOCUMENTS

Occasionally, a client’s American Correspondent will request that a notarised document be “consularised” or “legalised” by a U.S Consular officer in Australia.

Under no circumstances can that request be met. The only recognised means of authenticating an Australian notarisation required for any purpose within the United States is the affixing of an Apostille, which by virtue of the Apostille Convention has completely replaced Consular legalisation of notarised documents as between contracting parties.

As noted above, the Apostille Convention is an international

treaty to which the United States and Australia are both contracting parties.

Article VI (paragraph #2) of the Constitution of the United States (generally known as “the Supremacy Clause”), provides that:

... all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Therefore, the provisions of the Apostille Convention supersede and displace any state, territory or local law or practice which is inconsistent with the Convention.

Accordingly, **any request** by any court or bank or other institution in the United States or by a state, territory, county or municipal authority **for consular legalisation of an Australian notarisation is invalid.**

INSTRUCTIONS TO RETURN UNBOUND DOCUMENTS TO AMERICA

Often enough, an American Correspondent’s instructions include a direction that the notary must not staple or otherwise fasten or bind notarised documents, because they must be returned to the USA as loose pages. (Presumably making it easier for filing clerks to scan the documents into electronic registers.)

An Australian notary must never comply with a direction of that nature nor should the notary provide an unbound notarised document to the client.

Apart from it being in fundamental breach of a basic precept of good notarial practice in Australia, failure to properly bind a notarised document will result in DFAT declining to affix an Apostille to the document if needed.

In passing, it is noted that U.S consular officers are instructed to bind notarised documents consisting of two or more sheets.

Among other things, 7 FAM 837.4 provides:

(a) When the instrument or document to which a notarial act relates consists of more than one sheet, or when the notarial certificate will be attached and not written on the [single page] document itself, [the consular officer] should bring all of the pages together under [the officer’s] official seal.

(b) This is best done by perforating each of the pages,

including the notarial certificate, in the upper left corner [and by] inserting eyelet grommets ...

(c) ... the total number of pages should be indicated on the consular certificate or on the last page of the instrument where no separate certificate is used.

If necessary, American Correspondents should be told that when it comes to binding notarised documents, Australian notaries' standards are at least as exacting as the standards required of U.S consular officers.

SIGNATURE PAGE PACKAGES

From time to time, but with increasing frequency, a client will receive an emailed Signature Page Package [usually] from a trusted American Correspondent such as the client's lawyer or business associate; often enough relating to the imminent closing (ie. settlement) of a commercial transaction.

Invariably, the matter is "urgent" and the time limits specified for the return [by PDF scan and by FedEx/DHL] of executed, notarised and apostilled documents are extremely tight.

A Package usually includes the first pages of several documents and signature pages for each document, some of which are to be simply signed by or on behalf of the client and others of which require signatures to be notarised.

It should go without saying that an Australian notary must never notarise a signature on a bare signature page, no matter how trustworthy the local or U.S source may be and no matter how confident the client is that "she'll be right" once the signature pages have been returned to the USA.

A REQUEST TO "EXPLAIN" DOCUMENTS AND TO OTHERWISE ADVISE THE CLIENT

Throughout the United States, notaries are strongly warned not to "explain" aspects of documents to be notarised to clients for fear of accidentally straying into the "unauthorised practice of law" which is a serious offence in all jurisdictions.

Nonetheless, sometimes, but not often, and presumably in an attempt to be helpful and to allay possible client concerns about the daunting mountain of paperwork to be completed, an [over-enthusiastic] American Correspondent will request that the Australian notary explain particular aspects of documents to the client or otherwise advise the client about the purposes of documents.

A request of that nature must not be accommodated.

Even though most Australian notaries are lawyers, the longstanding general rule of Australian notarial practice is that a notary should not give any professional advice to a client other than in relation to the nature and terms of a notarial certificate and its subsequent authentication. Transactional advice to a notarial client is a matter for the client's Australian or foreign advisors, even if, as a lawyer, the notary is expert in areas to which documents relate.

Normally, the notary's duty is only to ensure that documents are actually filled in and to indicate to the client when they are not. In that regard, it is emphasised that under no circumstances should a notary intervene in relation to a document which is patently incomplete or which refers to exhibits or annexures that are missing.

To make matters worse, on the odd occasion the notary is asked to complete a formal certificate within the documents that the requested explanation or advice has been provided to the client who understands what he or she has been told.

When faced with a certificate of that nature, the notary should cross it out and replace it with a statement to the effect that Australian notaries are prohibited from giving transactional advice to clients.

Apart from anything else, it is a brave lawyer who gives explanations or advice about American documents and transactions without being admitted to practice by the relevant U.S state or territory bar.

U.S POWERS OF ATTORNEY

The U.S federal government has not prescribed powers of attorney to be used for any federal purposes. Suitable U.S state or territory or properly authenticated foreign notarised powers of attorney may be used for federal purposes as and when needed.

Each U.S state and territory has prescribed or recommended its own powers of attorney to be used for its own domestic purposes. In those forms, the person or entity granting the power is usually referred to as "*the Principal*" and the attorney is usually referred to as "*the Agent*" or "*the Attorney-in-Fact*" (to distinguish the attorney from an "attorney-at-law").

Typically, state and territory legislation prescribes or recommends specific forms of powers of Attorney to be used generally, or for health or guardianship purposes, or for specific commercial purposes. Most jurisdictions have provision for specific powers of attorney for:

- bank account transactions;

- real estate closings;
- stock (ie shares and securities) transactions; and
- sale of motor vehicles.

As a general rule, U.S attorneys-at-law may prepare their own forms of powers of attorney for local or international general or specific purposes, so long as those forms do not purport to replace prescribed forms.

There does not appear to be legislation in any U.S jurisdiction that prevents the use of powers of attorney in the USA that have been prepared outside the USA in “foreign” forms. “Foreign” powers of attorney must always be signed in the presence of a notary in the country of origin and, as applicable, be apostilled or legalised.

U.S powers of attorney are not formulated as deeds. Save for various Australian prescribed short forms which are to be used domestically and which are expressed to be deeds, there is no requirement of Australian law that a power of attorney be executed in a particular state or territory by the Principal as a deed in order to be effective abroad.

Therefore, a U.S state or territory power of attorney sent to Australia by an American Correspondent may be simply signed (and if required, sworn) in the Australian notary's presence. The notarial certificate may then be completed in the ordinary course.

AMERICAN “VITAL RECORDS”

Birth, death, marriage and divorce certificates are generically known in the United States as “vital records”.

From time to time, Australian notaries are asked to assist clients in obtaining or certifying copies of U.S vital records. Another minefield to be navigated.

Nothing prevents an Australian notary certifying a copy of a U.S vital record for strictly non-American purposes. **Copies of U.S vital records certified by “foreign” notaries, even with Apostilles affixed, are not recognised or accepted in the United States at all.**

Notaries holding office in most U.S jurisdictions have limited authority to certify copy documents. With few exceptions, they are forbidden to directly certify copies of vital records. (15)

(15) E.g. Colorado notaries may certify copies of out-of-state vital records and in Louisiana, notaries may certify copies of original certificates or documents including vital records annexed to any authentic acts they prepare and complete

(16) 18 USC§1426

(17) For further information see USCIS website <www.uscis.gov>

Incidentally, it is a U.S. federal offence punishable by up to 25 years imprisonment for any person (including an American notary and possibly a foreign notary as well) who:

... without lawful authority, prints, photographs, makes or executes any print or impression in the likeness of a certificate of arrival, declaration of intention to become a citizen or certificate of naturalization or citizenship or any part thereof. (16)

Note: The offence relates to U.S. naturalization and citizenship papers. It is not a federal offence to copy or notarise a copy of a U.S passport.

If needed, the U.S Citizen and Immigration Services, will provide certified true copies of naturalization and citizenship papers, provided that the requesting person's identity and status as a naturalised citizen can be confirmed by the USCIS office at which the request is processed. (17) Applications may be made online and do not require the intervention of an American or foreign notary.

Obtaining official copies of U.S vital records

Australian notaries and their clients are able to obtain official copies of vital records directly from relevant state or territory sources.

Hot links to individual state and territory sources, information and application forms may be found on the U.S. National Center for Health Statistics website: <cdc.gov/nchs/w2w/index.htm>

Sometimes, payment can be troublesome. Many offices do not accept credit card payments by mail or telephone. Generally, international payments must be made by cashiers cheques or international money orders in U.S dollars drawn upon a U.S bank.

Almost always, it is simpler, faster and easier to use the services of an accredited commercial data broker to obtain official copies of vital records. Vitalchek Network Inc (“**Vitalchek**”), a member of the international LexisNexis group, is the largest and best known of the data brokers. Vitalchek is accredited by every U.S state and territory. Its website is <<https://www.vitalchek.com>>

In the past, difficulties have been experienced in obtaining

California vital records via Vitalchek, because California did not recognise foreign notarisation of documents provided in support of Applications. (The same difficulties arose when Applications were made directly.)

Due to recent changes to California's legislation, the particular difficulties now appear to have been overcome.

ANOTHER EXCURSUS – U.S. TAXPAYER IDENTIFICATION NUMBERS

Every person and entity liable to pay U.S. federal tax must have a U.S. Taxpayer Identification Number (“**a TIN**”).

All U.S. citizens (wherever located), all U.S. permanent residents and most non-citizens lawfully working in the United States are entitled to be registered for U.S. social security benefits. On registration, a person receives a unique Social Security Number (“**an SSN**”) from the U.S. Social Security Administration. The SSN doubles as the person's TIN.

Within the United States:

- an Employer Identification Number (“**an EIN**”) issued by the U.S. Internal Revenue Service (“**the IRS**”) to American **business entities (including sole proprietorships, partnerships, corporations, trusts, non-government not-for-profit organisations and deceased estates)**, is the entity's TIN; and
- a foreign national who is not eligible for U.S. social security benefits (and therefore not eligible to have an SSN) or a foreign entity or person(s) that are not eligible to have an EIN must obtain an Individual Taxpayer Identification Number (“**an ITIN**”) from the IRS.

Outside the United States, an ITIN may be obtained from the IRS only by using the services of an IRS Certified Acceptance Agent. Presently, there are eight certified Acceptance Agents in Australia (see Appendix #2 below) each with Australia-wide jurisdiction. (18)

In all applications for the issue of an ITIN, an IRS Form W-7 must be filed. The form is accompanied by documentation substantiating the Applicant's true identity and status as an alien individual or foreign entity.

In foreign jurisdictions, such as Australia, the Acceptance

(18) Acceptance Agents may also be IRS Enrolled Agents, who are entitled to prepare U.S. tax returns for clients and to represent U.S. taxpayers who are being audited by the IRS.

Agent reviews and certifies the Applicant's documentation, interviews the Applicant or the Applicant's authorised signatory (these days by audio-visual link where necessary) and forwards the completed Form W-7 to the IRS for processing.

In the case of an individual Applicant, the Acceptance Agent must sight the individual's passport and any other original relevant documents.

For Form W-7 purposes, notarised copies of documents are not acceptable. Notaries have no role in the process.

Author's Acknowledgements and Thanks

The preparation of this Practice Note was originally prompted by a most interesting and informative Continuing Professional Education Presentation by the English Notary, Tony Martin, “*U.S. Documents – a practical approach*” for members of the Society of Notaries of England and Wales. (Found at <[the notariessociety.org.uk](http://the.notariessociety.org.uk)>)

During the course of my notarial practice, I have been able to assist a good many clients in conducting their personal and commercial affairs in America by notarising a large range of documents sent from that extraordinary country. Those interventions have been invaluable in identifying the issues I have canvassed in this Practice Note.

Thanks to my notarial colleagues, Michael Bula, Paul Cariss, Joseph Lukaitis and John Pearce for sharing their experiences and thoughts on the subject with me.

As always, special thanks to my wife Robyn, for her professional skills and her continuing support and never-ending patience.

April 2022

APPENDIX #1

Links to America's notary public laws and websites

- Hot links to official notary public websites in
 - all the U.S states;
 - the District of Columbia; and
 - the U.S Virgin Islands

may be found on the Notary Public Administrators (“NPA”) website. (The NPA is a staff section of the National Association of Secretaries of State, based in Washington DC).

See <npa-section.com/contacts-resources.html>

- Relevant legislation and materials concerning notaries public in the remaining four permanently inhabited U.S territories may be found as follows:
 - American Samoa
See <new.asbar.org/section/title-31-professions/chapter-03-notarypublic/>
 - Guam
See <oagguam.org/guam-notary/>
 - Northern Marianas Islands
See <cnmilaw.org>
Search for public law 14-52
Also search for Chapter 5-30 notaries public rules and regulations
 - Puerto Rico
Google search for Puerto Rico Notarial Act 1987

APPENDIX #2

IRS certified Acceptance Agents in Australia

This list is basically as published by the IRS online at <irs.gov/individuals/international-taxpayer/acceptance-agents-Australia> Where necessary, particulars have been updated following ASIC and Agent's website searches.

- Jeremy Crooks of the Firm, Gingerbread Tax
160 Clarence Street, Sydney, NSW, 2000
Telephone: 0421 052 323
- Catherine Smith of the Firm, A Cloud Thing
2 Warri Crescent, MacMasters Beach, NSW, 2251
Telephone: 0421 241 496

- Taxstudio (Australia) Ltd
111 Flinders Street, Surry Hills, NSW, 2010
Head Office telephone: +1 (310) 633 3339
- USglobaltax Pty Limited
Suite 114, 410 Elizabeth Street, Sydney, NSW, 2000
Head Office telephone: +1 (649) 373 2949
- Kudzanai (Richard) Makura of the Firm, U.S. Tax Time
28 Eenie Creek Road, Noosaville, Qld, 4566
Telephone: 1800 143 412
- Ustaxcentral Australia Pty Ltd
Shop 3, 249 Oxley Avenue, Margate, Qld, 4019
Head Office telephone: (07) 3040 3586
- New York Business Advisory Pty Ltd
Shop 4, 1 Young Street, Southport, Qld, 4215
Telephone: 0416 399 721
- Donna Shaw
101 Koornalla Crescent, Mount Eliza, Vic. 3930
Telephone: 0412 260 758

APPENDIX 3

Paper sizes

Most American legal documents are prepared on “U.S Legal” paper (216mm x 365mm; 8.3” x 11.7”) as opposed to A4 paper (210mm x 297mm; 8.5” x 11”) which is the paper generally used in Australia and internationally.

In Australia, office laser and inkjet printers typically have their “default” setting set to A4 paper. Overwhelmingly, office printers have ‘auto-scale” in their programming and automatically scale printouts of American documents received by email to A4 paper.

All modern [digital] photocopiers are readily adjustable to enable “U.S Legal” documents to be sized to A4 paper when copied. If an American document on “U.S Legal” paper is sent or handed over by a client for completion, signing and notarisation, it should be copied to A4 paper before being completed, signed and notarised.

Notarial certificates should be prepared on A4 paper to match the paper size of the [adjusted] American documents.

Print out documents “Single Sided”

“Double-sided” documents should always be notarised as

“single-sided” documents to make it easier to scan them back to America.

Advising U.S recipients to “scale” scanned documents

When scanning notarised document(s) to the client, to in turn scan to an American Correspondent, it is always useful in the covering email for the Australian notary to suggest that the American Correspondent be advised to take necessary steps to scale the scanned document(s) to the paper available on the receiving printer(s).



Peter Zablud, AM, RFD, FSNV, Dist.FANZCN
Notary Public

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