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Practice Note

Remote Notarisation - Don't do it

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The COVID-19 pandemic has resulted in a Notary asking the Council if it is possible to use videoconferencing facilities to notarise a document.

Summary

The opinion of the Society of Notaries of New South Wales is that this type of service, in any form, is completely **unacceptable** to notarial practice.

In addition, the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*, (NSW) 22 April 2020, **does not apply** to work undertaken by a Notary.

The Society's opinion accords with:

- (a) the views of the Law Society of New South Wales in their published *FAQ on Electronic Witnessing of Signatures*;¹
- (b) the Opinion of the Council of the Society of Notaries of England and Wales on *Personal Appearance and Remote Authentication* issued on 26 January 2017; and

¹ https://www.lawsociety.com.au/sites/default/files/2018-07/LS2976_LegalTech_Witnessing-electronic-signatures_FAQ.pdf accessed on 20 April 2020

(c) the Society of Notaries of England and Wales updated Opinion *Covid 19 - Distant Communication Technology and Personal Appearance* issued on 18 March.

The Society embraces technology but must ensure the trustworthiness of the notarial act. The Society is mindful of our professional duties as Notaries and for the Society to endorse the use of technology for a Notary in performing their duty, it must be safe, secure and reliable.

Background

Remote notarisation may be requested by your clients, or suggested by Notaries that they may perform this type of service, mainly due to the current pandemic arising from the COVID-19 virus and its impact upon face to face meetings with clients, and for some Notaries to attempt to enhance the services offered by them.

What is remote notarisation and does the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* apply to Notary work?

This is the process of undertaking a notarial service of witnessing a client sign a document via some form of video link. This might be by FaceTime, Zoom, Teams, Skype or any of the myriad of video applications available.

Technology and the use of video conferencing facilities have advanced so that a person ‘appears’ before the Notary at the time of the notarisation using audio-visual technology over the internet or telephone network instead of being physically present in the same room as the Notary. Remote notarisation is also known as webcam notarisation, online notarisation and virtual notarisation.

The new Regulation² came into force on 22 April 2020. It applies to Australian **domestic work** for the electronic witnessing of documents in Australia for Australian purposes. This is suitable by Lawyers (not Notaries) to perform. It operates for a limited time period, and applies to a defined set of documents being, a will, power of attorney, enduring power of attorney, deed or agreement, enduring guardianship appointment, affidavit and annexures or exhibits to affidavits, and statutory declarations³.

² *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*, (NSW) 22 April 2020

³ see section 1, definition of “document” includes the following:

Notaries appointed in New South Wales **do not** perform domestic Australian work. This also applies to Notaries appointed in other Australian States and Territories.

The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*, (NSW) 22 April 2020, **does not apply** to work undertaken by a Notary.

The United States of America

There are vast differences between the work performed by an Australian Notary and that of a Notary in the United States of America. For example, Notaries in the USA perform their duty on a domestic basis, whereas, an Australian Notary only performs their duty for international purposes i.e. documents being notarised in Australia for use abroad.

Another difference is that a Notary in New South Wales must be a practicing and registered lawyer (similar to other Australian States) and the commission of the Notary is for life (or at least for so long as they hold a practicing certificate). The American Notary is not a legally qualified person and their commission is limited to a period of time.

Notaries in the USA do perform remote notarisation and this is unique to their practice introduced by legislation in various states⁴. In 2011, Virginia was the first State to pass a law allowing Notaries to perform remote notarisation. Momentum for remote notarisations shifted in 2015 when Montana became the second state to allow them — although in a more limited form. Then Florida enacted a law allowing certain law enforcement and correctional officers to administer oaths using electronic means. The Louisiana legislature then passed a

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- (a) a will,
 - (b) a power of attorney or an enduring power of attorney,
 - (c) a deed or agreement,
 - (d) an enduring guardianship appointment,
 - (e) an affidavit guardianship appointment,
 - (f) an affidavit, including an annexure or exhibit to the affidavit,
 - (g) a statutory declaration

In addition, pursuant to section 17 of the *Electronic Transactions Act 2000*, (the regulation-making power) the new Regulation amends the following act: Oaths Act 1900, Guardianship Act 1987, Succession Act 2006, Powers of Attorney Act 2003, the Conveyancing Act 1919, and, another Act administered by the Attorney General.

⁴ Professor Zablud, AM, RFD, has detailed in a paper “*Remote Online Notarisation*” April 2020, the various States of the USA, he indicates, that have introduced legislation, or are in the process of introducing legislation, being Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Ohio, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin.

resolution to study eNotarisation, including the use of audio-video technology. Two other states – Texas and Maryland – introduced webcam eNotarisation bills which initially failed but later, upon revision, passed in 2019.

Remote notarisation is generally a knowledge-based authentication system and there are serious questions about its veracity. There are also reports that hackers have breached databases that supply information to systems that facilitate remote notarisation.

The original intention of the USA legislators was to supply a regulated, highly sophisticated technological process aimed at giving qualified, trained Notaries with a new way to provide their services by using a purpose designed technology platform to facilitate the process.

Notary's professional duty

A Notary must, in all instances, identify the party appearing before them, confirm that that person has the required legal capacity and understanding, and that the person appearing before them has expressed their free will to be bound by the terms of the instrument (e.g. absence of violence, fraud or undue influence).

The function of a Notary is to provide a document that is safe, secure and reliable by authentication, and in so doing, avoid the risk of fraud.

For the Notary to achieve this, the Notary must, in person, satisfy themselves as to:

- (a) the identity of the person signing;
- (b) the understanding of the person signing;
- (c) the capacity of the person signing;
- (d) their authority, where applicable; and
- (e) that there is no undue influence or force being exerted upon the person appearing.

A Notary is not able to delegate their functions or powers, so the Notary must see the person physically appear before them to ensure that the required standard of verification has been applied.

What is “appearing”

One of the fundamental duties of a Notary is identification of the appearer and witnessing signatures. For a person to “appear”, they must physical be present in the same place as the Notary.

It is an essential requirement that a Notary undertake identification themselves and must not delegate this function.

The methods of identification undertaken in conveyancing transactions in NSW and around various Australian States, **are not similar** or anything akin to performing the duty of a Notary.

There is no legislation in any Australian State or other countries like the United Kingdom, Singapore or New Zealand, enabling Notaries to perform their functions remotely.

What are the minimum requirements for attesting a document?

By attesting a document, the attesting witness, being a person who does not have a personal interest in the document:

- (a) certifies that they were present at the time the document was signed⁵;
- (b) certifies that the document attested was signed by the witness⁶;
- (c) certifies that the document was signed voluntarily, so that it was the signatory’s own act⁷; and
- (d) represents that they attested at the time they witnessed the signature by the signatory⁸.

Each of these functions is directed at one thing – providing independent verification in the event that a party seeks to deny their signature. It follows that the duty cannot be fulfilled if any part of the process is conducted in such a way that the witness is later able to deny any

⁵ Seal v Claridge (1991) 7 QBD 519; Freshfield v Reed (1842) 9 MN & W 404; 152 ER 181; Ellison v Vikicevic (1986) 7 NSWLR 104 at 112; Netglory v Caratti [2013] WASC 364 at [144]-[147]

⁶ Freshfield v Reed (1842) 9 MN & W 404; 152 ER 181; Ellison v Vikicevic (1986) 7 NSWLR 104 at 112

⁷ Freshfield v Reed (1842) 9 MN & W 404; 152 ER 181; Burns v Lorac Mining (1985) 4 FCR 301 at 303

⁸ Netglory v Caratti [2013] WASC 364 at [150]-[170]

of the matters set out in paragraphs (a) to (c) above, and the duty in paragraph (d) above serves to protect the integrity of the certification process.⁹

Circumstances where a Notary might consider waiving personal appearance

Notaries will regularly authenticate the signatures of people that they know well and whose identities and signatures have previously personally been checked by and recorded by the Notary. Typically, this might be officers of large corporations who are backed up by well-run internal legal departments and where a relationship of trust exists over a period of years. Even then, it is the Notary's risk if the Notary's certificate proves to be incorrect.

Determining the willingness and awareness

It is extremely difficult to verify the identity of a person appearing on a computer screen or to determine the veracity of an identity document or the appearer's willingness and awareness of what is occurring. All of this is arguably harder because of the limitations of what can be seen on camera.

Being physically present means a Notary is far more likely to be able to pick up any signs that something is not quite right. This is particularly poignant given the ongoing problem of elder financial abuse, where relatives of caregivers are pressuring or even tricking the appearer. Whilst notaries are senior trained lawyers, and not expected to be experts in detecting abuse, notaries are expected to make an educated common-sense judgment.

What are the consequences of invalid notarisation?

The consequences of incorrectly witnessing a document that you notarise depend on the proper construction of the provision imposing the requirement, but where a document has been incorrectly witnessed:

- (a) the document may not have the intended, or any, legal effect¹⁰;
- (b) making the attestation may be misleading or dishonest conduct on the part of the Notary witnessing the appearer's signature; and

⁹ Law Society of New South Wales *FAQ on Electronic Witnessing of Signatures*, accessed 20 April 2020 https://www.lawsociety.com.au/sites/default/files/2018-07/LS2976_LegalTech_Witnessing-electronic-signatures_FAQ.pdf

¹⁰ *Netglory v Caratti* [2013] WASC 364 at [146], [309]; *Ellison v Vikicevic* (1986) 7 NSWLR 104 at 112

- (c) in the case of incorrect witnessing by a notary, making the attestation could lead to liability for misconduct or even negligence, or amount to unsatisfactory professional conduct¹¹.

Additionally, and most importantly, the document may not be acceptable in the country to which it is destined. The failure of acceptance of the document by the foreign jurisdiction which has no understanding of remote notarisation means that a Notary in New South Wales performing a remote notarisation will fail. Clearly investigations need to be made with the destination jurisdiction.

Conclusion

It is the opinion of the the Society of Notaries that:

- (a) *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*, (NSW) 22 April 2020 **does not apply to Notary work**; and
- (b) it is not best practice to do so; and
- (c) it is unacceptable to notarise the signature of a client using electronic video conference facilities (of any kind).

Where a client requests the Notary to use a video conference facility of any kind in order for a notarial act to be issued, the Notary is advised not to use this method, and to require personal appearance.

Ways to adapt your practice

¹¹ Seddon N, Seddon on Deeds, The Federation Press, Sydney, 2015; and section 6, *Public Notaries Act 1997*
6 *Appointment of public notaries*

(1) *The Court may appoint and enrol a person as a public notary in accordance with this section.*

(2) *The Court is, on any day appointed by the Court for the purpose, to hear and determine any application made for the appointment as a public notary of a person approved by the Admission Board as a suitable candidate for appointment.*

(3) *The Court may order that the name of a person be removed from the roll for misconduct as a public notary, incompetence as a public notary or for any other reason the Court considers warrants removal.*

(4) *Misconduct as a public notary includes conduct that, had it been done as an Australian legal practitioner, would be or be capable of being unsatisfactory professional conduct or professional misconduct under Chapter 4 of the [Legal Profession Act 2004](#).*

During the COVID-19 pandemic, you may be faced with challenging circumstances associated with social distancing. You can adapt. For example, some Notaries have asked clients attending at their office to sign a declaration regarding their health and possible exposure to the virus. Other Notaries are adopting alternative ways of seeing their clients. A novel way is dealing with the exchange of all information by email and then arranging the signing of the notarial document by having their client drive to the Notary's office, sign the document from within their car, with the Notary watching from a safe distance, and then the document being handed to the Notary to take back to their office to complete.

Regarding the COVID-19 virus, clearly all Notaries must follow up-to-date Australian Government advice and must be prepared to find solutions that will work for their individual practices. However, it is critical that a Notary undertake their duty to the highest standards, ensuring that our professionalism and reputation are not diminished and that our notarial acts remain secure and reliable.

Disclaimer:

This practice note was written by Justin Betar and adopted by the Council of the Society of Notaries of New South Wales as a result of the recent debate on the issue of video link / webcam Notary attestation. The aim of this practice note is to offer guidance to the members of our Society. The practice note may not be interpreted as giving advice in particular circumstances. No duty of care or liability whatsoever is accepted by The Society of Notaries of New South Wales Inc, its Council, or the members involved in the preparation of this practice note, to any individual or company who relies on any material in it.