A SUBMISSION
by
THE AUSTRALIAN AND NEW ZEALAND COLLEGE OF NOTARIES
concerning
Department of Foreign Affairs & Trade
Consular Strategy 2014 - 16

OUTLINE

This Submission has been prepared in response to a general invitation by the Minister for Foreign Affairs, the Hon. Julie Bishop MP to comment on the Department’s Consular Strategy 2014-16.

The Submission is directed towards aspects of the authentication by DFAT of documents emanating from Australia for production internationally and related matters, and aspects of the provision of notarial services by consular officers abroad.

If requested, the College will amplify any aspect of this Submission either verbally or in writing.

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The Australian and New Zealand College of Notaries

The College is a trans-Tasman organisation of notaries committed to providing the highest standards of notarial practice through excellence in education, professional development and support for its members.

Full membership is open to all practising Australian and New Zealand notaries.

Any notary holding office in any place outside Australia and New Zealand who is not qualified to be a member may be admitted as an associate of the College.

Headquartered in Melbourne, the College is Australasia’s leading organisation of notaries and is recognised as such throughout the common law world. Its substantial membership is drawn from all Australian states and territories and from New Zealand.
Introduction

In this Submission, comments and criticisms directed towards the Department of Foreign Affairs and Trade ("DFAT") as such, should not be construed as criticisms of individual members of staff either at home or abroad. Almost without exception, DFAT staff members take their duties seriously and provide services to the public with patience and goodwill to the best of their knowledge and ability.

As will be noted below, DFAT’s regional office staffing levels in Australia are sub-optimal. Particularly in Melbourne and Sydney, staff members are constantly subject to immense pressure by members of the public. As a rule, they respond to the pressure with admirable stoicism and professionalism.

The issues discussed in this Submission are far from exhaustive. They are however matters which, from the perspective of the notariat, deserve ventilation and serious consideration.

Document authentication services - the need for correct nomenclature

One of DFAT’s many important functions is its involvement in the authentication of public documents emanating from Australia for production and use abroad.

It does so on two bases, namely:

- pursuant to the delegated authority of the Secretary of the Department, who is Australia’s nominated “Competent Authority” for the purposes of the Hague Convention of 5 October, 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (“the Apostille Convention”) to which 106 countries, including Australia, are now party;¹ and

- as the Australian government’s authenticating body for the purposes of the “legalisation” of documents by the so-called “chain of legalisation” method still in use by a number of countries, including Brazil, Indonesia, the PRC, the Philippines, Vietnam and most of the Arab world.

As discussed below, pursuant to the 1963 Vienna Convention on Consular Relations (“the Vienna Convention”), the functions of Australia’s consular officers abroad include the provision of a limited range of (properly named) notarial services.

Despite DFAT’s protestations to the contrary, DFAT personnel have no notarial function within Australia for any purpose whatsoever. Domestically, only Australian notaries may prepare and complete notarial acts. When DFAT personnel authenticate documents on shore in Australia, they are not acting as notaries. The services they provide in that regard are purely ministerial services of an administrative nature and not “notarial” services.

Nonetheless, DFAT continues to insist that its staff provides a range of “notarial” services in Australia, even though they manifestly do not.

¹ For the text of the Apostille Convention, details of the Contracting States and information about the operation of the Convention, see the website of the Hague Conference on Private International Law, www.hcch.net>
Oddly enough, the sections of DFAT’s various state and territory offices which deal with the authentication of documents are not consistently named. For example, in New South Wales, the section is correctly referred to as the “Authentication Section”, while in Victoria, the section is inappropriately called the “Notarial Unit”.

Even so, one way or another, all DFAT’s regional offices make it clear that they are providing “notarial services” when they “service” documents by affixing apostilles pursuant to the *Apostille Convention* or authentication stamps for legalisation purposes.

The public believes wrongly that DFAT provides “notarial” services domestically, either by virtue of the name of the relevant unit, or through information found on the regional office websites or by the titles of official application forms or by a combination of them. Apart from any other consideration, members of the public often do not understand the distinction between the services offered by DFAT and those offered by notaries.

The College believes that steps should be taken to regularise the position by ensuring that misleading references to the provision of “notarial” services by DFAT within Australia are replaced where necessary by reference to “authentication” services or the like.

**Office hours and service levels**

The number of authentications required of DFAT in Australia is constantly increasing.²

The overwhelming number of authentications are provided by the Melbourne and Sydney offices. Yet, over the past few years office hours in both centres have contracted dramatically and service levels have been reduced.

In Melbourne, the “notarial unit” is open to the public from 8.30 a.m. to 1.00 p.m. Monday to Friday. Turnaround time is typically two business days. In Sydney, office hours are 9.00 a.m. to 1.00 p.m. The turnaround is two business days.³ It was only a relatively short time ago that the Melbourne office, for example, was open until 4.00 pm daily and same day service was the norm.

In the past, the Melbourne and Sydney authentication teams occupied their own discrete premises, with their own cashiers. Now both teams are located within their respective state Passport offices. Staff numbers are sub-optimal and cashiers are shared with passport services.

It would appear that the underlying reason for the decrease in service levels in Melbourne and Sydney is that the fees derived from authentication services are paid to consolidated...
revenue rather than to DFAT itself. If fees were retained by DFAT and applied towards the provision of better facilities and increased staff numbers in the two major centres, the quality and standard of service in those centres would immediately improve to reasonably acceptable levels.

**Authenticating translations by NAATI accredited translators**

DFAT routinely authenticates and affixes apostilles to translations prepared and signed by NAATI accredited translators. The practice is not only wrong in principle, but insofar as it relates to the *Apostille Convention*, it is not authorised by the Convention.

The argument put in support of DFAT’s practice is that as NAATI is a national accreditation body effectively conducted under the auspices of the Commonwealth, State and Territory governments, translations by NAATI accredited translators have official status which warrants and underpins an entitlement to have their translations directly authenticated by DFAT or to have apostilles affixed to them.

The argument is fundamentally flawed. Merely because a translator holds a government issued or sanctioned credential or is in some way “recognised” by government or by a government authority, does not automatically mean that the translator’s translation of any document, including a public document, should be deemed to be a public document in its own right.

Official recognition of competence or the grant of a government regulated or issued credential only means that the translator has been accorded professional status or has received particular training.

On the other hand, if a person, however qualified, is employed by government as a translator, or possibly even professionally engaged in that capacity on an *ad hoc* basis, the position is different. In those circumstances a translation of a public document from or into English is capable of being classified as a public document.

In every other case where a translation is required, the only appropriate methods of allowing the translation to be formally authenticated by DFAT are to have the translation made or verified by a suitably qualified notary or to have the translator (whether NAATI accredited or not) make a statutory declaration or an affidavit or sworn statement in the presence of a notary as to the accuracy of the translation that he or she has made or verified. In either event, an apostille may properly be affixed to the notarial act (i.e. the notary’s certificate).

In passing, it is noted that when authenticating NAATI translations, DFAT staff do so even if the document which is being translated is not even appended to the translation, thus

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4 The National Accreditation authority for Translators and Interpreters Ltd (NAATI) is the Australian national standards and accreditation body for translators and interpreters. It provides accreditation and credentialing services.

5 In the case of the *Apostille Convention* that will be so only if the document falls within one of the recognised heads.

6 Only certain Commonwealth countries accept statutory declarations for non-court matters. In other countries, affidavits or sworn statements are the norm for verifying translations.
making a nonsense of the entire process. Staff are apparently instructed that they are merely certifying or authenticating the translator’s signature and stamp and that they have no right or duty to look beyond the signature and stamp, provided that the document as presented to them is securely bound.

Chapter 22 of the Consular Services Handbook

As noted above, pursuant to the Vienna Convention, the functions of Australia’s consular officers abroad include “acting as notary”.

The Vienna Convention itself does not provide particulars of the notarial function. The extent of the consular role as notary may be gleaned from the International Law Commissions 1961 Commentaries on the Draft Articles of the (then) proposed Convention. The Commentaries note that:

(11) The notarial functions are varied and may consist, for instance, in:
(a) Receiving in the consular offices, on board vessels and ships or on board aircraft having the nationality of the sending State, any statements which the nationals of the sending State may have to make;
(b) Drawing up, attesting and receiving for safe custody, wills and all unilateral instruments executed by nationals of the sending State;
(c) Drawing up, attesting and receiving for safe custody, deeds the parties to which are nationals of the sending State and nationals of the receiving State, or of a third state, provided that they do not relate to immovable property situated in the receiving state or to rights in rem attaching to such property;
(d) Attesting or certifying signatures, stamping, certifying or translating documents, in any case for which those formalities are requested by a person of any nationality for use in the sending State or in pursuance of the laws of that State. If an oath or a declaration in lieu of oath is required under the laws of the sending State, such oath or declaration may be sworn or made before the consular official;

(12) …
(13) The administrative functions mentioned under paragraph (f) are determined by the laws and regulations of the sending State. They may consist, for instance in:
(a) - (b) …
(c) certifying documents indicating the origin of goods, invoices and the like.

As a rule, the provision of a limited range of notarial services by career staff and on occasion by locally employed staff, is not difficult. However, from time to time, it can be more than a little complex and may require special skill and knowledge. More importantly, errors by consuls acting as notaries potentially can expose DFAT and the government to liability.

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7 Vienna Convention Article 5(f).
The College understands that Australia’s career consular officers who take up their posts abroad receive minimal training in the provision of notarial services; typically from other consular officers who, however experienced as field officers they may be, were themselves minimally trained in notarial practice.

In providing notarial services abroad, consular officers rely on the *Australian Consular Services Handbook Part 5, Chapter 22: Legal processes including notarial services* (Chapter 22).\(^9\)

Not only is Chapter 22 superficial in its approach and content, but it appears to be largely derived from American notarial practice\(^10\). In several places, instructions given to consular officers in Chapter 22 are simply incorrect.\(^11\)

The College is willing and able to assist DFAT in re-drafting Chapter 22 and in training career officers in notarial practice before they take up their posts abroad.

**Training staff in state and territory offices**

It is also understood that staff training in DFAT’s state and territory offices as it relates to authentication services is limited. Training is largely focused on the mechanical aspects of authentication, with little or no attention given to its theoretical underpinning, particularly in relation to the issuing of apostilles under the *Apostille Convention*.

Quality induction training and continuing education programmes are essential, not only to ensure that both front and back office staff have the necessary skills to carry out their tasks efficiently, but also to ensure that they have an appropriate theoretical background to support their roles.

Training programmes need not be lengthy, complex or expensive. Where possible, important stakeholders such as the notariat, tertiary education authorities and officials associated with the generation of civil status documents should be involved in the preparation and presentation of training modules.

The College, in association with local societies of notaries, is willing and able to assist DFAT in the presentation of staff training in relation to the authentication of documents.

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\(^10\) For example, in Australia a “notarial act” is an instrument or certificate that records a fact or something that has been said, done or agreed which is authenticated by the notary’s signature and official seal. In the U.S.A., a notarial act is an action performed by a notary, e.g. the administration of an oath. Chapter 22 describes a “notarial act” in American terms.

\(^11\) For example, the instruction in Chapter 22 concerning the administration of oaths to Muslims specifies the use of a Koran, which is actually religiously inappropriate. (See the Report of the Law Reform Committee, Parliament of Victoria, *Inquiry into Oaths and Affirmations with reference to the Multicultural Community* (2002) 81-2)
Additional “notaries” in Western Australia

Australia became party to the Apostille Convention in 1995. Due to the sheer size of the State of Western Australia and the small numbers of notaries in that state, DFAT decided that Justices of the Peace, who were on duty in courts for the purpose of taking affidavits, were “officials connected with the courts or tribunals of the state”. Therefore their signatures and stamps on documents could attract apostilles provided people went to their local court house to have their documents or copies of documents certified by the duty JP.

Not only are JPs not “officials connected with the courts or tribunals of the state”, but the arrangement has now gone far beyond its original parameters.

On looking up “Authentications and Apostilles” on the DFAT website, a statement is found that in Western Australia, documents may be authenticated by Australian notaries public and “Western Australian Justices of the Peace”. A link headed “Additional Notaries in WA” may be followed which leads to the section of the website of the WA Attorney General’s Department dealing with Justices of the Peace. There are more than 3,000 JPs in Western Australia, all of whom are unqualified. Their only training is a requirement to read a handbook which has one chapter on taking affidavits and witnessing documents. The Handbook contains nothing about certificates or notarial practice.

On the website, under the heading “Find a Justice of the Peace”, there is a direction to “Justice of the Peace Document Witnessing Centres” in a number of WA regional and metropolitan locations, only some of which are court houses. People are told that if they cannot attend a Document Witnessing Centre, they may go to their local JP.

By virtue of bureaucratic indifference and lack of knowledge, over 3,000 Justices of the Peace have become de facto “notaries” in DFAT’s eyes - whether or not the JPs are physically in attendance at a court house.

The College strongly recommends that DFAT take the necessary steps to no longer affix apostilles to the signatures and stamps of Justices of the Peace or authenticate their signatures and stamps for legalisation purposes.

Authenticating academic credentials

Recent years have witnessed an increasing level of concern in government, academic and commercial circles around the world in relation to the perceived problem of fraudulent documents and how to deal with it.12

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12 Fraud and forgery are hardly modern phenomena. Since the earliest time, fraudulent documents have been part of commercial and personal life.

In Rome at the time of the Republic, forgery was well known. (Heather MacNeil, Trusting Records, Legal, Historical and Diplomatic Perspectives (2000), Kluwer Academic Publishers, 2).

The seventh and eighth centuries saw “the clever propagandistic fabrications of [St. Patrick’s writings] by the Church of the Armagh” (Rosamond McKitterick (ed) The Uses of Literacy in Early Medieval Europe (1990) Cambridge University Press, 326)
Of the millions of original and copy documents currently circulating internationally, there is no doubt that many of them are indeed fraudulent or have been fraudulently obtained.\(^{13}\) How many is anybody’s guess. The truth is that nobody knows the extent of the problem. There is however no evidence to suggest that the number of fraudulent or fraudulently obtained documents emanating from Australia is other than negligible.

Currently, attention around the world is focussed on bogus academic credentials which have become an increasing problem for both those called upon to authenticate credentials and for those to whom authenticated credentials are ultimately produced.

In parenthesis, it should be noted that the overwhelming number of academic credentials and certified copies of them presented to DFAT for authentication are genuine. Authentication procedures must therefore primarily be geared towards accommodating the needs of those who require authentication services in relation to legitimate documents.

A large number of Australians have overseas academic qualifications. Migrants and students from countries abroad commonly hold qualifications obtained overseas, many of which were used to assist them in gaining entry to Australia or to Australian tertiary institutions. Most of the qualifications are genuine.

For a variety of reasons, including seeking employment or further qualifications abroad, Australian citizens and residents wish to have copies of their existing credentials notarially authenticated and subsequently legalised by DFAT.

For fear of involvement in fraudulent activities, DFAT is presently declining to authenticate notarially certified original or copies of foreign academic qualifications. The rationale is that certifying copies of foreign academic credentials is a task for notaries in the country of origin of the credentials and not a task for Australian notaries.

An additional rationale offered by DFAT is that by authenticating the signature and seal of a notary who has certified a true copy of a foreign academic credential, DFAT and through it, the Commonwealth Government, will be considered complicit in the fraud if the credential proves to be fraudulent or to have been fraudulently obtained.

Neither rationale has any genuine or worthwhile basis, particularly having regard to the fact that DFAT’s own authentication documents specifically state that DFAT is not certifying the content of the document certified by a notary and is only certifying the notary’s signature and seal.

\(^{13}\) See eg Country Reports of the highly regarded Immigration and Refugee Board of Canada, found in the UNHCR online publication “Refworld” <http://refworld.org>
Forcing people to have qualifications certified abroad places an unreasonable burden on them, particularly when to do so requires the original credential to be sent abroad, with the attendant risks of loss and damage, to say nothing of the delays and inconvenience involved for the Australian citizen or resident.

It is clear that DFAT neither understands nor appreciates the nature of the notarial office in Australia and that, as a rule, the certification of a copy document, of whatever kind, by an Australian notary is accepted worldwide without question.

There are a few exceptions to the rule, largely from countries with limited knowledge of the history, role and function of the notariat. From time to time institutions in those countries and their consular posts in Australia will decline to accept Australian notarial certifications and will insist upon receiving certifications from notaries abroad. In those cases it is pointless to argue and people have no choice but to comply.

Notaries are not forensic document examiners nor are they credential evaluators. If a notary has reasonable cause to believe that a document in relation to which notarial intervention is sought has been fraudulently obtained or is a forgery, he or she is duty bound not to certify a true copy.

Unfortunately, in recent times, several notaries in New South Wales have been involved in the certification of large numbers of documents purporting to be testamurs of foreign academic qualifications. Board members of the College have seen a number of documents that have been certified by those notaries and have sighted examples of their notarial certificates. It is clear from the copies that the original documents were patently fraudulent. It must be said that the activities of the notaries concerned are a disgrace to the office of notary. In certain cases, those activities ought to result in the notaries being prosecuted and ultimately struck off the roll of notaries.

The College is prepared to assist and act in concert with DFAT and with relevant local societies of notaries to bring about punitive sanctions against notaries who consistently and flagrantly act improperly in relation to academic qualifications.

To do so requires the active co-operation of DFAT. When problems arise, it is important that DFAT communicates with the College, both to give and receive advice.

This Submission is not the place to discuss the appropriate wording of notarial certificates concerning original and copy academic qualifications. The College is presently in discussion with DFAT about that matter.

**The electronic apostille programme**

The *Apostille Convention* commenced life 52 years ago in a wholly paper environment. Times have changed. Due to its importance as an essential tool in the conduct of world trade and commerce, the apostille is being adapted to meet the changing times and to remain relevant to government and individuals and businesses involved in cross-border activities.

The electronic apostille programme ("the e-APP") is now well and truly on foot. It comprises two components designed and developed by the Permanent Bureau of the Hague Conference.
The first component is the electronic apostille itself, which allows applicants to receive an apostille on-line for a public document.

The second component is the electronic Register which enables a Contracting State to maintain a publicly searchable electronic register of all apostilles - electronic or not - which have been issued by the Competent Authorities of the State.\(^\text{14}\)

Australia is lagging well behind other comparable countries. Development of the e-APP does not appear to currently be in DFAT’s agenda. The e-App should be an integral part of the way DFAT will deliver services in the future. There is no reason why DFAT should not be moving ahead with the implementation of the electronic register as the first step to ultimately introducing the full electronic apostille programme.

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7 February 2014

\(^{14}\) There is a wealth of material about the e-APP and its implementation, which is available on the Hague Conference website <hcch.net>