

Challenges facing the notariat in Australasia in the 21st century

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INTRODUCTION

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The continuing development of electronic transactions provides more opportunities, if not technical challenges, for the notariat. Potential liability in contract and tort also exposes notaries to greater professional risk. The immediate effect of these challenges is that the notariat must strengthen its professional discipline and education. The longer-term effect may include a reduction in the opportunities for "part-time" notaries, and a greater professionalisation of the office.

Before discussing the specific challenges for the notariat, an explanation first about the origins and nature of the office of public notary (or notary public).

BACKGROUND

An understanding of the office of notary is only possible within its historical framework. Notaries Public¹ are creatures of the civil law, though they have a long been a feature of the common law world, being mentioned in the *Statute of Provisors 1352*.² They were long ecclesiastical officers,³ appointed from 1533⁴ by the Master of the Faculties to the Archbishop of Canterbury,⁵ in order to substantiate evidence of human activities.⁶ English notaries, and those in New Zealand, Queensland and other Commonwealth jurisdictions, remain appointees of the Faculties Office. However, most

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¹ Also called notaries, or public notaries; in Latin this is variously *registrarius*, *actuarius*, or *notarius*. The modern notary corresponds rather to the *tabellis* or *tabularius*, rather than to the *notarius*, who was a scribe (and often a slave).

² 25 Edw III stat 4 (Eng).

³ In canon law, a notary is a person legitimately constituted by ecclesiastical authority to authenticate by his or her signature ecclesiastical documents. By the fourth Lateran Council (1215), every ecclesiastical court was required to have a notary. In the Roman Catholic Church, the notary is commonly in holy orders. Lay notaries did not appear until as late as the 14th century.

⁴ By the *Ecclesiastical Licences Act 1533* (Eng) (25 Hen VIII c 21). This Act has been repealed so far as New Zealand is concerned, by the *Imperial Laws Application Act 1988* (NZ), though appointments of notaries by the Master of the Faculties continues. The relevant section, s 2, was repealed in England and Wales by the *Statute Law Repeals Act 1969* (UK). Formerly, all notaries throughout Western Christendom were appointed by, or with the authority of the Pope. In England, some bishops

Australian jurisdictions now provide for notaries to be appointed under the supervision of the respective State and Territory Supreme Courts. For example, in Victoria to be appointed an applicant must be fit and proper natural person and a practising lawyer of at least five years' standing.⁷ An applicant must also have completed to the satisfaction of the Board of Examiners a course of study related to notarial practice approved by the Council of Legal Education. These requirements are key to ensuring that notaries are suitable legal practitioners fit for the role.

The notary is a civil lawyer practising generally in non-contentious matters, though frequently notaries are called upon to authenticate documents for use in court proceedings or even to conduct deposition hearings for foreign parties. They are not advocates. Nor do they have the same relationship with their clients, as does a solicitor. However, in practice this is complicated by the fact that, in Australasia, all notaries are practising lawyers, such as solicitors.

The notary is at once the holder of a public office⁸ and a member of a distinct branch of the legal profession.⁹ In Australian jurisdictions the accepted view¹⁰ is that a notary is a practising lawyer who holds a unique public position of trust and fidelity with power to authenticate instruments especially in

received faculties to appoint notaries, while others were appointed directly by the Pope. There was, however, no general delegation to the Archbishop of Canterbury, or any other bishop. The Clerk of the Crown in Chancery no longer registers notaries public, as formerly – *Courts and Legal Services Act 1990* (UK), s 57(10).

⁵ The Commissary or Master of the Faculties is the head of the Court of Faculties, and also, as Dean of the Arches and Auditor, Judge of the Provincial Courts of Canterbury and York. The authority to appoint notaries is found in the *Ecclesiastical Licences Act 1533* (Eng) (25 Hen VIII c 21), the *Public Notaries Act 1801* (UK) (41 Geo III c 79), the *Public Notaries Act 1833* (UK) (3 and 4 Will IV c 70), the *Public Notaries Act 1843* (UK) (6 and 7 Vict c 90), and the *Courts and Legal Services Act 1990* (UK).

⁶ The faculty issued by the Office of the Master of the Faculties clearly sets out the responsibilities of a notary. The wording of a modern faculty appointing a notary in England and Wales, and the accompanying Oath of Allegiance and Declaration of Office are as follows –

by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, by Authority of Parliament lawfully empowered for the Purposes herein written: To Our Beloved in Christ, [...], a literate Person now residing at [...], Health and Grace: We being willing, by reason of your merits to confer on you a suitable Title of Promotion, do create you a Public Notary; previous Examination and all other Requisites to be herein observed having been had: And do out of Our Favour towards you, admit you into the number and Society of other Notaries, to the end that you may henceforward at [...] and all other places in England and Wales whatsoever [clauses of limitation or exception, for instance "except within the jurisdiction of the Incorporated Company of Scriveners of London"] exercise such office of Notary, hereby decreeing that full faith ought to be given, as well in judgement as thereout, to the Instruments to be from this time made by you: the Oath and Declaration hereunder written having been by Us, or our Master of the Faculties first required of you and by you duly taken and subscribed.

The Oath of Allegiance

I, [...], do swear by Almighty God, That I will be faithful and bear true Allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, according to Law.

The Declaration of Office

I, [...], do solemnly, sincerely, and truly declare and affirm that I will faithfully exercise the office of a Public Notary; I will faithfully make Contracts or Instruments for or between Party or Parties requiring the same and I will not add or diminish anything without the Knowledge and Consent of such Party or Parties that may alter the substance of the Fact; I will not make or attest any Act, Contract or Instrument, in which I shall know that there is violence or fraud; and in all things I will act uprightly and justly in the Business of a Public Notary, according to the best of my Skill and Ability.

Given under the Seal of Our Office of Faculties at Westminster this [...] day of [...] in the year of Our Lord, One Thousand and nine hundred and [...] and in the [...] year of Our Translation.

[signed]

[LS] Registrar

⁷ *Public Notaries Act 2001* (Vic), s 4.

⁸ Continental notaries tended to assume more the position of a public official before whom wills were proved and probate granted and by whom official records were maintained. None of these functions applied under the common law, probate being of course a matter for the church courts until the passage of the *Court of Probate Act 1857* (UK) (20 and 21 Vict c 77). The *Poor (Burials) Act 1855* (UK) (18 and 19 Vict c 79) had the same effect in Ireland.

⁹ One of the oldest officers of the law, the notary first developed in response to the need for reliable authentication of documents executed in one jurisdiction for use in another.

international matters. There is not in practice a separate profession of notary public, rather it is an office that is performed by practising lawyers. The notary is an officer of the law whose public office and duty it is to draw, attest or certify under his or her official seal, for use anywhere in the world, deeds and other documents. The international standing of notaries public gives authenticity to documents verified by them.¹¹

There has been no attempt in the common law world to codify the precise nature of the office of notary public as has been done in continental Europe, Latin America, and other parts of the world whose legal systems are based on principles derived from Roman law. The functions of notaries may however be gleaned from a number of sources. The chief of these is custom, principally the law merchant. To a limited extent case law provides guidance, and some statutes deal with specific aspects of their work. For example, the functions of notaries have some statutory recognition in various legislation such as the *Evidence Act 1995* (Cth)¹² and the *Bills of Exchange Act 1909*.¹³ By virtue of his or her office, the notary's signature,¹⁴ and seal,¹⁵ are recognised as being evidence of a responsible officer in most countries of the world.¹⁶

Although disparate duties fall to the notary public, they have as a common element the ancient function to substantiate evidence of human activities. This is clear in the wording of a modern Declaration of Office of a notary public appointed by the Master of the Faculties:

I will faithfully make Contracts or Instruments for or between Party or Parties requiring the same and I will not add or diminish anything without the Knowledge and Consent of such Party or Parties that may alter the substance of the Fact; I will not make or attest any Act, Contract or Instrument, in which I shall know that there is violence or fraud; and in all things I will act uprightly and justly in the Business of a Public Notary, according to the best of my Skill and Ability.

Various officers are empowered to witness the taking of a declaration, statutory declaration, and similar evidentiary instruments.¹⁷ Some of these, such as Justices of the Peace, and solicitors, are relatively numerous. While there are in New Zealand, for instance, some 15,000 solicitors,¹⁸ and 6,000 Justices of the Peace, there are only 200 notaries public. Their role however is unique, being concerned with commercial transactions. More importantly, the notary is recognised by private international law in a way that the other officers are not. By the law of nations, the acts of a notary

¹⁰ See for instance Leyser J, "Notaries in Australia" (1964) 37 ALJ 308; Zabllud P, *Principles of Notarial Practice* (Psophidian Press, Melbourne, 2005) p 37.

¹¹ See for instance, *The King v Scriveners Co* (1830) 10 B & C 519; *Re Trade Mark of Ryan Lewis & Co Pty Ltd; Ex parte Autotone Co* (1918) 24 CLR 460.

¹² *Evidence Act 1995* (Cth), ss 148 and 186.

¹³ *Bills of Exchange Act 1909* (Cth), ss 56(7).

¹⁴ The attestation and signature should be in ink rather than written with a ballpoint pen, which is liable to fading.

¹⁵ A notarial seal is not strictly necessary, but is invariably used. If the notary is armigerous, he or she may use their own arms on the seal. Seals are usually embossed, with an intaglio of case hardened steel and a relief of copper. This may be used with or without a wafer.

¹⁶ A court will take judicial notice of Commonwealth notary's seal and signature; *Brooke v Brooke* (1881) 17 Ch D 833. However, judicial notice will only be taken of a local notary's protest of a foreign bill as a result of ss 51(2) and 95(1) and the Second Schedule of the *Bill of Exchange Act 1908* (UK); *Poole v Dicas* (1835) 1 Bing NC 649; 131 ER 1267 [though this was questioned in *Brain v Preece* (1843) 11 M & W 773 at 775; 152 ER 1016 (Lord Abinger)].

¹⁷ Section 9 of the *Oaths and Declarations Act 1957* (NZ) confers upon notaries the authority to administer oaths and statutory declarations. Similar authority is conferred upon Justices of the Peace, solicitors, Registrars or Deputy Registrars of the High Court or of any District Court, or "any other person by law authorised to administer an oath", any employee of New Zealand Post Limited or Post Office Bank Limited, officer in the service of the Crown, or of a local authority from time to time authorised for that purpose by the Minister of Justice or any member of Parliament.

¹⁸ Including those qualified to practise as barristers, but formerly excluding barristers sole, who could not act as notaries public; *Code of Ethics* (1980) r 5.14 [though the equivalent rule is absent from the *Rules of Professional Conduct for Barristers and Solicitors* (5th ed, 1998 – and now the *Lawyers and Conveyancers Act (Lawyers, Conduct and Client Care) Rules 2008* – the Master of the Faculties does not appoint barristers sole to the office of notary, and its nature is quite distinct from the day-to-day function of counsel].

have credit everywhere.¹⁹ The fundamentally important aspects of the notaries' office, I would argue, is their ubiquity, and that their responsibility is to the transaction itself, to ensure that it is legally binding.²⁰ They remain under the same professional obligation to their client as a non-notary lawyer and thus bound to respect the incidents of that relationship including client legal privilege and confidentiality.²¹

INCREASING PROFESSIONALISATION OF THE NOTARIAT

The notariat in the common law world has undergone some significant recent changes. In Australia it became an indigenised office or profession, though generally without significant implications for the nature or role of the office. In England the *Courts and Legal Services Act 1990* (UK) saw the emergence of the notarial profession in England and Wales from a long period of legislative neglect. This was caused in part at least by the entry of the United Kingdom into the European Community.

The growing international contacts of the legal profession had led to an appreciation of the importance of the role played by notaries in the civil law jurisdictions of continental Europe. This, combined with broader efforts at professionalising the legal profession, led to moves to bring the profession within a tighter regulatory framework analogous to that existing in the other branches of the legal profession. Similar forces are at work in Australasia.

ELECTRONIC "CHALLENGES"

Aside from regulatory changes to the environment in which the notariat operates, changes in technology have been said to have had significant implications. One of these is the advent of the internet and electronic communications generally. In notarial practice it happens that a person may wish to have certified a document that is accessed electronically. This occurs in respect of many documents filed at the Australian Securities and Exchange Commission and in other public records.

There appear to be no legal difficulties in authentication which are unique to electronic documents. Indicia of authenticity such as signatures may have technological equivalents, such as digital signatures. It may also be comparatively straightforward to determine the date or accuracy of contents of an electronic document.²² There is nothing in the current law which requires a specific change to be made to accommodate any difficulties in the authentication of computer documents. Specific difficulties caused by legislative provisions requiring "documents" to be "in writing" and "signed" by the parties to a contract may require alteration to pre-existing laws.²³ The use of signatures as a physical manifestation of consent or as a requirement of law presents an immediate difficulty for those who would prefer to transact business electronically.²⁴

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce provides that an electronic signature may be legally effective as a manual signature, but does not define an electronic signature.²⁵

In New Zealand the *Electronic Transactions Act 2002* (NZ) is based on work carried out by the Law Commission, and closely follows both the Model Law on Electronic Commerce prepared by UNCITRAL in 1996 and the Australian *Electronic Transactions Act 1999* (Cth).

¹⁹ *Hutcheon v Mannington* (1802) 6 Ves 823 at 824 (Lord Eldon, LC); 31 ER 1327.

²⁰ See, for instance, Lello M, *Notaries Public – Perspectives and Practical Tips* (September 2013) <http://www.parkerbulletin.co.uk/news/notaries-public-perspectives-and-practical-tips>; Continental notaries tended more to assume the position of a public official before whom wills were proved and probate granted and by whom official records were maintained. None of these functions applied under the common law.

²¹ Save where an exception applies, such as s 125 *Evidence Act 2008* (Vic). For the general rule as to the client relationship see, for instance, the "Interpretative Notes" in *Financial Action Task Force Recommendations* (FATF, February 2012) p 31.

²² Law Commission, *Electronic Commerce Part One*, Report 50 (Wellington, 1998) para 235.

²³ Law Commission, n 22, para 237.

²⁴ Law Commission, n 22, para 310.

²⁵ Article 7 of the United Nations Commission on International Trade (UNCITRAL) Model Law on Electronic Commerce.

The purpose of the Act is to facilitate the use of electronic technology. This it does by reducing uncertainty regarding the legal effect of electronic communications, and allows certain paper-based legal requirements to be met by using functionally equivalent electronic technology.²⁶ It also provides that every enactment passed before or after the commencement of the Act shall be read subject to Pt 3 of the Act.²⁷

The principles applicable to the making of a contract by electronic means should be no different to the principles applicable to contracts formed orally or in writing on paper. Indeed, the decided cases appear to have accepted that proposition as self-evident.²⁸

Under Art 7 of the United Nations Commission on International Trade (UNCITRAL) Model Law on Electronic Commerce, the elements of the functional equivalent to a signature are the need:

- to identify the person and to indicate that person's approval of the information contained in the data message; and
- for the method to be as reliable as was appropriate for the purpose for which the message was generated or communicated.²⁹

Article 7 only applies where a signature is a requirement of law. Where a signature is not required by law then the normal rules in relation to proving an agreement apply.

Legal documents will still require authentication – which will require the involvement of officers such as notaries. As yet there is no practical means for them to certify or authenticate electronically. But that does not appear to present particular difficulties for the notary or another other legal officers. Indeed, the provisions of the *Evidence Act 1995* (Cth) and corresponding State and Territory legislation,³⁰ provide solutions to these challenges.

In the main notaries will continue to authenticate transactions on the basis of parties executing documents in their presence. They may be called upon to verify or certify copies of contracts, for example, formed electronically. To do this it might be necessary to have a party make an affidavit as to the execution of the document electronically and reference the various electronic transmissions, such as emails, giving rise to the document. In such a situation the notary's function is to ensure that there is a way of confirming the existence of the document based on the available evidence in electronic form. It is not, however, the notary's function to confirm or verify the validity or enforceability of the document, which may require the addition of a legal opinion.³¹

CHANGES IN PRACTICE

The advent of new requirements for regulation, supervision and enforcement will mean that the costs borne by members of the profession, individually and collectively, will increase. This will place pressures on the notariat, which has traditionally comprised solicitors who hold an additional appointment as notary.

Roscoe Pound viewed a profession as composing a common calling in the spirit of public service.³² Similarly, according to Benna Lutta, the legal profession "can be said to be a kind of priesthood and dedicated to public service."³³ Hence, it logically follows that the goodwill of the legal

²⁶ Explanatory Note to *Electronic Transactions Bill*.

²⁷ Section 14 of the *Electronic Transactions Act 2002* (NZ).

²⁸ *Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC); *Corinthian Pharmaceutical Systems Inc v Lederle Laboratories* 724 F Supp 605 (1989); Law Commission, n 22, para 52.

²⁹ Law Commission, n 22, paras 316-320, 344-345.

³⁰ See for instance *Evidence Act 1995* (Cth), ss 153-158.

³¹ For example, the question might arise as to the content or enforceability of a contract on *Masters v Cameron* (1954) 91 CLR 353; 28 ALJR 438 principles.

³² Pound R, *The Lawyer from Antiquity to Modern Times* (West Publishing Co, St Paul, Minn, 1953).

³³ Lutta B, "The Role of the East African Lawyer" in Kibwana (ed), *Human Rights and Democracy in East Africa: The Constitutional Implication of East Africa Co-operation* (East Africa Law Society, 1997) pp 16-32.

profession largely depends on the people it serves, that is, members of the public. The members of the public have to be able to trust the profession if they are ever going to be comfortable charging the profession with the aforementioned functions.

Consequently, to perform the said functions in the spirit of public service, a high ethical and professional standard must be maintained within the rank and file of the legal profession. The lawyer must consequently, amongst others things, be of high integrity, probity, honesty and competent. Like in any other profession, members of the legal profession must shun those things which are likely to bring the profession into disrepute. They must exhibit a great sense of integrity, and, must give proper professional service. As professionals, therefore, they should be viewed as a bulwark of society, and not an obstacle to progress.

Of necessity, lawyers should identify themselves in a positive and practical manner with the aspirations and efforts of the people they serve. They should shirk complacency and constantly engage in the reappraisal of values and methodologies. By so doing, lawyers will be able to establish and justify their worth in society.

The need for lawyers to maintain a professional and ethical standard becomes even more imperative when it is considered that they have historically been regarded as constituting or belonging to a profession. Western society traditionally restricted the term “professional” to persons engaging in three activities: law, medicine and the church, though present day society have tended to add accounting, architecture and engineering (and certain others) to the list of professions. The notion that lawyers constitute a profession holds sway in most, if not all, the world.

It is a commonplace that legal professions will be self-governing or at least co-regulating. This is partly because of their important role in the legal system, but also because they constitute a learned profession. At its broadest a profession may be seen as distinct from a mere trade or occupation, and as such entitled to different treatment before the law; different, but not necessarily privileged. With great privileges come great responsibilities.

There is considerable international literature on professions, and their regulation, and an important sub-set on the legal profession. The 1979 British Royal Commission on legal services identified what it thought were five main distinctive features of a profession. Each profession has:

- a governing body (or bodies) [that] represents a profession and has powers of control and discipline over its members;
- [mastery of] a specialised field of knowledge. This requires not only the period of education and training ... but also practical experience and continuing study of developments in theory and practice;
- admission ... dependent upon a period of theoretical and practical training in the course of which it is necessary to pass examinations and tests of competence;
- [a] measure of self regulation so that it may require its members to observe higher standards than could be successfully imposed from without; and
- [an understanding that a] professional person’s first and particular responsibility is to their client. The client’s case should receive from the adviser the same level of care and attention as the client would himself exert if he had the knowledge and the means.³⁴

The first of these elements is particularly important in the context of this Report, concerned as it is with the maintenance of professional ethics.

The American Bar Association’s Commission on Professionalism identified a profession with the placing of the interests of others ahead of one’s own. In the case of the lawyer, the interests of the client must be placed ahead of those of the lawyer. The lawyer must also give precedence to the interests of the courts and of the justice system, as well as to those of third parties and of society as a whole. The hallmarks of a profession are integrity and service.³⁵ Since service is a primary objective,

³⁴ Royal Commission on Legal Services, *Final Report* (Her Majesty’s Stationery Office, London, 1979) Vol 1, pp 28, 30.

³⁵ Royal Commission on Legal Services, n 34.

the monetary reward must be relegated to second place. Thus rendering legal assistance to impecunious criminal defendants is a professional duty.³⁶

A profession will tend to be concerned with personal confidence of the client in the technical competence of practitioners, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole.³⁷ This has certain implications for the way in which professional misconduct is defined, and how it is handled. For example, while a disciplinary tribunal must have sufficient professional standing to be taken seriously by the legal profession, it must also seek to attract widespread public support for its actions.

Because standards cover conduct and competence, both technically and ethically, control must be exercised over both entry into the profession and conduct within it. It follows that by membership practitioners may be subject to sanctions for acts or omissions which do not violate the criminal or civil law.³⁸ Only statutory regulation can ensure that the disciplinary sanctions are effective. Thus it is normal for legal professions to be subject to binding codes of conduct and punishable for infringing these codes, whether or not their action also constitutes a civil wrong or a criminal offence under the general law.

Controls over the conduct of members of the legal profession include personal remedies in tort, contract or equity; the criminal law; an educational standard for entry; procedural and substantive requirements for admission to the bar; restrictions as to the right of entry into private practice; procedural and substantive requirements for issuing a practising certificate; continuing requirement of physical and mental fitness; provision of taxation of bills of costs; provision for strict control over trust accounts; requirements of membership of law societies (who have disciplinary procedures and sanctions).³⁹ A lawyer could not rely on their private involvement to opt out of any professional duty owed to the client.⁴⁰

Some of these controls belong to the wider law, but some are specific and reflect the fact that members of the profession voluntarily submit to higher standards of conduct than those required by ordinary citizens, and thereby render themselves liable for professional misconduct in addition to any penalty which the common or statute law may impose.⁴¹

To ensure that all those interested in the maintenance of professional conduct at the highest possible standard by the best possible measure to be satisfied, one must look to the system currently operating in disciplinary matters and compare it with a theoretical but attainable ideal as to how the disciplinary system of the profession should be designed; who should exercise its powers and by what procedures; and what powers should be conferred and how should the conditions for the exercise of the powers be defined.⁴²

To understand the role of statutory regulation of the professions it must be understood that the learned professions are bound together in a common discipline which creates a spirit of fraternity, scholarship and public service. The free market economic approach widely adopted by governments worldwide does not rest upon the same intellectual and public service basis. Business typically calls for skill, not learning, and the objective is profit, not service.

³⁶ *Darvell v Auckland Legal Services Subcommittee* [1993] 1 NZLR 111 at 120 (Williams J).

³⁷ *Royal Commission of Inquiry into Civil Rights* (1968-1971) (Ontario) Vol 3, No 1, para 1161 (McRuer Report).

³⁸ Flaus WR, "Discipline within the New Zealand Legal Profession" (1973) 6 *Victoria University of Wellington Law Review* 337 at 338.

³⁹ Flaus, n 38 at 339.

⁴⁰ *Sims v Craig Bell and Bond* [1991] 3 NZLR 535.

⁴¹ Abeysuriya R, "The Legal Profession" in "Selected Extracts from Papers Given at the [LAWASIA 1993 Colombo] Conference" [1993] *New Zealand Law Journal* 414.

⁴² Flaus, n 38 at 339.

The premise for the statutory regulation of professions is that it is necessary for a profession to have the power of control and discipline to suppress dishonourable or improper practices among its members and thereby maintain professional standards. Self-regulation without statutory authority is possible, but unlikely to be truly effective.

In the 1980s movement towards economic liberalisation in many countries led to the role of professions being re-examined. This included a widespread assumption that the only need for occupational regulation was to provide information. The whole issue was then reduced to one of minimising the cost of obtaining information. The alternatives proposed were government-imposed arrangements such as occupational licensing, and voluntary private arrangements such as trade associations. Fortunately this free market approach to professions is no longer in favour internationally, nor did it ever have more than a marginal effect on the legal professions of Commonwealth countries.

If professional rules and ethics and their enforcement ceased to be the concern of professional bodies, professions would become merely voluntary associations, no longer having responsibility for admission standards, ethical standards and professional discipline. The obsession with economics and the free market, the general lack of understanding of the way in which professional bodies operate, and the belief that self-interest has been the motivation for professional bodies could lead to the demise of the professions as they are recognised internationally.⁴³ Even the legal profession would not be safe from the pressure to “de-regulate”.

The right of a profession to self-discipline is not automatic, though in the case of the legal profession it is based on long and historic tradition and has received legislative recognition. The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest.⁴⁴ On the other hand, these professional associations act as a counter-weight to an increasingly monolithic state.⁴⁵ A balance must be struck between government interests, non-government interests and professional interests.⁴⁶ This is particularly true with respect to the provision of disciplinary procedures, and codes of conduct and ethics.

The traditional justification for giving powers of self-regulation to any body is that the members of that body are best qualified to ensure that proper standards of competence and ethics are set and maintained. This is generally true, but the risk is that the powers may be exercised in the interests of the profession or occupation rather than in the interests of the public.⁴⁷ This requires safeguards to be integrated into the system, safeguards which commonly require a degree of lay involvement and/or that processes occur in public (subject to certain matters which should be kept confidential) and are thus subject to public scrutiny. It may be that the public rarely avails itself of this privilege, but it should be preserved regardless.

For a profession to justify any powers or privileges which it may receive, it must be able to show that it is not selfishly concerned for its own interest but has regard for that of the public. It must show itself worthy of the power of domestic discipline which is conferred upon it. For this reason lay members should generally be appointed to the governing bodies of all self-governing professions and occupations. Non-legal professional bodies have a long tradition of lay members.⁴⁸ For the bodies to be dominated by lay members however would be a perversion of the reason for including non-professionals. Recently there have been some legal professions where the number of lay members almost equals the numbers of lawyers on disciplinary bodies. This is perhaps going a little too far in this direction, as it threatens to undervalue the principle that members of a profession are best qualified to ensure that proper standards of competence and ethics are set and maintained.

⁴³ Rt Hon Mr Justice McKay, “Professions at Risk” [1993] *New Zealand Law Journal* 104 at 106-107.

⁴⁴ McRuer Report, n 37 at para 1162.

⁴⁵ Abel R, *The Legal Profession in England and Wales* (Oxford: Basil Blackwell Ltd, 1988) p 7.

⁴⁶ Ross S, “The Solicitors (Amendment) Act 1974 (UK): Its Relevance to Australia” (1975) 49 ALJ 268 at 272.

⁴⁷ New Zealand Public and Administrative Law Reform Committee, “Working Paper Relating to the Disciplinary and Complaints Procedure of the Legal Profession” (1977) p 3.

⁴⁸ Abel Smith B and Stevens R, *Lawyers and the Courts* (Harvard University Press, Cambridge, 1967) p 192.

The recent debate on the role and regulation of the legal profession has led to significant changes in both Australia and New Zealand. Important recent developments in Australasia have included the emergence of national standards in respect of the legal profession, such as are embodied in the *Legal Profession Act 2004* (Vic) and the *Lawyers and Conveyancers Act 2006* (NZ). Specific changes with respect to the notarial profession have included the recent activities of notarial societies that now include, at least in Victoria, educational activities and annual conferences. The establishment of the Australian and New Zealand College of Notaries in 2008 is also an example of the proactive approach that has been taken. The Australian States and Territories are presently giving effect to a national-based legislative scheme for the profession.⁴⁹

Notaries must be professionally active, for instance in the requirement in the *Public Notaries Act 2001* (Vic), that a notary must be a practising lawyer.⁵⁰ This means that a notary must hold a relevant current practising certificate. Critically, however, it is unlikely that the need for periodic reassessments of the role, training and regulation of notaries will decline. Indeed, it is likely to become ever more important.

CONCLUSION

The challenges facing the notariat in Australasia are many, but few are unique to the profession. Indeed the most significant is the revival and strengthening of the identity of the notariat as a distinct but fused – in most common law jurisdictions – profession, imbued with its own unique characteristics. This will bring with it increasing professionalisation, and increased costs, but will ultimately strengthen the profession.

⁴⁹ See, for instance, the *Legal Profession Uniform Law Application Act 2014* (Vic) (No 17 of 2014).

⁵⁰ *Public Notaries Act 2001* (Vic), s 4(1)(b).