

ADD-MINISTRY INC.

OBLIGATIONS OF COMMITTEE SECRETARIES

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**With acknowledgements to the assistance of members of the AUSTRALIAN
NOT-FOR-PROFIT ACCOUNTANTS NETWORK INC**

Disclaimer: While every effort has been made to comprehensively cover the requirements and responsibilities for Administrators & Secretaries, there are so many specific responsibilities that may apply in specific situations and as legislation affecting areas of responsibility is subject to constant change the matters indicated in this paper should be treated as a guide only and not be relied upon by themselves without appropriate research of the current provisions and without seeking appropriate professional advice.

Introduction

In this session we will attempt to cover the large number of requirements and procedures that you and your organization need to fulfil in order to comply with its legal obligations and still function effectively. We will cover the requirements of the Associations Incorporation Act WA, the Corporations Act and in the process will be looking at practical issues such as the convening of meetings, maintaining Minutes, registers, custody and use of the Common Seal.

In this discussion we will be using the words Administrator, Company Secretary, Committee Secretary and Secretary interchangeably.

The law of meetings and the administration of incorporated associations and companies comes with substantial history. The WA Associations Incorporation Act 1987 refers to the repealing of the 1895 legislation. The Corporations legislation has been around formally in Australia since early last century. The customs and processes inherent in both these Acts dates back into the 18th century. So being that steeped in centuries of tradition it will naturally need reinventing to bring it all into our modern world. Or can we learn from others mistakes and as a result have better outcomes?

There are a good number of books written on the Law of Meetings and I encourage you as a person concerned with this area of organizational operations, to seek one out at the Government Information Office, or at the libraries of the Institute of Company Secretaries, or one of the professional accounting bodies.

The Role of a Secretary

So let's look at the role of a Committee Secretary.

The role a Secretary performs within an entity necessarily varies with the:

- size and type of entity
- nature of the activities
- composition of membership, legislative and other obligations imposed on the entity; and
- expectations

There are however core responsibilities that are almost inevitably undertaken by the Secretary. There are also common tasks and responsibilities that are carried by many.

Common Secretary Roles

A number of company secretaries wear other hats. Commonly, these can include:

- Accountant
- Lawyer
- Senior manager
- Membership Registrar

The following functions are often undertaken:

- Governance, with responsibility for legislative compliance (for example, compliance with environmental legislation, trade practices, fundraising etc) and for the establishing and maintaining appropriate governance practices, monitoring and reporting procedures.
- Insurance, ensuring appropriate insurances are in place, monitoring policy terms and premiums and completing insurance proposals.
- Intellectual property protection, ensuring that business names, logos, trademarks and patents, etc are registered and that use of intellectual property is monitored.
- Development of organisational policy in administrative matters, such as drafting Policy Manuals.
- The provision of legal advice, including in relation to taxation, superannuation, employee benefits.
- Signatory to bank accounts, company documents, certifying copies of documents.
- Ensuring the correctness of material representing the organisation to the public in brochures, advertisements, web-site, and in the Annual Report.
- Senior management team member, participating in decisions regarding the organisation's activity, including involvement in strategic planning.
- Interaction with statutory authorities as the proper, public or designated officer.
- Public spokesperson, for example, in relation to business matters or crises that arise.
- Entity representative, for example, at meetings with auditors, unions, consultants, lawyers etc.

The extent to which these duties and responsibilities fall into your jurisdiction in your particular organization may seem to depend on the history of the organization but it would be helpful to you to understand what you are legally responsible for.

Statutory Duties of Secretaries

“More limited statutory duties apply to Committee Members under the Associations Incorporation Act 1987 (“the Act”) compared to those which apply to Company Directors under the Corporations Act. Committee Members owe statutory duties including the obligation to take “reasonable steps to secure the Association’s compliance with Act” (s.42) and to avoid conflicts of interest by disclosing pecuniary interests in proposed contracts (s.21) and abstaining from deliberations (s.22). Liability also falls on Committee Members who knowingly make or authorise false or misleading statements or omissions in documents lodged with the Commissioner or submitted to member (s.43).

Potentially, Committee Members can also be liable for insolvent trading under the Corporations Act, but there is some doubt over whether this result is achieved due to the way the legislative provisions and regulations have been drafted (s.3A, ss.30(4), 31 and 32 of the Act and the *Associations Incorporation Regulations 1988* (WA), r.6(1) and r.8). My advice is; don’t be the one to test it! (See also below**).

Other potential sources of statutory liability for Committee Members include liability under the *Income Tax Assessment*, Pt.VI Div.9 (director penalties), *Fair Trading Act*, *Occupational Safety and Health Act* and the *Criminal Code*.”

(Jackson McDonald Lawyers, 2001)

The Secretary of an Association is a Committee Member and as such carries all of the duties and obligations of a committee member. The Model Rules produced by the Department of Commerce provide:

10 (1) *Subject to sub-rule (9), the affairs of the Association will be managed exclusively by a Committee of Management consisting of-*

- (a) a Chairperson;*
- (b) a Vice-Chairperson;*
- (c) a **Secretary**;*
- (d) a Treasurer; and*
- (e) not less than _____ other persons,*

all of whom must be members of the Association

Under the Corporations Act a Board Member can be indemnified out of the assets of the organization however there appears to be no equivalent in the State legislation.**

Sec.6 of the *Volunteers Protection from Liability Act 2002* (WA) gives volunteer workers protection from civil liability for anything done in good faith when doing community work. This legislation has a commencement date of 1 January 2003. To qualify for this protection, the work must be organised by an incorporated association, a local government or other body corporate or by a State agency or instrumentality or department of the Public Service for a prescribed community purpose (all the prescribed purposes in s.4(1) of the *Act* qualify) and the volunteer must receive no remuneration for doing the work (except reimbursement of reasonable expenses).

This protection does not extend to liability for defamation or for death or bodily injury caused while driving a motor vehicle, or where the volunteer was significantly impaired by drugs or alcohol or knows or reasonably ought to have known that they were at the time acting contrary to instructions or outside the scope of the community work that has been organised.

If the voluntary worker is protected from liability under s.6 then liability will fall on the community organisation that organised the work (s.7).

(Jackson McDonald Lawyers, 2001)

But does any of this protect the Secretary from responsibilities of his office? I think not.

If a member of a committee of an incorporated association fails to take all reasonable steps to ensure the association complies with its obligations under the Act, the member commits an offence and is liable to a maximum fine of \$500 (s. 42). Penalties under the upgraded Act are expected to increase significantly. This personal obligation of committee members is a very important one. It means that all committee members **MUST** do what is reasonable to make sure that the obligations on the association under the Act are complied with, or they may face prosecution.

Under the Corporations Act ASIC can prosecute for severe civil penalties and possibly damages unless you have acted in good faith, without a conflict of interest, in an informed manner and sensibly believed the action was in the best interests of the organisation. However, the Department of Commerce (WA) have given assurances that under the upgraded Act prosecution and fines will be referred to as a “last resort” reserved for very serious breaches of the Act. Their aim will be to educate rather than penalise.

The duties of individual committee members described in an association’s rules may assist them in working out what are the reasonable steps for them to take.

Many people underestimate the skills required to properly fulfil the role of Secretary. Many just regard a Secretary as the minute taker at meetings. How many of your organizations have a job description or a duties and responsibilities statement which defines your actual role? Have you looked closely at your Constitution to see just what your responsibilities are?

The Corporations Act states that all public companies are required to have a Secretary who must be a natural person over 18 years of age, ordinarily resident in Australia and not otherwise disqualified.

Specific Obligations of Secretaries

Specified duties and responsibilities as set out in the Constitution. The Model Rules for WA Incorporated Associations is quite clear:

12 The Secretary must-

- (a) co-ordinate the correspondence** of the Association;
- (b) keep full and correct Minutes** of the proceedings of the Committee and of the Association;
- (c) comply on behalf of the Association with-**

(i) section 27 of the Act with respect to the **register of members** of the Association, as referred to in rule 6;

(ii) section 28 of the Act by keeping and maintaining in an **up to date** condition the **rules of the Association** and, upon the request of a member of the Association, must make available those rules for the inspection of the member and the member may make a copy of or take an extract from the rules but will have no right to remove the rules for that purpose; and

(iii) section 29 of the Act by **maintaining a record of** -

(A) the names and residential or postal addresses of the **persons who hold the offices** of the Association provided for by these rules, including all offices held by the persons who constitute the Committee **and persons who are authorised to use the common seal** of the Association under rule 22; and

(B) the names and residential or postal addresses of any persons who are appointed or act as trustees on behalf of the Association, and the Secretary must, upon the request of a member of the Association, make available the record for the inspection of the member and the member may make a copy of or take an extract from the record but will have no right to remove the record for that purpose;

(d) unless the members resolve otherwise at a general meeting, **have custody of all books, documents, records and registers** of the Association, including those referred to in paragraph (c) but other than those required by rule 13 to be kept and maintained by, or in the custody of, the Treasurer; and

(e) perform such **other duties as are imposed by these rules** on the Secretary.

The organizational mandate

Ensuring the organisation complies with its Constitutional reason for “being” in the case of most not for profit entities.

Compliance with applicable statutes

For most not-for-profit organisations this means ensuring it complies with the Corporations Law/ Associations Laws and regulations and other applicable legislation - Trade Practices, Workplace Health and Safety, Superannuation, Fundraising etc.

Board Meetings

Responsibility for the organisation of Board meetings and the co-ordination of Board papers and agenda will fall to the Secretary. Meetings are attended to by the Secretary who also prepares/oversees preparation of Minutes of meetings. The Secretary will usually also advise the Chairperson concerning issues that might arise during the course of a meeting including procedural issues or any conflicts of interests that may be relevant to the discussion at hand.

Similar tasks are often performed by the Secretary in relation to sub-committee meetings, particularly any involving corporate governance, audit and risk management or other areas which might involve compliance or an administrative aspect.

Meetings

For member or shareholder meetings the Secretary will be responsible for organising shareholder or member meetings with all of the consequent processes such as drafting and sending notice of meeting, ensuring Minutes of the meeting are taken and advising the Chairperson as needed.

Clause 16 of the Model Rules “General Meetings” states

*(5) Subject to sub-rule (7), the **Secretary** must give to all members not less than 14 days notice of a special general meeting and that notice must specify-*

- (a) when and where the general meeting concerned is to be held; and*
- (b) particulars of the business to be transacted at the general meeting concerned and of the order in which that business is to be transacted.*

*(6) Subject to sub-rule (7), the **Secretary** must give to all members not less than 21 days notice of an annual general meeting and that notice must specify-*

- (a) when and where the annual general meeting is to be held;*
- (b) the particulars and order in which business is to be transacted, as follows-*
 - (i) first, the consideration of the accounts and reports of the Committee;*
 - (ii) second, the election of Committee members to replace outgoing Committee members; and*
 - (iii) third, any other business requiring consideration by the Association at the general meeting.*

*(7) A special resolution may be moved either at a special general meeting or at an annual general meeting, however the **Secretary** must give to all members not less than 21 days notice of the meeting at which a special resolution is to be proposed. In addition to those matters specified in sub-rule (5) or (6), as relevant, the notice must also include the resolution to be proposed and the intention to propose the resolution as a special resolution.*

*(8) The **Secretary** must give a notice under sub-rule (5), (6) or (7) by-*

- (a) serving it on a member personally; or*
- (b) sending it by post to a member at the address of the member appearing in the register of members kept and maintained under rule 6.*

Clause 18 *(1) The **Secretary** must cause proper Minutes of all proceedings of all general meetings and Committee meetings to be taken and then to be entered within 30 days after the holding of each general meeting or Committee meeting, as the case requires, in a minute book kept for that purpose.*

*(2) The **Chairperson** must ensure that the Minutes taken of a general meeting or Committee meeting under sub-rule (1) are checked and signed as correct by the Chairperson of the general meeting or Committee meeting to which those Minutes relate or by the Chairperson of the next succeeding general meeting or Committee meeting, as the case requires.*

Statutory returns

Preparation and/or lodgement of statutory returns. The type of returns will vary, depending on the nature of the organization. There is currently no annual return form required for Associations in WA (unlike other States) however the Department is able to order production of financial records at any time and it warns that failure to comply with the Department's directions may constitute a criminal offence (Information Sheet 206). (With the upgraded Act, expected later in 2011, there is expected to be an obligation for an Annual Return in WA also).

The Secretary will often be the proper, or designated, or public officer for returns required by the Australian Taxation Office, ASIC, Commissioner of Fair Trading or other regulatory bodies. The Secretary will legally be responsible for ensuring there are proper processes in place to confirm statutory returns have been prepared accurately and lodged when required, or if not, for notice to be given to the Board when this has not occurred, even if the processes have been delegated or assigned to someone else.

Registers

Maintenance of the various registers required by an organisation to be maintained will usually fall, in whole or part, to the Secretary. These can include:

- **Member register-**

The organisation's register of members will be the responsibility of the Secretary. When the register is maintained in-house the Secretary will be responsible for ensuring changes in details are recorded.

The WA Model Rules for incorporated associations provide:

6 (1) The Secretary, on behalf of the Association, must comply with section 27 of the Act by keeping and maintaining-

*in an up to date condition a **register of the members** of the Association and their postal or residential addresses and, upon the request of a member of the Association, shall make the register available for the inspection of the member and the member may make a copy of or take an extract from the register but shall have no right to remove the register for that purpose.*

(2) The register must be so kept and maintained at the Secretary's place of residence, or at such other place as the members at a general meeting decide.

(3) The Secretary must cause the name of a person who dies or who ceases to be a member under rule 8 to be deleted from the register of members referred to in sub-rule (1).

- **Statutory registers-**

Depending on the nature of the organisation there are other registers that will normally be the responsibility of the Secretary. This would include the maintenance of registers

of members, option holders, debenture holders and registers required under various Financial Administration statutes.

- **Document register and safekeeping-**

The Secretary will normally be responsible for safekeeping and for maintaining a register of important documents. These documents might include original confirmed Board Minutes, contracts, leases, original regulatory approvals, etc. Processes for the safekeeping of other important material, such as backup computer discs, licences, Board books and the maintenance of appropriate on and off-site storage facilities for company documents will often also fall to the Secretary.

- **Governance registers-**

The Secretary may also maintain registers as a matter of Board policy, or good corporate governance. Such registers would normally include a register of the use of the common seal, of powers of attorney issued by the entity, of documents signed under any power of attorney and of other important documentation e.g., bank guarantees.

- **Common Seal**

The protection and use of the organisation's seal will normally be the responsibility of the Secretary. Although the use of a seal is now optional under the Corporations Act, many Boards continue to prefer this formality and many Constitutions have not yet been altered and still require a Seal to be used. The legislation establishing most statutory bodies continues to mandate the continued use of a common seal. The model rules for WA incorporated associations provides:

22 (1) The Association must have a common seal on which its corporate name appears in legible characters.

(2) The common seal of the Association must not be used without the express authority of the Committee and every use of that common seal must be recorded in the minute book referred to in rule 18.

(3) The affixing of the common seal of the Association must be witnessed by any two of the Chairperson, the Secretary and the Treasurer.

(4) The common seal of the Association must be kept in the custody of the Secretary or of such other person as the Committee from time to time decides.

- **Registered Office and Principal Place of Business**

For companies, the Secretary will be responsible for ensuring that the company's Registered Office (for the service of documents) and Principal Place of Business have been recorded with ASIC (Form 484), that the insignia of the company is properly displayed (for example, with the correct name, ACN/ARBN etc) and that the office and any necessary registers are registered with ASIC within the required time periods.

- **Proper Process**

The Secretary is responsible for implementing a process to ensure compliance with regulations and statutes relevant to the organisation. In statutory bodies, for example, procedures should be in place for the timely retrieval of reasons for an administrative decision.

The WA Department of Commerce in its Information Sheet 6 for Incorporated Associations advises:

*The overall role of the committee is to manage an association in accordance with the purposes or objects of the association as stated in its rules. In undertaking this role, the committee must fulfil a number of **legal responsibilities** which include making sure that:*

• the association complies with its obligations under the Act and in particular under Part V,

which includes:

- sections 21 & 22 which require disclosure by committee members of any pecuniary (financial) interest in contracts being considered by the committee, and abstaining from any deliberations and vote;*
- section 23 which requires that annual general meetings be convened within 4 months of the end of an association's financial year;*
- section 24 which defines special resolutions (required to change the rules or voluntarily wind up) to include requirements of notice to members, a general meeting and a vote of at least three-quarters of those entitled to vote, who are present or represented by proxy, if proxies are allowed;*
- section 25 defines the standards for maintaining financial records;*
- section 26 requires that accounts showing the financial position of the association be submitted to members at the annual general meeting;*
- section 27 requires the maintenance of a register of members and their residential or postal addresses, and access by any member to inspect and copy;*
- section 28 requires the maintenance of up to date rules, and access by any member to inspect and copy;*
- section 29 requires the maintenance of a list of office bearers and trustees and their residential or postal addresses, and access by any member to inspect and copy.*
- the association complies with its rules and any funding agreements or other contracts;*
- the association complies with its legal responsibilities to any employees, such as complying with employment awards or agreements, paying tax and superannuation and providing a safe working environment;*
- the association complies with its legal responsibilities to members, volunteers and any clients or customers who may use the association's services;*
- an assessment has been made of whether insurance cover is required and to what extent;*
and
- any other relevant laws or regulations are complied with.*
- Specific **financial responsibilities** include making sure that:*
 - there is compliance with requirements under the Act in relation to financial accounting and*
 - reporting to members;*
 - the association can pay all its expenses (it may assist to develop a budget annually);*
 - the conditions of any funding agreement are followed;*
 - the accounts are audited if this is required by the association's members, rules or funding agreements; and*

- *good risk management procedures are in place. (For example, a requirement that two authorised signatories sign off on any association cheque and that another member or employee completes cheque account reconciliations can be a good method for minimizing risk.)*

Depending on the size and nature of your association, other areas of responsibility may include the management of staff, the development and implementation of policies and procedures; and the provision of quality services to members and/or clients.

The Secretary's role in facilitating Board effectiveness

Although the Committee or Board is primarily responsible for its own effectiveness, there are several ways in which the Secretary can enhance this.

Errors by the Secretary or their assistants can reflect adversely upon the way in which an organisation or its Board is perceived. Obvious examples of this are errors in material circulated to members or shareholders; invalid ballot papers etc and poorly managed meetings. Equally there are a number of aspects of the Board's own performance that can reflect upon the Secretary. Overall, it is in the interests of both the Board and its Secretary that both are performing at their best.

One of the ways a Secretary can maximise the Board's effectiveness is to assist the Board to undertake an evaluation of its performance. This arms the Board with a more meaningful measure of accountability.

There are a number of reasons a Board evaluation can be effective:

- An opportunity to assess and respond to the Board's strengths and weaknesses
- A measure by which the Board can prioritise its activities
- Defining and clarifying the performance standards expected of the Board and areas in which that performance may be improved
- A formal appraisal enables each Committee member to reflect upon the Board's accomplishments, what the Board ought to be doing and how it might improve what it is doing. For both the Secretary and the Board, an evaluation of strengths as well as weaknesses can give a Board, individual directors, committees and the Secretary, a sense of competence and accomplishment.

Importantly, for the purposes of this topic, it can assist the Secretary to identify ways in which the effectiveness of the Board can be enhanced.

An area where the Secretary can directly improve the effectiveness of the Board is in relation to Board operations, including:

Meeting packages

Meeting packages (or 'Board briefing papers') should include a logical agenda (preferably settled beforehand with the Chairperson). The papers should record whether a decision is required. This information should be contained on the face of the agenda. Board papers should clearly identify the issue being put before the Board, the pertinent facts and any necessary supporting documentation. The paper should always include a recommendation by management, with a clear summation of the reasons for that recommendation, perhaps in the form of a recommended resolution.

Board books should only contain material that will be relevant and useful to Board members.

Timing and regularity of Board meetings

These will depend on the nature and size of the organisation and its business, the complexity of the issues being faced and the level of confidence the Board has in the management team.

The length of the Board meeting is often regarded as a measure of a meeting and its chair. If Board meetings are consistently lengthy then it may be that the role of the Board, or the level of involvement of the Board in the day to day operational matters should be re-examined.

Board discussion and participation

It is really for the chair, rather than the Secretary, to ensure that Board discussions proceed productively and that all members of the Board are engaged in the decision-making. A Secretary can assist by ensuring that individual Board members have the information they require to assist them in contributing to the debate concerning a matter. The Secretary can ensure that orientation programs and briefing sessions are made available to Board members to assist them to fully understand those matters relevant to helpful debate and decision-making.

New Secretaries of a Not for Profit Organisation - Checklist

	Association (WA)	Company	Checked
Secretaries Job Description drafted and agreed with the Board, includes Constitutional requirements	Recommended	Recommended	
ASIC/Department of Commerce records up to date: Registered Office (open at least 4 hours daily) Principal Place of Business Company Officers list & addresses	To be kept at Secretary's home or other approved place	To be kept at registered office or principal place of business or other approved place. Advise ASIC of changes (Form 484)	
Members Register	Required	Required	
Common Seal Register	Recommended	Recommended	
Unclaimed Monies Register	Recommended	Required	
If no Common Seal then Powers of Attorney or other written delegation of authority in place			
Register of Charges	Recommended if any	Required if any	
Annual Returns up to date	N/A	Annually on "Annual Review Date"	
Minute of the Board adopting Annual Return	N/A	Annually	
Minute of the Board confirming Solvency	Recommended	Annually	
Financial Reports (including the Board and Auditors signed reports) Lodged		Annually within 4 months of financial year end (Form 388)	
Constitution reviewed and up to date			
Board papers prepared and distributed in advance of meeting			
Minutes of Governing body filed safely in hard copy			
Appointment of Proper or Public Officer			
Other matters in job description e.g.: Bank account signatories Business names Trademarks Safe custody of documents Trade Practices Environmental issues OH&S Privacy Charitable Collections registration etc			

Street Appeal Registration (Perth) Child Protection Superannuation Stamp Duty Insurances Website accuracy and completeness			
Directors and Officers Insurance			
Tax Status – Tax concession charity/mutual association, PBI/FBT DGR etc correct on www.abr.business.gov.au			

Useful Links

Aust Legal Information Institute	www.austlii.edu.au
Aust Securities Commission	www.asic.gov.au
Australian Taxation Office (not for profit pages)	www.ato.gov.au
Chartered Secretaries Australia	www.csaust.com.au
CPA Australia	www.cpaaustralia.com.au
Institute of Chartered Accountants	www.icaa.org.au
WA Dept Regional and Local Govt	www.communitywise.wa.gov.au
WA DOCEP (Charities)	www.docep.wa.gov.au/charities
WA DOCEP (labour relations etc)	www.docep.wa.gov.au
WA State Law Publisher	www.slp.wa.gov.au

Chartered Secretaries Australia and the accounting bodies run helpful courses from time to time

Annual Year end Procedure – Companies Limited by Guarantee

Task	Required Timing	Agreed Date
Draft the timing schedule		
Agree schedule with accounts staff and with external auditors		
Pre year end preparations		
Balance date preparations		
Audit confirmations sent to banks etc		
Financial workpapers to be compiled and made available to auditor		
The Board to authorize Annual Financial Report		
The Board to meet/resolve to approve financial reports and directors report		
Auditors to sign Audit Report		
Lodge Financial reports (Form 388)	Within 4 months of year end	
Annual Report contents (other than financial report section) to be finalized and approved by Board and by auditor		
Agree Agenda for AGM with Board including notices of any resolutions to be passed		
Send Notice of AGM (plus attachments) to members	No less than 21 days before AGM	
Annual General Meeting	Within 5 months of year end	

Incorporated associations versus companies limited by guarantee

Incorporated Associations cannot undertake interstate activities unless registered with an ARBN under Pt.5B.2 of the Corporations Act. Query what is the *activity threshold* to be caught under Pt.5B.2 of the Corporations Act (s.601CA – previously Pt.4.1 of the *Corporations Law* – s.340)? *ASIC Practice Note 47* (paragraph 47.85) suggests a low threshold – merely signing a cheque or publishing a document interstate could be caught.

Companies have higher reporting obligations (but reporting and disclosure obligations vary according to the type of company). Incorporated Associations have no current requirement to lodge annual returns or financial accounts or have them audited, but note this could change with the coming Bill (Proposal 10).

Incorporated Associations must be formed for a prescribed purpose (s.4), e.g. religious, educational, charitable, benevolent, literature, science, arts, sport, recreation, amusement, community, social, cultural, local community, political, other approved purpose. There is a proposal to remove this requirement.

Incorporated Associations must act within their Objects, otherwise risk invalidity under the *ultra vires* rule. The *ultra vires* rule is modified by s.15, to preserve contractual liability of the association when transacting with third parties, but members can seek compensation or restraining injunction to prevent *ultra vires* acts.