

Amalgamating or merging incorporated associations

Legal information for NSW incorporated associations

This fact sheet covers:

- ▶ what is the effect of amalgamation?
 - ▶ is amalgamation the best option for your organisation?
 - ▶ the amalgamation process, and
 - ▶ what your organisation needs to do after amalgamating.
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This fact sheet summarises some of the legal issues for an incorporated association in New South Wales to consider before deciding to amalgamate with another incorporated association in New South Wales under the *Associations Incorporation Act 2009 (NSW)* (the Act).

To keep it simple, this fact sheet uses the term ‘amalgamate’ (which is used in the Act), however you may have heard or used the term ‘merge’ to describe the same process.

What is amalgamation?

Amalgamation is the process of two or more separate incorporated associations becoming a single association. Generally, when two legal bodies merge, one must wind up and transfer assets to the other. However, the Act sets out a process that allows two or more incorporated associations to join together to form a new legal structure, without either of them having to close down, and with their assets automatically transferring to the new (amalgamated) group.

Incorporated associations can, but do not have to, follow this process to merge. More than two incorporated associations can amalgamate using the amalgamation process in the Act. This fact sheet deals with the amalgamation of two incorporated associations in New South Wales.

There are a number of other possible scenarios in which not-for-profit organisations might want to join together, including:

- a NSW incorporated association ‘merging’ with a company limited by guarantee (a national not-for-profit legal structure formed under the *Corporations Act 2001 (Cth)*). As there is no mechanism in the Act or the *Corporations Act 2001 (Cth)* for this to occur, a traditional merger is required where one organisation is wound up (for more information go to [Ending an Organisation at www.nfplaw.org.au/changingorending](http://www.nfplaw.org.au/changingorending)), or
- organisations that are considering working closely together without ‘amalgamating’ or legally combining their structures, for example through a joint venture arrangement or contractual agreements such as auspicing agreements (for more information go to [Working with other organisations at www.nfplaw.org.au/workingwithothers](http://www.nfplaw.org.au/workingwithothers)).

What is the effect of amalgamation?

The amalgamation process for incorporated associations is governed by the Act. The effect of an amalgamation is that the new amalgamated association:

- becomes the registered entity
- will have a new name and ABN
- takes on any pending legal proceedings against each association
- the property of the individual incorporated associations becomes the property of the amalgamated incorporated association (this includes fixed assets such as office furniture, computers, equipment etc). There is no need for formal transfers of ownership (except for changing records where necessary, such as completing a 'Transfer of Land' form for land held by the organisations)
- any mortgages or charges remain in effect and will apply to the amalgamated incorporated association
- all debts and liabilities and contractual obligations of the individual incorporated associations become the debts and liabilities and obligations of the amalgamated incorporated association
- members of the individual incorporated associations become members of the amalgamated incorporated association, and
- will have a new committee and public officer.

Is amalgamation the best option for your organisation?

Committee members need to remember when considering an amalgamation that they must act in the best interests of their organisation.

If you are approached by another organisation suggesting an amalgamation, you need to ask for:

- details of the proposed amalgamation
- the reasons for the proposal
- the expected costs, and
- benefits for your organisation and your clients.

This information should be provided in writing so that you can obtain your own independent legal advice on the proposal. Depending on the circumstances, it may be preferable for your existing structures to remain in place, with the separate organisations entering into an agreement about working together in the future, rather than fully amalgamate.

Another option may be for your organisation to be wound up (ie close down – end its services) with the services taken over by another organisation.

FURTHER READING

For more information on acting in the best interests of an organisation go to the Not-for-profit Law Information Hub page on Governance at www.nfplaw.org.au/governance.

Some issues to consider before amalgamating

- If your organisation has been endorsed by the ATO as a deductible gift recipient (**DGR**) or tax concession charity (**TCC**), or is registered as a charity with the Australian Charities and Not-for-profits Commission (**ACNC**), will the amalgamated association be eligible for these endorsements and for charitable registration? This should be discussed with the Australian Taxation Office (**ATO**) and the ACNC early in the process.
- The Act requires the members of both incorporated associations to approve both the amalgamation and the amalgamated association's proposed objects and constitution. Before proceeding, each Committee should consider whether the amalgamation is likely to obtain member approval, and what level of consultations with your members and other stakeholders may be desirable.
- What will be the impact on your clients? Can your objectives still be met? Will you have to compromise?
- What is the culture of each organisation? Could there be a clash of cultures which may be disruptive for employees, volunteers and clients?
- Will there be a loss of existing name and brand recognition?
- What will be the size of the new organisation? What size of organisation is best suited to deliver your services?
- Where will the organisation be located? Will this impact on service delivery or activities?
- What will be the impact on your existing contracts and funding agreements?
- What will be the impact on your employees and existing employee agreements?
- How will the other organisation's agreements be affected?
- Does the other organisation have any potential or actual liabilities or debts you need to consider?
- How will the information held by each organisation be dealt with – are there legal privacy and confidentiality obligations you need to consider?

Do the anticipated benefits of the amalgamation outweigh the likely costs?

Potential benefits of an amalgamation

These include:

- reduced overheads – benefiting from economies of scale and eliminating duplicated functions
- shared managerial experience
- exploit links and contacts
- share knowledge and skills
- ability to offer more services or service a larger area
- better ability to seek and obtain funding, and
- stronger brand.

Possible costs of an amalgamation

These include:

- accounting fees and due diligence fees (as part of the amalgamation process)
- legal fees for reviewing contracts and agreements etc.
- management time spent on the amalgamation negotiations, e.g. negotiating the rules for the amalgamated incorporated association; negotiating committee representation; deciding the new name and brand; discussions with employees, volunteers, clients
- loss of existing name and brand recognition
- impact on employees and volunteers of the change, uncertainty and any staff cuts
- loss of existing funding arrangements
- loss of existing tax endorsements and charitable registration – impact on funding and concessions (although the amalgamated association may itself be eligible for these)
- changes in the ability to salary package (if status as public benevolent institutions or health promotion changes), and
- administrative steps post amalgamation (see below).

The amalgamation process

There are four main steps in the amalgamation process:

Step 1

The associations must reserve the proposed name of the new association. It is necessary to lodge an application for reservation of name, along with the prescribed fee, with the Registry of NSW Fair Trading (Registry). A name reservation lasts for three months.

Step 2

The associations must determine the basis under which the associations will amalgamate, including:

- the objects and constitution
- committee and first public officer, and
- structure and operations.

The associations wishing to amalgamate must each pass a special resolution (which means a positive vote from 75% of eligible votes cast at a general meeting of members). The resolution must:

- approve the objects and proposed constitution of the association (which could be the Model Rules, the Model Rules with amendments, or specially drafted rules), and
- authorise the application for registration of the amalgamated association.

In addition, the associations must ensure that each association is up to date with their financial reporting obligations under sections 45 and 49 of the Act for the three financial years before the application is made.

Step 3

The public officer of each of the amalgamating associations must lodge an 'Application for registration of an amalgamated incorporated association' with the Registry Services (details on the [Fair Trading website](#)).

The form must include:

- the association's proposed name
- the associations official address - this must be an address within New South Wales, must be a location used by the association, or location where the public officer resides, is employed or carries on business
- statement of objects
- a copy of the proposed constitution (unless the Fair Trading Model Constitution is used);
- copies of the special resolution approving the amalgamation, passed by members for each association

- an estimate of income, assets, expenditure and liabilities of the first financial year
- an itemised statement of the combined assets and liabilities
- the original certificate of incorporation for each association (or, a statutory declaration of its loss or destruction)
- any outstanding documents required to be lodged under section 45 and 49 of the Act by each of the amalgamating associations for the 3 financial years before the application is made, and
- payment of the prescribed fee.

The form must be signed by the person nominated to be the first public officer of the amalgamated association.

The form to lodge is available on the [Fair Trading website](#).

Step 4

A Certificate of Incorporation will be issued by Fair Trading for the amalgamated association after the application for amalgamation has been accepted. At this time, Fair Trading will cancel the incorporation of the individual incorporated associations.

What do we need to do following amalgamation?

AFTER AMALGAMATION CHECKLIST

- apply for an ABN for the new entity
- apply to the ACNC for the new entity to be registered as a charity and endorsed by the ATO as a DGR
- notify all stakeholders of the new entity name and ABN, including:
 - ATO – to cancel the ABNs of the individual incorporated associations
 - ATO – for PAYG and GST registrations
 - state and/or territory revenue authorities, if one or both of the existing associations have previously been granted an exemption from payroll tax
 - WorkCover and other insurers
 - superannuation funds
 - funding bodies
 - bank accounts
 - fundraising registrations
 - lessors, e.g. equipment, properties, vehicles
 - suppliers, e.g. power, telephone, internet service provider, office supplies
 - RTA in relation to any motor vehicles
 - the Registrar-General of Land & Property Information in relation to any real estate (land) holdings. Transfer forms will need to be completed
 - lenders
 - employees, and
 - change letterhead, logo, website, printed materials.

Resources

Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub (www.nfplaw.org.au) has further resources on the following topics:

- ✔ [Working with other organisations](#)
- ✔ [Changing constitutions](#)
- ✔ [Duties of members of a committee of management](#)

Legislation

- ✔ [Associations Incorporation Act 2009 \(NSW\)](#)
- ✔ [Associations Incorporation Regulation 2010 \(NSW\)](#)
- ✔ [Corporations Act 2001 \(Cth\)](#)

NSW Fair Trading

- ✔ [Amalgamating a incorporated associations](#)

A Not-for-profit Law Information Hub resource. Access more resources at www.nfplaw.org.au

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