

# Amalgamating or merging incorporated associations

Legal information for Western Australian incorporated associations

## This fact sheet covers:

- what is amalgamation?
- what is the effect of the new amalgamation process?
- is amalgamation or merger the best option?
- do the anticipated benefits of amalgamation outweigh the costs?
- the amalgamation process
- the current merger process, and
- what your organisation needs to do after amalgamating or merging.

**This fact sheet summarises some of the legal issues for a Western Australian incorporated association to consider before deciding to amalgamate or merge with another Western Australian incorporated association.**

The new *Associations Incorporation Act 2015* (WA) (**the Act**) governing Western Australian incorporated association commenced on 1 July 2016. The Act contains provisions that allow two or more incorporated associations to amalgamate and form a new incorporated body. The previous Act, the *Associations Incorporation Act 1987* (WA), did not contain a specific process or rules for amalgamation.

This fact sheet sets out the steps involved and issues to consider if your organisation is considering amalgamating using the new process.

### NOTE

There are other ways organisations can work together, including through a merger process. For more information about the alternative arrangements go to the Information Hub page on working with others at [www.nfplaw.org.au/workingwithothers](http://www.nfplaw.org.au/workingwithothers).



## What is amalgamation and how does my organisation amalgamate?

Amalgamation when two (or more) separate incorporated associations in Western Australia become a single association by following a special statutory process that is generally simpler than a traditional merger.

The Act sets out a specific amalgamation process. This process is only available where the amalgamating groups are all incorporated associations incorporated in Western Australia.

If a Western Australian incorporated association wishes to:

- merge with a company limited by guarantee (a national not-for-profit legal structure formed under the *Corporations Act 2001* (Cth)), or
- join an incorporated association from another state or territory,

then the amalgamation process under the Act is not available. Instead, the options for the organisations include:

- one of the organisations transferring all of its assets and liabilities to the other organisation and then winding up
- one of the organisations winding up and distributing its surplus assets to the other organisation, or
- both organisations choosing to form a new legal entity to carry out activities in the future and then transferring their assets to the new organisation and winding up.

In addition, not-for-profit organisations can consider working closely together without ‘amalgamating’ or legally combining their structures. For example, organisations may consider entering into a joint venture arrangement or contractual agreement. For more information go to Working with other organisations on the Information Hub at [www.nfplaw.org.au/workingwithothers](http://www.nfplaw.org.au/workingwithothers).

## RELATED RESOURCES

For a simple overview of the amalgamation process, see the short video at [www.nfplaw.org.au/workingwithothers](http://www.nfplaw.org.au/workingwithothers).



# The amalgamation process

Under the Act, two or more incorporated associations may apply to amalgamate to form a new incorporated association (this is called a ‘new body’ under the legislation).

## CAUTION

Before amalgamating, the two organisations should carefully consider what they hope to achieve by amalgamating and set out the terms for the amalgamation. This may include terms regarding employees, delivery of services, responsibility for liabilities, board representation and governance issues and anything else which the organisations consider important.

The proposed terms can be recorded in a Memorandum of Understanding (**MoU**) or similar document which the parties can then use as a base for negotiating their amalgamation. The MoU will often also cover how each organisation should act in the lead up to any amalgamation.



The main steps outlined under the Act are:

### Step 1

Each incorporated association needs to check that the proposed amalgamation is consistent with its rules. If amalgamating is inconsistent with the purpose and rules of one or both of the associations, an application to amalgamate cannot be made.

### Step 2

Each of the incorporated associations wishing to amalgamate must pass a special resolution of members at a general meeting approving:

- the terms of the amalgamation
- the name and objects or purposes of the new body, and
- the rules of the new body.

### Step 3

Associations must lodge an application to amalgamate with the Commissioner. Only one application is lodged on behalf of both associations (they do not need to prepare and lodge two separate applications), and must include the following:

- copies of the special resolutions passed at Step 2
- a statement signed by a member of the management committee of each incorporated association, confirming that the special resolution was passed in accordance with the Act (for more information about passing a special resolution under the Act, go to [‘Changes to an organisation’s constitution or rules’](#)), and
- all of the information which must be provided to the Commissioner when an application for incorporation is lodged (including name and address and the proposed rules for the amalgamated association).

The [application form](#) can be accessed online on Consumer Protection’s website and the corresponding fee is \$180 (as of September 2016).

### Step 4

The Commissioner may require public notice of the application for amalgamation by advertisement, or in some other way.

Any person may, in accordance with the terms of the public notice, request that the Commissioner decline to incorporate the new body.

### Step 5

The Commissioner will issue a certificate of incorporation of the new body if:

- the time for making a request under Step 4 above has expired without any request being made (or a review of a request has resulted in the request being denied by the Commissioner), and there has been no public application requesting that the amalgamation not proceed
- the Commissioner is satisfied that each association has passed the special resolutions to amalgamate, and

- the Commissioner is satisfied that the new body is eligible to be registered including having:
  - an acceptable name, and
  - rules which are compliant with the Act.

The amalgamating associations must return their original/current certificates of incorporation to the Commissioner prior to the certificate of incorporation being issued for the new body.

## What is the effect of the new amalgamation process?

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Upon amalgamation, the incorporation of each of the previous associations is automatically cancelled and the new body:

- becomes a registered entity
- may have a new name and ABN
- takes on any pending legal proceedings against the original associations
- becomes the legal and beneficial owner of the property of the associations that amalgamated
- inherits the rights and liabilities of the original associations, including mortgages and charges
- becomes responsible for all contractual obligations, and
- may have new rules, a new committee of management and a new secretary.

The benefit of the amalgamation process is that certain steps occur automatically, which saves time and money.

## Is an amalgamation the best option for your organisation?

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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 some initial information, at minimum, including:

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

This information should be used as a starting point for you to commence discussions and consider whether, in principle, you may be interested in amalgamating.

### 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](http://www.nfplaw.org.au/governance).

If you want to approach another organisation about amalgamating, you should make sure you have done your homework first and can provide the other organisation with information about why they might choose to amalgamate with you.

If you do decide that you want to amalgamate, it is important that you go through a detailed due diligence process. The process should help you get your affairs in order and learn more about the association you are proposing to amalgamate with.

It is during the due diligence process that you can identify any potential issues or roadblocks and develop a plan to deal with them. 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 amalgamating (go to [Working with other organisations](#)).

### CAUTION

Take your time to seriously consider a potential amalgamation. The more time you spend getting to know your own affairs and the affairs of the other entity, the more likely you are to be able to make an informed decision that leads to a successful amalgamation.



### SOME ISSUES TO CONSIDER BEFORE AMALGAMATING

- If your organisation has been endorsed by the Australian Taxation Office (**ATO**) as a deductible gift recipient (**DGR**) or tax concession charity (**TCC**), will the amalgamated association be eligible for these endorsements? This should be discussed with the ATO or tax specialists early in the process.
- Before proceeding, each incorporated association's committee should consider whether the amalgamation is likely to obtain member approval, and what level of consultation with your members and other stakeholders may be desirable.
- What will the impact be 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?
- How will each organisation's employees and volunteers be dealt with? Will they transfer over to the new organisation?
- 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?
- Some contracts or funding agreements require you to obtain prior approval from the government or other parties before you can amalgamate. You should consider whether you need any consents or approvals before amalgamating.
- 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, debts, or significant risks 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?
- What is the proposed timeline for the amalgamation (keep in mind any notice periods for meetings)?

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

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## 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 legal fees (as part of the amalgamation process)
- legal fees for reviewing contracts and drafting agreements
- management time spent on the amalgamation negotiations, eg. 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
- cost of any staff redundancies triggered by amalgamation
- impact on employees and volunteers of the change, uncertainty and any staff cuts
- loss of existing funding arrangements
- loss of existing tax endorsements – impact on funding and concessions
- changes in the ability to salary package (if status as public benevolent institutions or health promotion changes), and
- administrative steps post amalgamation (see below).

# What do we need to do following amalgamation or merger?

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## AFTER AMALGAMATION/MERGER CHECKLIST

- apply for an ABN if you have established a new entity
- notify all stakeholders of the amalgamation, including:
  - ATO – for PAYG and GST registrations
  - WorkSafe and other insurers
  - superannuation funds
  - funding bodies
  - bank accounts
  - fundraising registrations
  - lessors (eg equipment, properties, vehicles)
  - suppliers (eg power, telephone, internet service provider, office supplies)
  - Department of Transport in relation to any motor vehicles
  - Landgate in relation to any real estate (land) holdings. Transfer forms will need to be completed
  - lenders, and
  - employees, and
- change letterhead, logo, website, printed materials (if required).

# Resources

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## Related Not-for-profit Law Resources

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

- ✔ Working with other organisations - [www.nfplaw.org.au/workingwithothers](http://www.nfplaw.org.au/workingwithothers)
- ✔ Duties of committee members - [www.nfplaw.org.au/runningtheorg](http://www.nfplaw.org.au/runningtheorg)
- ✔ Governance - [www.nfplaw.org.au/governance](http://www.nfplaw.org.au/governance)

## Other relevant resources

- ✔ [Department of Commerce Western Australia](#)

Visit the Department of Commerce website for relevant forms, fees and further information about amalgamation and incorporation.

## Relevant legislation

- ✔ [Associations Incorporation Act 2015 \(WA\)](#)
- ✔ [Corporations Act 2001 \(Cth\)](#)

A Not-for-profit Law Information Hub resource. Access more resources at [www.nfplaw.org.au](http://www.nfplaw.org.au)

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