Merging with other organisations

Legal information for community organisations

justice connect
Not-for-profit Law

This fact sheet covers:

- what is a merger?
- is a merger the best option for your organisation?
- the merger process, and
- what your organisation needs to do after merging.

This fact sheet summarises some of the legal issues for a community organisation to consider before deciding to merge with another organisation.

A merger arrangement is an option to formalise working together that is available to all community organisations in Australia and regardless of their legal structure (ie. incorporated associations, companies limited by guarantee, indigenous corporations and co-operatives).

If you are an incorporated association looking to merge with another incorporated association in the same state, then the statutory process of 'amalgamation' is also an option for you (in all states and the ACT, with amalgamation an option in Western Australia from July 2016). This fact sheet will not cover the amalgamation process. You can need more about amalgamation on the Amalgamation and Mergers page of the Information Hub.

1. What is a merger?

A merger is the most complex legal arrangement for working with other organisations. It is also a final process, and cannot be undone, so all parties need to be confident in their plans. A merger can happen in a variety of different ways, depending on the organisations involved, such as:

- when one (usually smaller, but not always) organisation becomes part of another (usually larger) organisation, or
- when two organisations merge to create a brand new organisation.

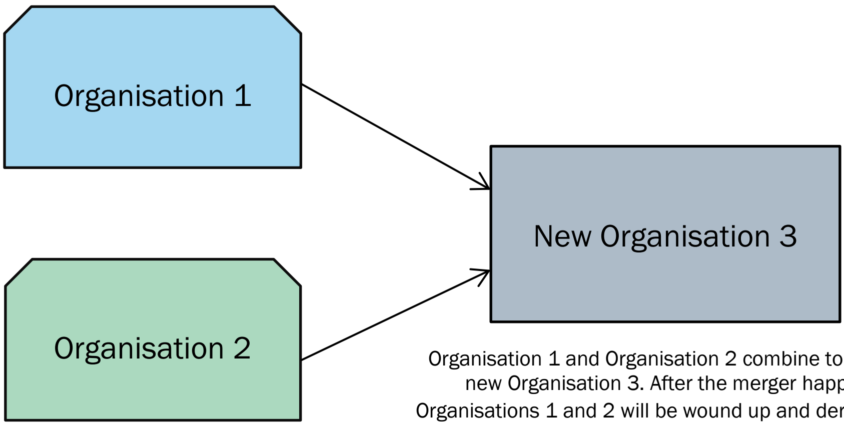
There are many different paths or strategies to achieve a merger of two or more organisations. Mergers are always specifically tailored to the organisations and situation involved. All mergers will involve the organisations signing a contract, which sets out the terms of the merger and how the merger will work.

NOTE

The organisations involved in a merger will almost always need the help of a lawyer to put together a merger, particularly to assist them with structuring their merger and drafting the merger contract. Each organisation will also likely need financial and tax advice.

The two most common merger pathways

Option 1: Two or more organisations combine to create one new organisation (similar to ‘amalgamation’ for two incorporated associations). The existing organisation will enter into an agreement to merger. A new organisation will be incorporated, and then the merging organisations will transfer their assets, employees and operations to the new organisation and the merging organisations will usually wind up and be deregistered. The newly merged organisation is usually brand new, with a new name, website and redesigned brand. Members are usually provided with an opportunity to become a member of the new merged organisation.

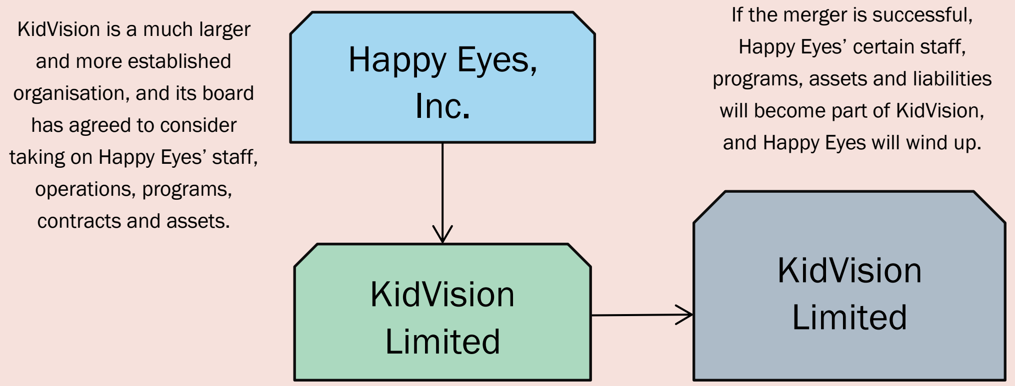


Organisation 1 and Organisation 2 combine to create a new Organisation 3. After the merger happens, Organisations 1 and 2 will be wound up and deregistered.

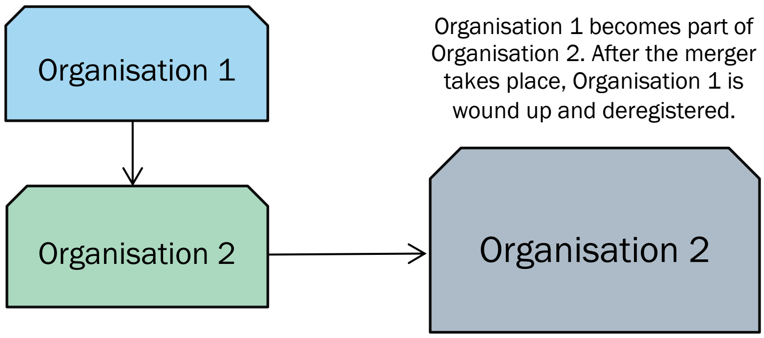
Organisation 3 can have purposes that encompass both Organisation 1 and 2. However, organisations will need to seek advice about transferring assets if Organisation 3’s purposes are different to their own (due to potential tax consequences and if assets are held on trust to be used for a very particular purpose).

CASE STUDY 1 – Happy Eyes and KidVision: Happy Eyes, Inc. is a small incorporated association that conducts educational programs for the parents of young children who are visually impaired. KidVision Limited is a larger company limited by guarantee that also works with young children who are visually impaired. Happy Eyes and KidVision currently conduct different, but complementary, programs with the same clients at Melbourne’s Royal Children’s Hospital. 1 month ago, Happy Eyes was informed that their government funding (which funds 80% of their operations) will be cut at the end of the financial year.

The committee of Happy Eyes understands that without continued government funding it cannot continue to operate, so decides to approach KidVision with a merger proposal. They also know that KidVision recently received a large bequest and has cash reserves. The proposal suggests KidVision take on as many staff and activities of Happy Eyes as possible, so that its programs can continue to operate. Theypropose a merger is the most sensible way to make this happen. Happy Eyes is willing to deregister once the activities and staff have transferred. The board of KidVision saw great value in the work of Happy Eyes, and thought its activities aligned well with its existing purposes. KidVision agreed to the proposal.



Option 2: One organisation (usually larger and more sophisticated, or with other beneficial attributes such as access to tax concessions or deductable gift recipient endorsement) takes on some or all of the assets, operations, employees and volunteers of another (usually smaller) organisation, and then the smaller organisation winds up and is deregistered. Going forward, the organisations operate together under the name and brand of the larger organisation. This is sometimes called an integration. In a situation where Organisation 2 will take over or integrate Organisation 1, the purposes of Organisation 2 need to be able to accommodate the activities of Organisation 1 that will be transferred to Organisation 2.



Where a company is created to form the merged organisation, it can be structured in many different ways depending on the nature of the organisations and activities involved. Where the new organisation will be taking in a social enterprise operated by one of the original organisations, the new organisation may consider structuring as two entities, such as a company limited by guarantee that wholly owns a private company which operates the enterprise.

2. What is the effect of a merger?

Unlike amalgamations, the merger process is not outlined in law and can be completely customised and is therefore quite complex! A merger is essentially a contractual agreement between two organisations to form a single organisation. For example, when two organisations merge together:

- only those assets that the organisations want to become the assets of the merged organisation will transfer across, and each individual organisation will need to legally transfer the ownership of those assets
- only those debts and liabilities that the organisations want to become the debts and liabilities of the merged organisation will transfer across, and each individual organisation will need to deal with its debts and liabilities that do not transfer across
- the organisations can decide which activities will continue
- the organisations may restructure staffing arrangements, which could include redundancies
- the purpose can be tailored to take into account the particular purposes of the new organisation (noting that access to tax concessions, and existing trusts that automatically apply to the assets of charities in certain circumstances may limit flexibility in drafting purposes), and
- the members of the individual organisations may not automatically become the members of the merged organisation (legal opinion is divided on whether 'automatic' membership of a CLG is possible unless a special process involving court approval is undertaken). The members of the organisation will usually be given the option of becoming members of the merged organisation. However, members may agree unanimously to forfeit their membership rights as part of the merger process. When dealing with membership issues it is important to get legal advice to make sure that members are not being 'oppressed', which can give members a right to take the organisation/s to court.

NOTE

For incorporated associations, legislation requires that the remaining assets of the individual organisations need to be passed to another organisation with similar objects.

Do the anticipated benefits of a merger outweigh the likely costs?

Potential benefits of a merger

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 and influence.

Possible costs of a merger

These include:

- accounting fees and due diligence fees (as part of the merger process)
- legal fees for reviewing contracts and agreements etc.
- management time spent on the merger negotiations, eg. negotiating the rules for the newly merged organisation; negotiating committee representation; deciding the new name and brand; discussions with employees, volunteers, clients
- loss of existing name and brand recognition
- potential difficulties transferring important contracts such as funding contracts, subcontracting arrangements or lease agreements
- impact on employees, volunteers and members, including potential staff cuts
- potential loss of existing funding arrangements
- potential 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 merger (see below).

3. The merger process

Unlike amalgamation, where the process is set out under law, every merger will look different, depending on the merger pathway that is chosen and the nature of the contract between the parties.

EXAMPLE OF A TYPICAL MERGER PROCESS

1. The board of at least one of the merging parties decides to explore a merger as a strategic priority. The board may seek an indication form the organisation's membership about whether a merger would be likely to be approved by the membership before spending time and money on the next merger steps.

2. A board or committee might identify two or three organisations it might like to approach for a merger, or it might decide to speak directly to an organisation it already works with on an informal basis.

3. The boards or committees of both organisations will have preliminary meetings about a potential merger.

4. Once the two organisations decide they are willing to look into merging together, they will usually carry out 'due diligence'.

5. Any issues identified in the due diligence process should be resolved, either by asking the organisation with the issue to fix it before the merger, or taking the issue into account by including certain terms and conditions in the merger contract.

6. Once both organisations' committees or boards have decided they want to go ahead with the merger, they will usually hold an official board or committee meeting, and will make an official decision to seek member approval of the proposed merger by passing a resolution.

7. Depending on the rules or constitution of the organisations involved, often a merger will require the consent of the members. The organisations might need to hold meetings of their members and ask them to pass a resolution approving the merger (a special resolution is usually required). This will often require significant engagement with members.

8. Each organisation will need the assistance of a lawyer throughout the merger process. Assistance is required most during the negotiation and preparation of the merger contract. After the merger contract is signed, the organisations can begin the process of logistically merging together and transitioning their activities, clients and staff.

9. After the merger contract is signed, the last step is the winding up of the organisation/s which will no longer operate. It may be that two organisations merged or amalgamated to form an entirely new organisation, and so both organisations no longer operate and need to be wound up. Or, it may be that only one organisation needs to be wound up, because it has transferred its assets to the other organisation that will continue as the corporate structure for the merged organisation. This can be one of the most complicated steps, and you will need the assistance of lawyers to ensure the organisation that is winding up properly meets all its liabilities, and also appropriately manages assets that may be held in trust.

RELATED RESOURCES

For more information about the due diligence process and key legal issues for merging organisations, go to NFP Law's Working with Other Organisations Guide at www.nfplaw.org.au/workingwithothers

4. What do we need to do following a merger?

AFTER MERGER CHECKLIST

☐ apply for an ABN for the new entity (if Option 1 followed)

☐ Notify all stakeholders of the new entity name and ABN, including:

- ATO – for PAYG and GST registrations
- workplace injury insurer (eg. WorkCover) 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)
- relevant road and traffic authority in relation to any motor vehicles (eg. VicRoads, Department of Transport WA)
- relevant land title office 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.

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 organisation - www.nfplaw.org.au/workingwithothers
- Passing special resolutions – www.nfplaw.org.au/secretaryguide
- Duties of committee members – www.nfplaw.org.au/runningtheorg
- Governance – www.nfplaw.org.au/governance

Other Resources

- Whitelion and Nous Group online merger toolkit - http://www.nfpmergers.com.au/

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