

Statutory transfer to effect merger of incorporated associations

Legal information for incorporated associations in the Northern Territory

This fact sheet covers:

- what is the effect of a merger by statutory transfer?
- is a statutory transfer process the best option?
- the merger by statutory transfer process
- the asset transfer and dissolution process, and
- what your organisation needs to do after merging.

This fact sheet summarises some of the legal issues for a Northern Territory incorporated association to consider before deciding to merge with another Northern Territory incorporated association under the *Associations Act* (NT) (the Act) and the *Associations Regulations* (NT) (the Regulations).

Under the Act, incorporated associations may become one legal entity (merge), if one of the incorporated associations seeking to merge transfers its assets to the other under an asset transfer process set out in the Act. Under this statutory process set out under the Act, once the appropriate notices are lodged, the transferring association dissolves (it will cease to exist). Unlike other jurisdictions in Australia, there is no formal amalgamation process available for incorporated associations in the NT. There are many different merger options available and each option should always be tailored to the specific organisations involved. The process described in this fact sheet is only one of many options that organisations seeking to merge can consider.

NOTE

The statutory transfer does not apply to an incorporated trading association, that is, an incorporated association formed or carried on for the purpose of trading or securing pecuniary profit to its members.



What is the effect of a merger by statutory transfer?

If the statutory transfer process is followed, the receiver of the transferred assets takes on the legal rights and obligations of the transferring association(s). This means that the receiving association:

- takes on any pending legal proceedings by or against the transferring association(s)
- becomes the legal and beneficial owner of the assets of the transferring association(s) (without the need for any conveyance, transfer, assignment or assurance)

- inherits any liabilities, including mortgages and charges, and can be liable for the past acts or omissions of the transferring association(s), and
- becomes responsible for all contractual obligations of the transferring association.

For the statutory process to apply, all members of the transferring association also need to become members of the receiving organisation. These members must not be subject to any greater liabilities as members of the new organisation than they were as members of the transferring association (ie. additional charges to become a member of the new organisation or liabilities transferred across from other transferring associations).

CAUTION

Transferring membership can be a complex issue, and your organisation should seek advice on the specific circumstances of the associations involved.



Is a statutory transfer process the best option for your organisation?

This part sets out some important issues and a checklist that should be considered prior to any decision to commence with an asset transfer and wind-up.

Before embarking on a merger of any kind, it is a good idea for both organisations to do ‘due diligence’ on each other, to understand the organisation they are thinking about merging with, and to check to see if there are any problems or issues that should be addressed before the merger. Due diligence is a process which involves both organisations investigating each other by asking for certain information from each other, then reviewing and analysing that information.

Each incorporated association needs to remember when considering a merger that they must act in the best interests of their organisation.

If you are approached by another organisation suggesting a merger, you need to ask for:

- details of the proposed merger
- 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 merge (go to Working with other organisations on the Information Hub at www.nfplaw.org.au/workingwithothers).

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 MERGING

- 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 other incorporated association be eligible for these endorsements? This should be discussed with the ATO early in the process. You will also need to ensure that any DGR revocation clause in your governing documents is given effect to. Such a clause sets out how any surplus gifts, deductible contributions and related money will be transferred to another DGR with a similar charitable purpose in the event of a wind-up.
- Consider whether the proposed transfer and dissolution 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 and continue 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? 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?
- What is the proposed timeline for the amalgamation (keep in mind any notice periods for meetings)?

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

Potential benefits of merging

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 a merger

These include:

- accounting, due diligence fees and legal fees
- management time spent on the negotiations and discussions with employees, volunteers and 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 – impact on funding and concessions
- changes in the ability to salary package (if status as public benevolent institutions or health promotion changes)
- administrative steps post-merger (see below), and
- complex membership transfer issues.

TIP

There are some significant legal and administrative requirements involved in the merger by statutory transfer process.

We recommend that you seek legal advice about what is required for your particular organisation, especially if your organisation has a large membership base.



The merger by statutory transfer process

The associations involved in a proposed merger will need to decide which association will continue to exist (or even decide to incorporate a new association), and which association/s will transfer assets and dissolve under the statutory transfer process.

The transferring association will need member approval, and it is best practice for all associations involved, including the receiving association, to seek member approval.

CAUTION

Remember that any special resolution must meet any requirements specified in the rules of your incorporated association. For example, the rules of your incorporated association may place special requirements on the passing of a special resolution, like a long notice period.



The management committee of any transferring association must determine all of its surplus assets, prescribed property (see below) and whether any grants from the Northern Territory Government, Commonwealth Government or otherwise, have not been acquitted.

Prescribed property

Prescribed property must be dealt with in a particular way under a statutory transfer process. Under the Act, prescribed property cannot be transferred by passing a resolution of members without consent of a Minister.

'Prescribed property' means property that was acquired from, or using funds obtained under a grant from, the Northern Territory Government or the Commonwealth Government, and includes an interest, (legal or equitable) in property. It does not include:

- property acquired from the Northern Territory Government or Commonwealth Government using funds that were not (directly or indirectly) obtained under a grant from the Northern Territory Government or Commonwealth Government, or
- an item of personal property (property other than real property/land) that has a total (current market) value of not more than \$25, 000.

An incorporated association must not dispose of, charge (a term meaning to use the property to secure a loan) or otherwise deal with prescribed property except:

- a disposal to, or a charge as security for a loan or other benefit by, the Northern Territory Government, or
- a lease, including a sublease, for a term of 12 months or less,

unless the Minister provides written consent to do so.

An exception applies to prescribed property that is a lease under the *Special Purposes Leases Act* or the *Crown Lands Act*.

If you have doubts about whether certain property is 'prescribed property' or not we recommend you seek advice from a lawyer as it is important to get this distinction right. Many incorporated associations in the Northern Territory will have a register of the prescribed property they hold.

All other property (ie. non-prescribed property)

An incorporated association may (by a members' resolution passed in accordance with its constitution) transfer its real and personal property (other than prescribed property) to an incorporated association that was formed to promote objectives similar to its own, or charitable objectives.

Generally, there are four steps involved in a transfer of property by an incorporated association to another incorporated association.

Step 1

All outstanding annual audited financial statements of accounts must be lodged (unless an exemption has been granted by the Commissioner).

Step 2

The transferring association must pass a special resolution to transfer all of its remaining surplus assets to the other incorporated association.

Step 3

Within 14 days after the members' resolution has passed, the public officer of the transferring association must:

- file a copy of the resolution with the Commissioner, along with the following forms:
 - 'Resolution authorising transfer of property of an association'
 - 'Notice of intention to transfer property of an association', and
- send its 'Notice of intention to transfer property of an association' form for publishing to:
 - a newspaper circulating in the part of the Northern Territory where the association operates and any other newspaper that the Commissioner considers appropriate, and
 - the Northern Territory Government Gazette at gazettes.dcm@nt.gov.au.

Step 4

- Any members who did not vote in favour of the resolution, and creditors, may apply to the Supreme Court for an order prohibiting the transfer within 28 days after the last publication of the notices set out above.
- The incorporated association must not transfer the assets until:
 - 28 days after the publication of the last notice
 - a decision of the court if an application has been made by a member (or creditor) to prohibit the transfer, or
 - if the Commissioner is reviewing the operations of the incorporated association, until the Commissioner is satisfied that the association is carrying out its functions or is in operation (whichever is latest).
- Once the transfer of all assets has been completed in accordance with the resolution, the public officer must immediately file a 'Notice of completion of transfer of property of an association' form with the Commissioner.
- The transferring association is taken to be dissolved (this happens automatically) three months after the filing of the notice of completion.

- All members of the transferring association should become, or be provided opportunity to become a member of the receiving association.

The effect of these steps is that a merger of sorts has taken place, and the incorporated association that receives the property is the newly merged entity.

RELATED RESOURCES

The necessary forms for the relevant notices can be found on the [Department of Business website](#). Forms should be addressed to Licensing Northern Territory, and sent to the [Territory Business Centre](#).



What do we need to do after the merger by statutory transfer?

Ensure communications are no longer made under the name of the transferring association and that all stakeholders are notified of the merger, 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)
- NT Department of Transport in relation to any motor vehicles
- NT Land Titles Office in relation to any real estate (land) holdings; transfer forms will need to be completed
- lenders, and
- employees.

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 – www.nfplaw.org.au/workingwithothers
- ▶ Duties of committee members – www.nfplaw.org.au/runningtheorg
- ▶ Governance – www.nfplaw.org.au/runningtheorg

Other Related Resources

- ▶ [NT Department of Business](#)

The Northern Territory Department of Business carries out the oversight of incorporated associations, and this page contains important information for incorporated associations generally and specifically relating to asset transfer, as well as relevant forms:

Legislation

- ▶ [Associations Act](#) (NT)
- ▶ [Associations Regulations](#) (NT)

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

© 2016 Justice Connect. You may download, display, print and reproduce this material for your personal use, or non-commercial use within your not-for-profit organisation, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify this resource. Apart from any use permitted under the *Copyright Act 1968* (Cth), all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 16013, Collins Street West, Melbourne 8007, or email nfplaw@justiceconnect.org.au.