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Not for Profit Mergers and Amalgamations

At some point in their lifespan, not for profit organisations may seek to join with other similar organisations. Reasons vary, and could be motivated towards achieving economies of scale, maximising synergies or fulfilling a mission. In other cases, an organisation may wish to cease operations or no longer operate on their own due to regulatory changes or market forces.

When an NFP organisation – whether an association incorporated under State laws, or a company limited by guarantee – decides to explore merger or amalgamation pathways, the relevant considerations will be similar (but different) to what is seen in corporate commercial business settings.

PART A: TYPES OF MERGERS

In brief terms, a merger is a contractual agreement between organisations to form a single organisation. A merger can vary depending on the nature of the merging organisations and desired outcomes. Organisations may choose to pursue:

- **Creation of one new organisation:** The original organisations are deregistered (or become dormant). Their assets and liabilities transfer to the new organisation.
- **Acquisition or takeover:** This is essentially a two step process. First, an organisation (usually larger and more sophisticated) takes on some or all of the assets, liabilities, operations, employees and volunteers of a second organisation. Following the transfer, that second organisation is then deregistered (or becomes dormant). This is often the simplest form of a merger. In some cases the identity of the acquired organisation may be retained, perhaps as a division of the remaining organisation. In other cases, it is no longer used.
- **Other forms of merger:** These could include a takeover as a subsidiary (where one organisation becomes a wholly owned subsidiary of another) or the creation of a new group structure (in which case the merging organisations each operate as subsidiaries of the same parent entity).

A NOTE ABOUT AMALGAMATIONS

In contrast with mergers, *amalgamations* are a statutory process. Under the *Associations Incorporation Act 2015* (WA), for example, an application may be lodged with the Commissioner for Consumer Protection for a new association to be incorporated, amalgamating two or more existing incorporated associations. Upon amalgamation, there is a vesting of property and liabilities in the new body; and there is no further deregistration process for the old entities to undertake.

This may be an option for two incorporated associations, but would not be an option for companies limited by guarantee or associations incorporated in different States.

PART B: STEPS IN THE MERGER PROCESS

Each organisation will have its own internal processes. As a guide, the progression of events might look as follows:

- **Concept phase:** A decision is made to investigate merger opportunities; potential partners/targets are identified; preliminary talks are undertaken (subject to confidentiality arrangements as necessary). Initial feasibility assessment and preliminary or high level due diligence may be undertaken, and the organisation may also consider possible merger structures at this time.

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Further, organisations should start to consider which assets, liabilities, activities and staff will transfer and continue and which ones will not. Themes arising in the concept phase will likely evolve as the merger progresses.

- **MOU/term sheet:** Where parties are amenable in principle to merger discussions, it is advisable to formalise and document an agreed process.
- **Due diligence:** This may be one-way or both ways. Due diligence is discussed later in Part C of this Fact Sheet.
- **Negotiate & enter into merger agreement:** See Part D of this Fact Sheet.
- **Pre-completion steps:** Ordinarily, the merger agreement would be subject to various conditions needing to be satisfied prior to completion of the merger.
- **Completion of the merger**
- **Post-completion steps:** It may be necessary, for example, to notify regulators (eg ACNC/ Consumer Protection) and to seek the deregistration of any entity(/ies) which will no longer be required.

PART C: DUE DILIGENCE

It is not possible in this fact sheet to give an exhaustive or universal checklist, but the following are likely to be key due diligence focus areas:

- Corporate governance and organisational structure;
- Review of operations (by desktop review and also visual and site inspections);
- Clients and customer lists;
- Material Contracts eg sub contracts and outsourcing arrangements; joint ventures; valuable contracts which should be retained; and any contracts which may be best terminated);
- Real property (land ownership and leases, and any mortgages or charges);
- Plant and Equipment, and any security interests;
- Information Technology;
- Employment matters including key personnel; documented employment contracts and policies; outstanding entitlements; and industrial agreements and awards;
- Insurance: existing policy terms and coverage;
- Any current legal disputes, litigation or proceedings;
- Financials (including accounting and tax records);
- External consultant reports (eg legal, accounting, management consulting).

CONTACT DETAILS

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The information contained in this Fact Sheet is general information only and does not constitute legal advice

PART D: KEY TERMS

Key terms which should be addressed at the MOU stage, or in the formal merger agreement, or both may include:

- Merger model/legal structure;
- Due diligence (scope, access to information, documents, staff, facilities and records);
- Transfer of assets and liabilities;
- Continuation of activities and services;
- Post merger considerations such as branding, board composition and leadership positions;
- Parties' roles and responsibilities;
- Timeframes;
- Circumstances where merger will not proceed, and parties' rights to withdraw;
- Employment matters: Personnel retention and responsibility for employee entitlements;
- Confidentiality and exclusivity;
- Warranties and representations;
- Pre-completion, completion and post-completion steps.

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