

## Amalgamation

**Note:** The information contained in this fact sheet is intended as a guide only, and is not legal advice. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do. The information in this fact sheet is written for people and organisations resident in, or affected by, the laws that apply in Victoria, Australia and is current at 23 April 2010.

### Overview

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This fact sheet summarises some of the legal issues for a Victorian incorporated association to consider before deciding to amalgamate with another Victorian incorporated association under the *Associations Incorporation Act 1981 (Vic)* ('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 terms 'merge' to describe the same process.

In the amalgamation process provided for in the Act, two incorporated associations join together to form a new legal structure, without either of them having to close down (or wind up) and with the assets automatically transferring to the new (amalgamated) legal structure. Using the amalgamation process in the Act means that neither incorporated association has to go through the process of winding up and having to transfer assets to the other organisation (although this is a separate option that may be preferred in some cases).

More than two incorporated associations can amalgamate, however this fact sheet assumes only two are considering amalgamation.

There are a number of other possible scenarios in which not-for-profit organisations might want to join together, which are not covered by this fact sheet. For example, a Victorian incorporated association may want to 'merge' 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 *Associations Incorporation Act* or the *Corporations Act* for this to occur, alternatives would have to be considered (such as one of the organisations winding up and transferring assets to the other organisation.) This process is not covered in this fact sheet.

Also, organisations that are considering working closely together might be able to do so without 'amalgamating' or legally combining their structures. For example, in some situations, joint venture arrangements or other contractual agreements can be used to formalise and document close working relationships between two or more organisations, without the need for the organisations to change or merge their individual legal structures (see Related Resources at the end of this document).

## What is the effect of amalgamation?

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The amalgamation process of two incorporated associations is governed by the *Associations Incorporation Act*. Under the Act, 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 a separate conveyance, transfer or assignment to transfer ownership. However, you may need to fill in paperwork to formalise the transfer, for example complete a 'Transfer of Land' form and lodge with the Land Victoria office for a transfer of land.

The property remains subject to any mortgage, charge, etc. which applied immediately before it became the property of the amalgamated incorporated association.

All debts and liabilities of the individual incorporated associations become the debts and liabilities of the amalgamated incorporated association.

## Is 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 (see Related Resources at the end of this document).

If you are approached by another organisation suggesting an amalgamation, you need to ask for details of the proposed amalgamation, the reasons for it and 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.

It may be preferable for the existing structures to remain in place, with the separate organisations entering into an agreement about working together in the future (see Related Resources at the end of this document).

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.

## Some issues to consider before amalgamating

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- ▶ What will be the impact on your clients? Can your objectives still be met – will you have to compromise?
- ▶ If your organisation has been endorsed by the 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 early in the process.

- ▶ The Act requires the members of both incorporated associations to approve both the amalgamation and the amalgamated association's rules and statement of purposes. Before proceeding, each Committee should consider whether the amalgamation is likely to obtain member approval, and whether consultations with your membership may be desirable.
- ▶ What is the culture of each organisation? Is a clash of cultures possible, 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 organisation is best suited to deliver your services?
- ▶ Where will the organisation be located and will this impact on service delivery?
- ▶ What will be the impact on your existing contracts and funding agreements? What will be the impact on your employees and existing employee agreements? You should find out how the other organisation's agreements will be affected.
- ▶ Does the other organisation have any potential or actual liabilities or debts you need to consider?

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

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### Possible benefits of an amalgamation

These include:

- ▶ reduced overheads – economies of scale, eliminate duplicated functions;
- ▶ shared managerial experience;
- ▶ knowledge sharing;
- ▶ better able to seek and obtain funding; and
- ▶ stronger brand.

### Possible costs of an amalgamation

These include:

- ▶ accounting fees – due diligence;
- ▶ legal fees for reviewing contracts and agreements etc.;
- ▶ management time spent on the amalgamation negotiations eg. negotiating the rules and statement of purposes 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;
- ▶ existing funding arrangements do not continue;
- ▶ existing tax endorsements do not continue – impact on funding and concessions, and, for public benevolent institutions and health promotion charities, the ability to salary package; and
- ▶ administrative steps post amalgamation (see below).

## The amalgamation process

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There are four main steps to becoming one incorporated association:

### Step 1

The associations wishing to amalgamate must each pass a special resolution (see Related Resources at the end of this document) and approve the:

- ▶ terms of the amalgamation;
- ▶ statement of purposes of the proposed amalgamated incorporated association; and
- ▶ rules of the proposed amalgamated incorporated association (Model Rules, Model Rules with amendments, own rules).

### Step 2

The associations wishing to amalgamate must each lodge with the Registrar of Incorporated Associations at CAV (the Registrar) a 'Notice of Special Resolution Approving Amalgamation of Incorporated Associations' (form available on CAV website see Related Resources at the end of this document).

### Step 3

The Public Officers of the incorporated associations must collectively lodge with the Registrar an 'Application for Amalgamation of Incorporated Associations' together with a copy of the statement of purposes and the rules of the proposed amalgamated association and the prescribed fee (form available on CAV website see Related Resources at the end of this document).

### Step 4

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

## What do we need to do following amalgamation?

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- ▶ Apply for an ABN for the new entity;
- ▶ Notify all stakeholders, including;
  - ▶ ATO – to discuss how tax concessions can be transferred to the new entity;
  - ▶ ATO – for PAYG and GST registrations;
  - ▶ 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;
  - ▶ Vic Roads in relation to any motor vehicles
  - ▶ The Registrar of Titles at Land Victoria in relation to any real estate (land) holdings. Transfer forms will need to be completed;
  - ▶ lenders; and
  - ▶ employees;
- ▶ Change letterhead, logo, website, printed materials.

## Related Resources

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### Related legislation

*Associations Incorporation Act 1981* (Vic)

*Corporations Act 2001* (Cth)

### Related links

For online legal information resources for Victorian community organisations about:

- ▶ working with other organisations (joint ventures, MoUs) see [www.pilch.org.au/workingwithothers](http://www.pilch.org.au/workingwithothers)
- ▶ passing special resolutions see [www.pilch.org.au/incguide](http://www.pilch.org.au/incguide) (Chapter 5) and [www.pilch.org.au/changestoconstitution](http://www.pilch.org.au/changestoconstitution)
- ▶ the duties of committee of management members in an incorporated association see [www.pilch.org.au/positionsia](http://www.pilch.org.au/positionsia)