

# Working with other organisations

Legal issues to consider when working with other not-for-profit organisations

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# Part 1

## Introduction

# Introduction



## This part covers:

- ▶ why organisations may want to work together, and
- ▶ the process for deciding whether and how to work together



### Disclaimer

This guide provides information on working with other organisations. This information is intended as a guide only, and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to the [full disclaimer](#) that applies to this guide.

## The purpose and structure of this guide

This guide:

- is designed to help organisations understand the different arrangements they can use to work together, and
- summarises some of the legal issues that not-for-profit organisations should consider before deciding to work together

This guide is made up of 9 parts:

<b>Part 1.</b>	<b>Introduction</b>
<b>Part 2.</b>	<b>Ways that organisations can work together</b>
<b>Part 3.</b>	<b>Governance and culture – organisational fit and project structure</b>
<b>Part 4.</b>	<b>Due diligence</b>
<b>Part 5.</b>	<b>Tax and charity status</b>
<b>Part 6.</b>	<b>Real property and intellectual property</b>
<b>Part 7.</b>	<b>Integrating and transitioning backend services</b>
<b>Part 8.</b>	<b>People and safety</b>
<b>Part 9.</b>	<b>Privacy and dealing with information</b>



### Note

This guide is intended for not-for-profit organisations that are considering working with other not-for-profit organisations. There may be other legal issues to consider when a not-for-profit organisation wants to work with a for-profit organisation.

## Why do organisations work together?

There are many reasons why organisations may consider working together.

### The benefits of working together can include:

- increased efficiency
- shared overhead costs
- increased reach or broader service offering
- shared knowledge, learnings and research findings, or
- access to certain funding that is unavailable to the organisations without working with others

Initiatives and strategies around working together have emerged – from ‘collective impact’ to ‘shared value’ (see below for links to more information).

There are also developments in the Australian government funding landscape, with some tender processes promoting consortia formation or even mergers for organisations delivering government-funded services.



### Note

While there may be good reasons to work together with other organisations, it may not always be appropriate and there may be valid reasons to continue working alone.



### Tip

Potential legal issues that may arise from working with other organisations should be considered **before** choosing an arrangement or approach, as that choice of arrangement may help manage key legal issues and risks, and avoid potential significant legal costs.



If you are in the early stages of considering whether to work with another organisation or a range of organisations, the following links may be useful reading:

- [Collaboration for Impact](#)
- [Shared Value](#)
- [Strategic Business Planning – Victorian Department of Families, Fairness and Housing](#)

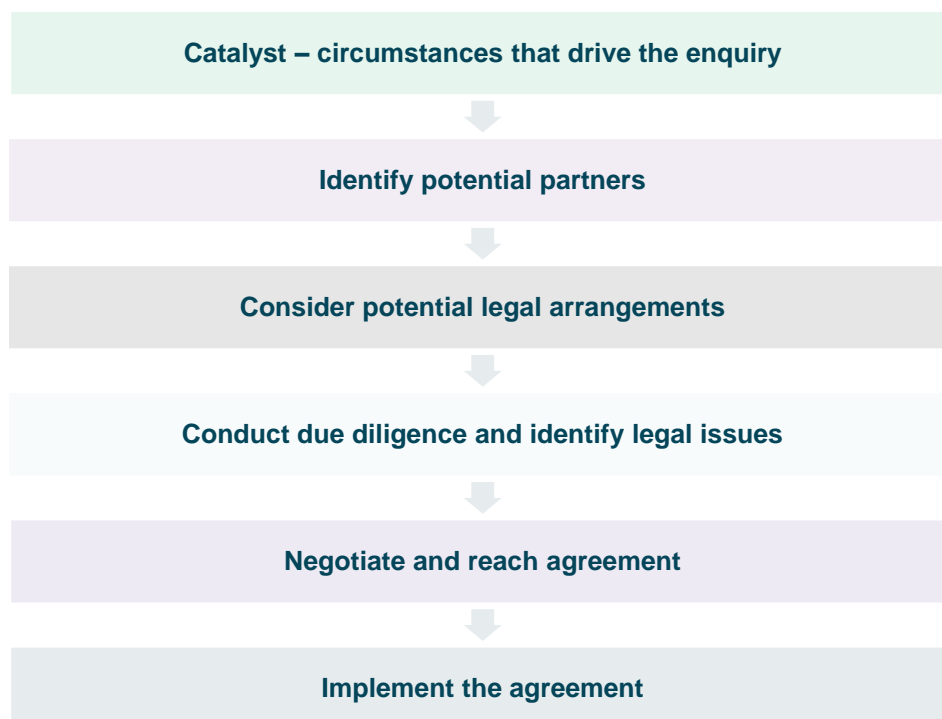
**Examples of organisations that have merged include:**

- [Mission Australia](#) (formed in 1997 through the merger of many city mission organisations across Australia),
- [Justice Connect](#) (the merger of PILCH Victoria and PILCH NSW in 2013), and
- [Whitelion](#) (the merger of Open Family Australia and Whitelion in 2011)

**Examples of organisations working together include:**

- [Care Connect](#), which offers shared services to other not-for-profits, and
- [Environment Victoria](#), which works with a range of organisations across Australia

## The process for deciding whether and how to work together





**Note**

Most organisations will need professional assistance to take these steps.

Professionals that should be involved include lawyers, accountants and employment advisers.

## Is working with another organisation the best option?

**Caution**

No organisation should commit to working with another organisation without considering this very carefully.

The laws and issues that not-for-profit organisations need to consider will sometimes be more complicated than a similar situation for for-profit businesses.

Charitable tax laws and charitable trust laws can add complexity – so it's always wise to seek advice from a specialist lawyer about legal issues that your idea might create, and how to execute your plans.

With planning and advice, there are many opportunities for not-for-profit organisations to work together to pursue their missions effectively and efficiently.

When considering working with another organisation, committee or board members need to think carefully about all aspects of their organisation, and the organisation they are considering working with.

### Committee or board members must consider:

The purposes of both organisations	<input type="checkbox"/>
What the organisations hope to achieve by working together	<input type="checkbox"/>
The opportunities to increase reach, enhance quality, or reduce costs	<input type="checkbox"/>
How the organisations will fit together culturally	<input type="checkbox"/>
How each organisation's charity or tax status (if any) will be affected by the proposed action plan	<input type="checkbox"/>
Whether there will be overlap in operations, assets, staff or programs	<input type="checkbox"/>

Depending on how closely the organisations are considering working together, the board or committee members should also think about whether they should agree to participate in a due diligence process, how detailed that process will be, and how the costs associated with due diligence will be met.



## Case studies in this guide

Throughout this guide, we use two case studies to illustrate the issues discussed:

- **Case study 1 – Three organisations in a hurry to amalgamate**

This case study involves three organisations hoping to amalgamate in a hurry to meet the requirements to tender to deliver government-funded services

- **Case study 2 – A small organisation merging with a larger organisation**

This case study involves a merger, where a small organisation will integrate into a larger organisation.



# Part 2

**Ways that organisations can work together**

# Ways that organisations can work together

This part covers the ways organisations can work together:

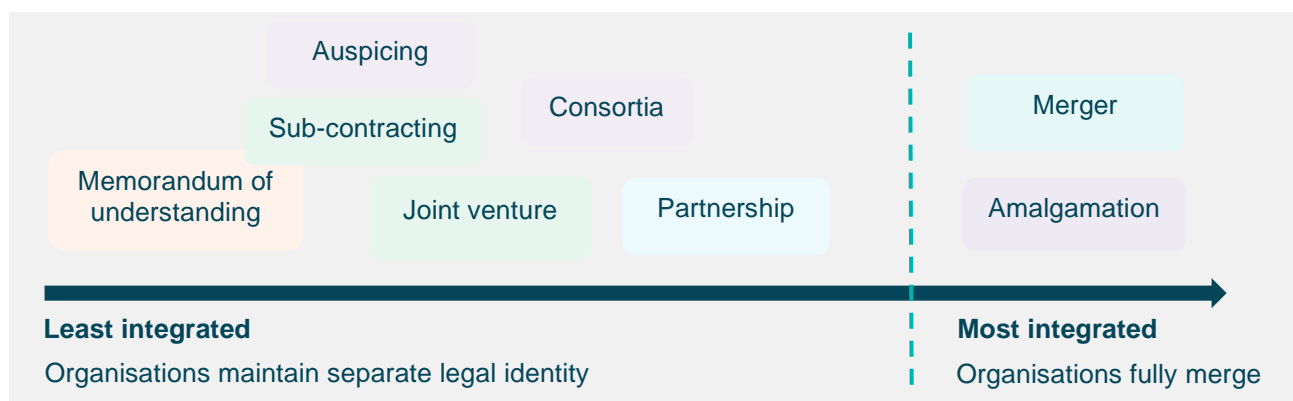
- ▶ consortia
- ▶ memoranda of understanding
- ▶ auspicing
- ▶ sub-contracting
- ▶ joint ventures and partnerships
- ▶ amalgamations and mergers

This part of the guide sets out legal arrangements which can be used by two or more organisations that want to formally work together.

When deciding what legal arrangement is most suitable for your organisation and the organisation you would like to work with (as well as the project you will work on), one thing to consider is the extent to which the parties want to be integrated (joined).

The diagram below shows the scale of integration in working arrangements from least integrated to most integrated.

How integrated are the organisations that are working together?



## Tip

Always consider the tax consequences (if any) of the legal arrangement you are looking to make as this may have significant financial consequences.



# Consortia

A consortium is an association of organisations, which allows two or more organisations to combine their capabilities. This can help them to meet geographic coverage requirements or to provide the scope of services required by a project or tender.

Not-for-profit organisations often choose to form a consortium in response to a government tender.

**A consortium does not have a separate legal identity.** A consortium can be formed using the legal mechanisms set out in this part of the guide.

Advantages to forming a consortium	Disadvantages to forming a consortium
<ul style="list-style-type: none"> <li>Consortia partners can share skills, experience and expertise, which can increase their chances of winning tenders</li> </ul>	<ul style="list-style-type: none"> <li>Forming a consortium might make it harder to respond to a tender, as some potential consortia partners may not be open with providing their information or may have long internal approval processes to approve the submission of a tender</li> </ul>
<ul style="list-style-type: none"> <li>Different consortia partners can bring different and unique selling points to the table</li> </ul>	<ul style="list-style-type: none"> <li>It takes time to develop a consortium and to form good relationships between consortia partners – a hastily developed consortium may cause problems later down the track</li> </ul>
<ul style="list-style-type: none"> <li>Consortia partners can share development costs and reduce overheads</li> </ul>	<ul style="list-style-type: none"> <li>A consortium is harder to manage than a single organisation</li> </ul>
<ul style="list-style-type: none"> <li>All consortia partners can share in the risk of the consortium</li> </ul>	<ul style="list-style-type: none"> <li>If one consortium partner fails to deliver, then the entire consortium may suffer</li> </ul>



## Note

The terms 'consortium' and 'consortia' are very broad and don't have defined legal meanings.

This part of the guide sets out different legal mechanisms that organisations can use to form a more structured consortium. Organisations that want to form a consortium should obtain legal advice to make sure that the structure of their consortium is fit for its purpose.

# Memoranda of understanding

A memorandum of understanding (**MOU**) is often used when two organisations agree to share information, set up a framework or set out a vision for working together. MOUs are common in the not-for-profit sector.

Organisations entering into an MOU do not merge together – they remain separate, but decide to work together to achieve a common goal. MOUs can have different levels of formality, but are often used when organisations don't want to enter into a binding arrangement.



### Example

An MOU might say that Organisation 1 and Organisation 2 want to achieve a certain goal together, and that they agree to enter into negotiations to enter into a contract.

After the MOU is signed, Organisation 1 and Organisation 2 will negotiate and eventually sign a more formal agreement.

### MOUs are generally the least formal legal arrangement discussed in this guide.

MOUs are often not legally binding, although they can be legally binding if the organisations require their promises to each other to be enforceable.

If an organisation wants to enter into a legally binding arrangement, it may be more appropriate to consider a more formal arrangement like a joint venture (discussed below).

An MOU is typically used as the first step when two or more organisations are exploring the potential to enter into a more specific or formal contract or agreement at a later stage after negotiations.



### Tip

If organisations do not intend for their MOU to be legally binding, they should state in the MOU that it is not legally binding. Organisations should also check for other language that may indicate that the MOU would be binding, such as language that creates rights and obligations.

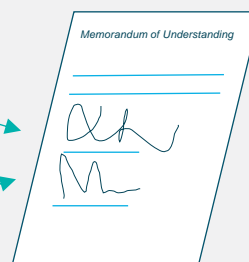
It's good practice to discuss whether the MOU is intended to bind all the parties or only certain parties.

Organisation 1

Both organisations sign the MOU

No legal obligations are formed between the organisations

Organisation 2



Organisations 1 and 2 are still separate organisations, but they have signed a MOU to work together



For more information on MOUs, see [our webpage on memoranda of understanding](#).

## Auspicing

To 'auspice' means to provide support, sponsorship or guidance.

An auspicing arrangement is a bit like a sub-contracting arrangement – the auspicor applies for funding or sponsorship for a project, and then sub-contracts the project to the auspicee.

However, in most cases, the auspicee would normally approach an auspicor seeking assistance, rather than an auspicor looking for projects to auspice.

Auspicing has evolved out of the difficulty unincorporated groups can have to obtain funding such as grants. This difficulty is exacerbated because funding bodies generally prefer to deal with an incorporated legal entity (rather than an unincorporated group of people) and some funding bodies restrict grants to organisations with deductible gift recipient (**DGR**) endorsement or tax concession charity (**TCC**) status (most often held by certain types of established organisations).

An auspice agreement entered into by the auspicor and the auspicee is a legally binding contract. It sets out the legal obligations regarding the roles and funding relations between the auspicor and auspicee.

When an auspicing arrangement is set up, it's important to have a written auspicing agreement so that all parties understand their roles and responsibilities in the auspicing relationship.

An auspicing agreement must be drafted with care because the auspicor is taking legal and financial responsibility for the auspiced project and the auspice agreement will not relieve the auspicor of those obligations.



For more information, see [our webpage on auspicing](#).

## Sub-contracting

Sub-contracting is common in the not-for-profit sector, in particular between 'lead agencies' that are funded by a government department to deliver services, and other agencies that help deliver those services.

Often, sub-contracts need to be prepared in a hurry after news of a successful tender application. As a result, subcontracting agreements in the not-for-profit sector can be inadequate.



For more information, see our webpages on [sub-contracting](#) and [entering into contracts](#).

## Joint ventures

Joint ventures are contract-based arrangements, and are usually established for a specific project when two or more organisations agree to formally work together to achieve a common goal.

When two organisations enter into a joint venture, they **don't** merge together, or stop existing. Instead – they separately agree to work together for a particular purpose or project. Depending on what is agreed between the organisations, the organisations forming the joint venture might contribute money, skills, knowledge or other resources to the joint venture.

A joint venture is formed when two or more organisations sign a **joint venture contract**. A joint venture can be established for a wide variety of purposes.

A joint venture contract is usually customised to set out the terms of the joint venture.

### A joint venture contract is legally binding, and usually sets out:

- the obligations and rights of each organisation participating in the joint venture
- how the costs of the joint venture project is divided between each organisation participating in the joint venture
- how the joint venture project is completed, and
- how the day to day operations of the joint venture or joint venture project will run

The joint venture contract will usually also state that the arrangement is not a partnership.

If the contract does not state that the arrangement is not a partnership, a court may find that the arrangement was a partnership and not a joint venture. This would have legal consequences as each partner is liable for all the liabilities of a partnership – for example, if one partner becomes insolvent, the other partner is liable for 100%, not 50% of the partnership's liabilities.

### There are two main types of joint ventures:

#### 1. unincorporated joint ventures –

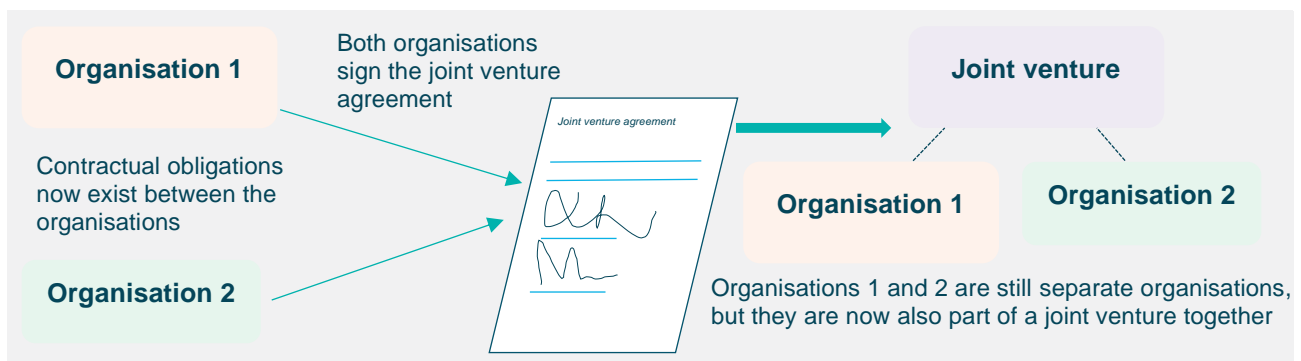
the joint venture is based on the contract signed by the organisations, and is not a separate legal organisation

#### 2. incorporated joint ventures –

the joint venture is incorporated and is therefore a separate legal organisation, such as a company limited by guarantee or a private company

The relationship between the organisations in a joint venture depends on the nature of the joint venture.

If the joint venture is unincorporated, the organisations are bound to fulfil the obligations written in the joint venture contract. If the joint venture is incorporated, then the organisations are likely to be members of the joint venture company, and have broader obligations as members.



For more information on joint ventures see [our webpage on joint ventures and partnerships](#).

For information on incorporation and separate legal organisations see [our webpage on the decision whether to incorporate](#).



# Partnerships

The term 'partnership' is often used in the not-for-profit sector to generally describe a relationship between two organisations, however this use has a different meaning to the legal meaning of 'partnership'.

**The term 'partnership' has a special legal meaning.** When a partnership is created, a separate legal organisation made up of the partners is created (although the original organisations remain independent outside the partnership). A partnership can be used as a 'vehicle' for two or more organisations to reach a particular goal or deliver a particular project or service.

Organisations which want to form a partnership will usually sign a **formal partnership agreement**, which sets out the terms of the partnership. The partners will owe obligations to each other under the terms of the partnership agreement and will agree to act in good faith to benefit the partnership. 'Good faith' means that each partner must act honestly and try their best to reach the goal the partnership sets out to achieve.

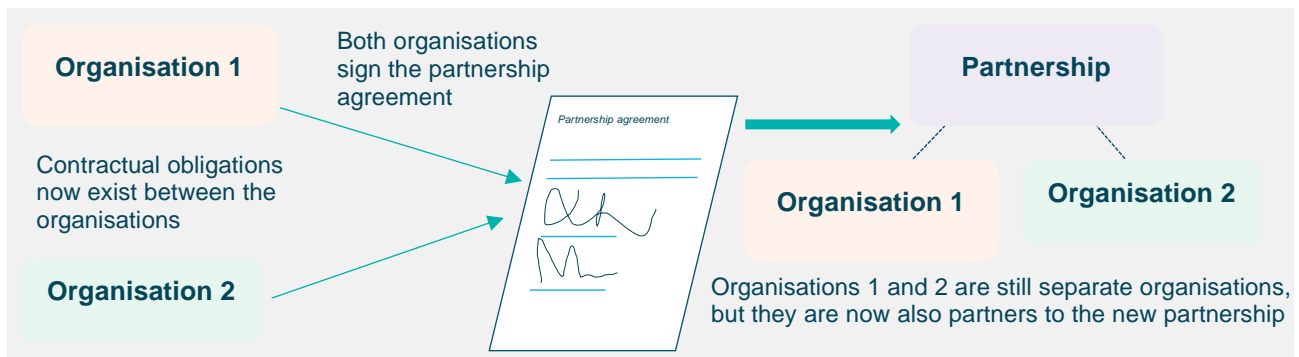


## Note

Each state has different laws for partnerships, but the laws are generally quite similar.

Organisations that form partnerships do not merge together or stop existing. Instead, they remain as individual organisations who have simply signed a partnership agreement to work with the other partners of the partnership.

**Importantly**, each partner in a partnership is 'jointly and severally liable' for the expenses and liabilities of the partnership. This means that one partner could be solely responsible and liable for all of the partnership's expenses and liabilities if the other partners are unable to pay.



## Example – partners are jointly and separately liable for the expenses of the partnership

Organisation 1 and Organisation 2 have both been operating for many years. They form a partnership to run a new mental health project in their area. They are responsible for different parts of the project.

When the project is half complete, Organisation 1 becomes insolvent. The partnership owes \$50,000 to contractors, and needs to provide services for six more months under the partnership's government funding agreement. Organisation 1 is wound up due to insolvency, so Organisation 2 is liable for the whole \$50,000, and for providing the

# Amalgamations

Amalgamating is a process which can be used by incorporated associations to formally combine to create one 'new' single incorporated association.

Amalgamation is an attractive alternative to a legal merger because it follows a simpler process to reach the same result.

Amalgamation is only available when the organisations that want to amalgamate are incorporated associations in the same state. Each state has its own laws that govern incorporated associations and the amalgamation process. The incorporated associations will need to approve the amalgamation through a special resolution and then apply to the relevant state regulator for approval.

When incorporated associations amalgamate, they form a new incorporated association, and the relevant state regulator will cancel the individual incorporated associations involved, so that they no longer exist.

The effects of amalgamation include:

- the property of the individual associations becomes the property of the amalgamated association
- all debts, liabilities and obligations become the debts, liabilities and obligations of the amalgamated association
- members of the individual associations become members of the amalgamated association, and
- new rules apply and a new committee of management is formed

Note – any legal proceedings against the individual associations may continue to apply against the new amalgamated association. The amalgamation will not end these proceedings.





### Case study 1 – three organisations in a hurry to amalgamate

Inner Strength, Inc. is an incorporated association in a regional town in Victoria, which was formed to raise awareness of domestic violence in the local community. Inner Strength also runs a small women's refuge for victims of domestic violence. Its small committee of management has wanted to expand its refuge and rehabilitation services for a long time, but has lacked funding.

Recently, the Victorian Government put out a tender for funding in the area of family violence. The tender relates to a broad regional area which includes the town Inner Strength operates in.

By itself, Inner Strength doesn't qualify for the tender, but the committee realises that it needs this funding if it wants to expand. It quickly reaches out to two other struggling incorporated associations in the area which offer services to domestic violence victims, suggesting that the three organisations form a consortium to respond to the tender. To do this, they decide to formally amalgamate, because they want to keep working together in the future.

If the new organisation doesn't win the tender or if the amalgamation doesn't happen in time to submit the tender, Inner Strength would run out of funding quickly, and may be forced to shut down their refuge. The tender is due in three months, so these organisations need to arrange to amalgamate quickly. The committees decide to meet, contact Consumer Affairs Victoria, and start the amalgamation process.



For more information, see [our webpage on amalgamations and mergers](#).

## Mergers

A merger is the most complex legal arrangement explained in this guide.

A merger can happen different ways, depending on the organisations involved, such as:

- when one (usually smaller) organisation becomes part of another (usually larger) organisation, or
- when two organisations merge to create a new organisation

There are many different paths and strategies to achieve a merger of two or more organisations.

Mergers are always specifically tailored to the organisations and situation involved to reach the best outcomes for all 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 will need the help of a lawyer to put together a merger, particularly to assist them with structuring their merger and drafting the merger contract.

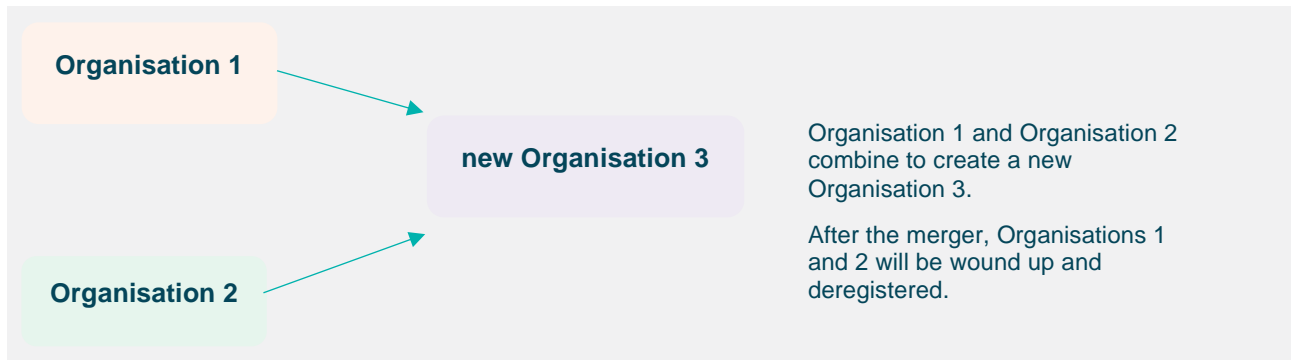


## The two most common merger pathways

### Option 1

Similar to an amalgamation – two or more organisations combine to create one new organisation.

The merging organisations will transfer their assets, employees and operations to the new organisation and the merging organisations are wound up and 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 3 can have purposes that encompass those of both Organisation 1 and Organisation 2.



### Note – transferring assets

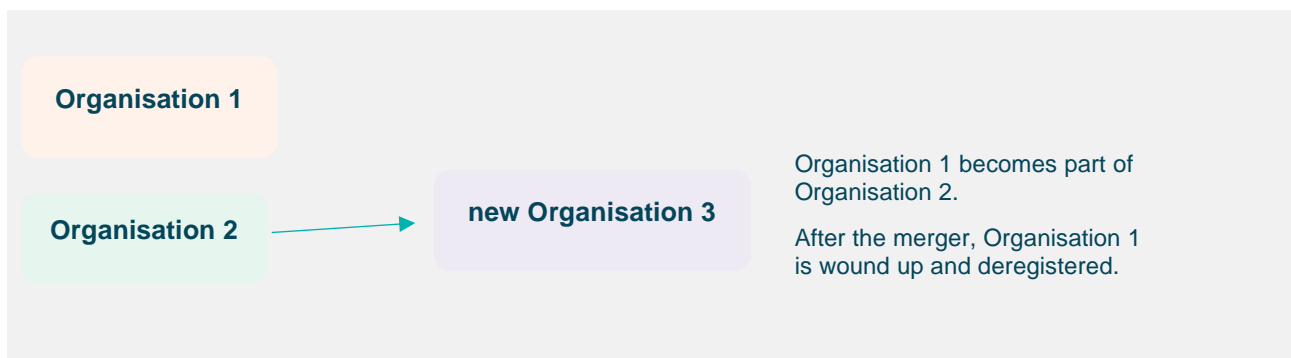
If the purposes of Organisation 3 will be different to the purposes of Organisation 1 or 2, or if assets held on trust are to be used for a purpose which may not align with Organisation 3's purposes, the parties must seek advice about transferring assets. This is due to potential tax consequences.

### Option 2

One organisation (usually larger and more sophisticated, or with other beneficial attributes such as access to tax concessions or deductible gift recipient endorsement) may take on some or all the assets, operations, employees and volunteers of another (usually smaller) organisation. The smaller organisation is then wound up and deregistered.

The organisations then operate together under the name and brand of the larger organisation. This is usually called a **takeover**, **merger** or **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.





## Case study 2 – a small organisation merging with a larger organisation

Happy Eyes, Inc. is an incorporated association which conducts educational programs for the parents of young children who are visually impaired. KidVision Limited is a larger company limited by guarantee which also works with young children who are visually impaired. Happy Eyes and KidVision currently conduct separate programs with the same clients at Melbourne's Royal Children's Hospital. A 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, and they are advised to amalgamate or merge with another organisation.

The committee of Happy Eyes understands that, without government funding, it can't continue to operate, so it decides to approach KidVision with a merger proposal. The proposal states that Happy Eyes' staff and operations will become part of KidVision, and Happy Eyes would be deregistered.

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 to take on Happy Eyes' staff, operations, programs, contracts and assets.

If the merger is successful, Happy Eyes will become part of KidVision, and Happy Eyes will be deregistered.

## Structuring the merged organisation

When a company is created to form the merged organisation, it can be structured in different ways depending on the nature of the organisations and activities involved.

If the new organisation is taking on a **social enterprise** operated by one of the original organisations, the new organisation may be structured as two entities – such as a company limited by guarantee that wholly owns a private company (a subsidiary), which operates the enterprise.

Unlike amalgamations, the merger process is not outlined in law (other than if competition issues arise) and can be completely customised. The merger process is therefore quite complex.

**A merger is essentially a contractual agreement between two organisations to form a single organisation.**

### When two organisations merge:

- 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 are not transferred across
- the organisations can decide which activities to continue
- the purpose can be tailored to take into account the particular purposes of the new organisation (noting that access to tax concessions, and trusts that automatically apply to the assets of charities, may limit flexibility in drafting), and
- the members of the individual organisations may not automatically become the members of the merged organisation. The members of the individual organisations would need to consent to becoming members of the merged organisation

## Example of a typical merger process

**Catalyst** – The board (or committee) of at least one of the merging parties decides to explore a merger as a strategic priority



**Identify potential partners** – the board (or committee) might identify two or three organisations it would like to approach for a merger, or it might decide to speak directly to an organisation it already works with on an informal basis



**Consider potential merger** – the boards (or committees) of both organisations will have preliminary meetings about a potential merger. Once the two organisations decide they are willing to look into merging together, they will usually carry out 'due diligence'. (Due diligence is discussed in more detail in part 3 of this guide)



**Conduct due diligence and identify legal issues** – 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



**Board resolutions** – once both organisations' boards (or committees) have decided they want to go ahead with the merger, they will usually hold an official board (or committee) meeting, and make an official decision to go ahead with the merger by passing a resolution. Depending on the rules or constitutions 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 (75% approval) is usually required).



**Reach agreement and implement the merger** – 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



**Winding up organisations which will no longer operate** – both organisations may need to be wound up (if they merged to form an entirely new organisation), or only one organisation may need to be wound up (if it has transferred its assets to the other organisation that will continue as the corporate structure for the merged organisation)



### Note – winding up

Winding up can be complicated. You will need the assistance of lawyers to ensure the organisation that is winding up properly meets its liabilities, and also appropriately manages assets that may be held on trust.



For more information, see our webpages on [amalgamations and mergers](#) and [the process of ending an organisation](#).



### Note – consortia

Organisations can use any of the legal mechanisms set out in the table below to form consortium. Organisations that want to form a consortium should obtain legal advice to make sure that the structure of their consortium is fit for its purpose.

Table comparing the ways organisations can work together

Memoranda of understanding	
Level of integration	Lowest
Level of complexity	Lowest
Involvement of legal representative	It's a good idea to have a lawyer draft your MOU
Cost	Lowest – may incur no cost at all
Documentation	Memorandum of understanding
Level of due diligence required	Low
Involvement of regulator	Low/nil
Auspicing and sub-contracting	
Level of integration	Low
Level of complexity	Low
Involvement of legal representative	It's a good idea to have a lawyer draft the agreement
Cost	Lowest
Documentation	Agreement
Level of due diligence required	Low
Involvement of regulator	Low/nil



Partnership	
Level of integration	High
Level of complexity	Low
Involvement of legal representative	A lawyer should prepare the partnership agreement and give tax advice
Cost	Low – depends on tax consequences
Documentation	Partnership agreement
Level of due diligence required	Low
Involvement of regulator	Depends on tax consequences
Joint venture	
Level of integration	Medium-high
Level of complexity	Low-medium
Involvement of legal representative	A lawyer should prepare the joint venture contract and give advice on what, if any, assets will be transferred to the joint venture, and how they can be transferred
Cost	Medium – mostly legal costs
Documentation	Joint venture agreement
Level of due diligence required	Medium
Involvement of regulator	Low (if JV is unincorporated), Medium (if JV is incorporated)
Amalgamation	
Level of integration	Highest
Level of complexity	High
Involvement of legal representative	You will need a lawyer to provide advice on the transfer of property, assets, contracts, debts, liabilities, staff, etc. to the new amalgamated association
Cost	Medium – legal costs and regulatory fees, possible tax consequences
Documentation	<ul style="list-style-type: none"> <li>• Documents for each association to approve the amalgamation</li> <li>• Documents to transfer assets, debts, liabilities, employees, etc. to merged organisation (if relevant)</li> <li>• Regulatory forms and documents</li> <li>• Documents required to set up new association</li> </ul>
Level of due diligence required	High





Involvement of regulator	High
<b>Merger</b>	
Level of integration	Highest
Level of complexity	Highest
Involvement of legal representative	Each organisation will need a lawyer to help them throughout the merger process, including the negotiation and drafting of the merger contract and the transfer of property, assets, contracts, debts, liabilities, staff, etc.
Cost	Highest – legal costs and possible tax consequences
Documentation	<ul style="list-style-type: none"> <li>• Merger agreement</li> <li>• Documents for each organisation to approve the merger</li> <li>• Documents to form new organisation</li> <li>• Documents to transfer assets, debts, liabilities, employees, etc. to merged organisation</li> <li>• Regulatory forms and documents</li> </ul>
Level of due diligence required	Highest
Involvement of regulator	High (generally), but depends on the kinds of organisations involved



# Part 3

**Governance and culture -  
organisational fit and project  
structure**



# Organisational fit and project structure

## This part covers:

- ▶ how well will the organisations work together?
- ▶ how will the new project or organisation be organised?
- ▶ what happens to the members?

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**When you are thinking about working with another organisation, it's important to consider how the people within the organisations will work together, and how the purposes of your organisations align.**

Thinking about these issues early can mean organisations have time to plan and put in place management strategies.

## How will the organisations work together?

You will need to consider how the culture of the organisations will work together – in particular, you should consider how your staff and volunteers will get along. Agreeing how to manage staffing issues will be critical to successfully working together.

### Things to consider

If the organisations are going to work on a new project together:

- how will the project be staffed, and who will oversee its day-to-day operations?
- will plans cause potential issues for key staff?

If the organisations are amalgamating or merging:

- will there be too many staff members if all staff from both organisations are employed by the new organisation?
- how will you manage this issue?

If working with another organisation will cause your staff members' employment or environment to change, it's important to manage the changes carefully and sensitively so that key staff members stay, and if required, transfer happily to a new organisation or onto a new project. It can be difficult for people who are passionate about what they do to adjust to organisational change.

Consultation obligations may also apply under a relevant modern award or enterprise agreement. See part 8 of this guide (people and safety) for more information.



## Tips

A good strategy for retaining key staff is to keep them informed of what is going on, manage their expectations, and ease them into the transition.

Other strategies might include:

- providing a tour of a new workplace
- providing information sessions and training sessions on new systems and policies
- asking for their feedback and input, and
- integrating staff socially so they get to know each other

# How will the new project or organisation be organised?

If your organisation is thinking of merging, amalgamating or entering into a partnership or joint venture, a new project or organisation might be created.

It's important to give this careful thought, together with any advice received from your lawyer.

### If a new project is being established:

How will the project be run on a day-to-day basis?

Will a new team or committee be formed using staff members from the individual organisations?

How will the new project be financed? What funding and assets will be contributed by each organisation?

### If a new organisation is being formed:

What kind of organisation will it be?

Do new rules or a new constitution need to be prepared and adopted by the members of the new organisation?

What will be the composition of the new committee? Will all the committee or board members from both organisations form a new board, or will a larger organisation's committee or board take on a few committee or board members from a smaller organisation? Will there be a completely new board? Will all the members' voting rights be equal?

How will management be organised to combine the operations of the two organisations?



### Case study 1 – three organisations in a hurry to amalgamate

The three organisations need to think about the new organisation's committee of management. Three separate committees of management can't become one single committee. The three committees have been meeting regularly to try and speed up the amalgamation process. At one of their meetings, they talk about the new committee and who will be on it. They also decide which employees of all three organisations will form the new management team for the new organisation. These are tricky decisions to make and they require significant co-operation from everyone involved.

## What happens to the members?

Membership is not affected when organisations maintain separate organisations (as is the case for most consortia, MOUs, partnerships and joint ventures).

However in the case of amalgamations and mergers (and particularly if the organisations are becoming a new organisation), it's important to consider what will happen to each organisation's members.

In the case of an amalgamation, the members of the individual incorporated associations will automatically become the members of the new amalgamated organisation.

However, in the case of a merger, the members of one or both individual organisations will not automatically become members of the new merged organisation. Depending on the legal structure of the new merged organisation, members may need to sign a new application for membership and pay a new membership fee or, in the case of companies limited by guarantee, sign a guarantee.

Where very large and complex mergers are planned, it's possible to seek a court order to automatically transfer members. This is a time consuming and costly process. As such, it's only useful to consider in certain circumstances. Your lawyers can explain this option to you if you think the cost may be justified in your circumstances.



### Case study 2 – a small organisation merging with a larger organisation

As an incorporated association, Happy Eyes has ten members, who are all staff members or volunteers of the organisation. The members will not automatically become members of KidVision, because it's a company limited by guarantee. Being a member of an incorporated association is different to being a member of a company limited by guarantee.

KidVision must decide whether it will invite the members of Happy Eyes to be members of KidVision, and if it does, what process it should follow.



# Part 4

## Due diligence

# Due diligence

## This part covers:

- ▶ the due diligence process,
- ▶ contracts, and
- ▶ finance and liabilities

**Due diligence is a critical early step in the process of deciding whether to work with another organisation.**

**It's a process of identifying issues or risks, and then deciding whether the issues or risks can be appropriately managed.**



### Note

The amount of due diligence required (that is, the level of detail put in to analysing the other organisation's documents and information) will depend on how closely the organisations are considering working together.

In the case of entering into a contractual arrangement for a particular project (as is the case for a memorandum of understanding), joint venture or partnership, less investigation may be required and may be limited to the financial or technical capabilities of an organisation depending on the type of project.

However, depending on how closely the organisations are going to be working, and the risks raised by the arrangement, more detailed due diligence may be required.

**The diagram below sets out how much due diligence is generally needed for the different legal arrangements.**



Due diligence is a very important part of the process of deciding to work with another organisation.



### Note

In the case of a merger, each organisation will want to look at the other organisation's corporate structure, rules or constitution, contracts, finances, lists of assets, employment contracts, policies and procedures, property arrangements and any other key contracts with significant value.

In the case of a joint venture, the organisations might decide they only want to see each other's financial statements for a specific period.



### Caution

Remember – directors and committee members have duties to meet when making decisions. Deciding whether to work with another organisation is an example of when directors should be very careful to ensure they are complying with their legal and fiduciary duties.

For more information, see [our webpage on governance](#).

## The due diligence process

'Due diligence' is simply a legal term to describe the process of organisations investigating and considering the risks of working together.

Typically, organisations ask for certain types of information from the other. That information is examined (usually by lawyers, technical advisors and accountants working for each organisation), and any issues or potential issues that might jeopardise the proposal to work together, or that might affect a new organisation after a merger happens, are identified.

Examples of issues include:

- an important lease is about to expire
- employment contracts don't comply with the law
- an organisation is acting beyond the scope of its purposes
- an organisation is restricted from changing its structure without seeking another party's consent
- an organisation holds client files in breach of privacy laws, or
- an organisation is currently being sued



### Tip

It's best to deal with any problems identified during due diligence before deciding to work together, rather than after.





### Case study 1 – three organisations in a hurry to amalgamate

The three organisations that want to amalgamate are small and similar to each other.

They each have:

- a lease for an office space
- a lease for the women's refuge they operate
- files which they keep for their clients
- various basic contracts with local doctors, hospitals, social welfare services and other referral organisations
- financial information, and
- a few employees

Each organisation has occupational health and safety concerns, given their clientele, and none of the organisations has any registered intellectual property.

Each organisation chooses to do some due diligence on the others, but only at a 'high level', because the amalgamation process needs to happen quickly.

#### Due diligence typically involves:

- each organisation asking for information and documents from the other (such as property information, current contracts, employment information)
- each organisation reviewing the information and documents provided by the other organisation
- if either organisation has any questions about the information or documents provided, they ask those questions of the other organisation, and
- when a lawyer is involved and is assisting an organisation with its due diligence, the lawyer will usually prepare a due diligence report for their client, setting out any issues or problems it has identified during due diligence. Technical and financial advisors might also prepare due diligence reports on the technical and financial aspects of the organisation



### Case study 2 – a small organisation merging with a larger organisation

Happy Eyes and KidVision send each other lists of information and documents they would like to receive from each other. Each organisation provides the other with all the information and documents they ask for, and their lawyers review this information and write due diligence reports for their respective clients, setting out the issues or problems they have found.

KidVision's lawyers have identified several issues they need to resolve before the merger is agreed to.



### Note – confidential information

Confidentiality agreements play an important part of the due diligence process.

Your organisation may hold its own confidential information or the confidential information of others. For example, your supplier lists or lists of donors may be confidential information. You should ensure you have an agreement to protect your organisation's confidential information.

Ensuring the protection of sensitive commercial information exchanged with another party as part of a due diligence may also be part of the directors meeting their duties.

## Contracts

Most organisations are involved in contracts of some kind, whether they are informal or formal.

When you are considering working with another organisation, it's a good idea to list all the contracts your organisation has signed, and find signed copies of the contracts. This will ensure you have this information readily available if another organisation wants to complete 'due diligence' on your organisation.



### Tip

Also think about any verbal contracts that your organisation might have entered into.

For example, your organisation might have a verbal contract with another organisation to use their office space for free. These contracts can be just as valid as written contracts if they satisfy the formal requirements for a contract.

See [our fact sheet on understanding contracts](#) for more information about whether a verbal agreement is actually a valid contract.



### Tip

If you are planning to give the other organisation a copy of your contracts, make sure you check the contract for any confidentiality restrictions. The contract might say that you can only give copies to certain people, or that you must obtain the other contracting party's consent before you give a copy to third parties.

If you are considering joining with another organisation to form a new organisation through a merger, it's important to know what contracts your organisation has signed, and what contracts the other organisation has signed –

- In the case of **amalgamation**, the new combined organisation will take on all the contracts and liabilities of the amalgamated organisations.
- In the case of a **merger**, once a new organisation is formed, the old organisations which signed those contracts might be deregistered or wound up (and would therefore no longer exist).

If your organisation ceases to exist while it is still a party to certain contracts, it may breach the terms of these contracts because it can't fulfil its contractual obligations, or the directors may not have met the requirements that apply when winding up an organisation.

To avoid this, you should consider whether you can:



- transfer (or 'assign' or 'novate') the rights and obligations under the existing contract to the newly merged organisation, or
- otherwise obtain the consent of the other party or parties to the contract before proceeding

Alternatively, you may prefer to terminate the contract.

### Avoid the issues raised on winding up to effect a merger by taking the steps below

- **Look at the contracts your organisation is party to**
  - Decide which contracts should be transferred over to the new organisation (after a merger takes place) and which contracts should be terminated
- **Read the contracts very carefully (or get your lawyers to read them)**
  - There may be a term in a contract that says your organisation needs to get the consent of the other party to the contract before you transfer it to the new organisation. If there is a term like this in a contract, you need to get the consent of the other party before you officially amalgamate or merge.
  - Check the contract to see if the consent needs to be in writing. The contract for the amalgamation or merger will often require that these types of consents be obtained before completing the amalgamation or merger.
  - Check to see if you can terminate the contracts you no longer need. The contracts will often have termination clauses which say that your organisation needs to give the other party written notice that you want to terminate the contract, by a certain time, or termination fees may apply
- **Your organisation will need to transfer the contracts it wants to transfer to the new organisation, and terminate those that it does not want to continue.**
  - You may need a lawyer to help you transfer the contracts.



### Case study 2 – a small organisation merging with a larger organisation

As part of due diligence, KidVision asked Happy Eyes for copies of all its contracts. Both organisations discussed which of Happy Eyes' contracts would be transferred to KidVision, and which would not.

**Contract 1:** Happy Eyes has a service contract with the Royal Children's Hospital to provide programs for parents of children who are visually impaired. Happy Eyes wants to transfer this contract to the newly-merged organisation.

Happy Eyes needs to draft a short letter to the Royal Children's Hospital asking for its consent to transfer the contract to KidVision, and allow plenty of time for the Royal Children's Hospital to give its consent before Happy Eyes and KidVision sign a merger contract.

**Contract 2:** Happy Eyes also has a contract with a phone company, which provides phone services at their small head office. Happy Eyes will become part of KidVision and will use their phones, so it no longer needs this contract. The contract has a termination clause, which says 'the customer may terminate this contract by giving two weeks' notice to the Company, and a \$100 termination fee applies'.

Happy Eyes needs to write a letter to the phone company, giving them two weeks' notice that they want to terminate the contract, and then pay the \$100 termination fee.

# Finances and liabilities

If your organisation decides it wants to work with another organisation, you need to be sure that both organisations are financially stable, and that they will be able to fulfil their commitments, including any outstanding commitments that relate to entering the intended arrangement (for example, paying debts and liabilities before merging).

This due diligence is especially important for proposed partnerships, amalgamations and mergers.

## Financial due diligence

If you are thinking about working with another organisation, it's important to understand the state of your organisation's finances and, depending on how closely the two organisations are going to be working together, investigate the finances of the other organisation as well.



Organisations exploring working together might ask for each other's financial statements, asset registers or grant funding details, to check and better understand their financial stability.

Some organisations have publicly available financial statements that are often included in annual reports. For charities, this information may be on the [national charities register](#). Carefully consider how up-to-date this information is and whether you need to ask for more information.

Your organisation should review the other organisation's financial situation very carefully, particularly if you are relying on the other organisation to contribute funding to a project, or if you are considering merging or amalgamating with that organisation.

### Think about:

- Where does their funding come from?
- Are their funding streams secure? Are there any conditions that apply to funding? Will these conditions affect plans to work together, or will working together jeopardise the funding?
- What assets do they have?
- Do they have cash on hand?
- Are significant assets held on trust to be applied to a very specific purpose or project?

## Liabilities

It's also important to consider the liabilities the other organisation has, and whether they have the potential to cause problems for the new project, amalgamation or merger.

In the case of an amalgamation or merger, the new amalgamated or merged organisation might need to take on these liabilities, so it is important to know about them and understand the risks involved. This information is usually provided or discovered during due diligence.

### Examples of liabilities include:

- debts (mortgages, loans, lines of credit, guarantees)
- employee entitlements (annual leave, long service leave, maternity leave, superannuation payments)



- litigation or claims against the organisation (current or potential litigation, claims made by employees), and
- tax bills or unpaid regulatory fees



### Tip

Ask the other organisation to confirm they have no current or potential litigation claims against them.

Depending on how closely you are working together, you might also want to search some state and federal court records to confirm there is no current litigation against the other organisation (this can generally be done online).



### Note

During due diligence it may be a potential issue if one organisation seems to be getting a 'better deal' than another organisation by merging or amalgamating. If so, the organisations need to weigh up the pros and cons and decide if the issue is significant enough to be a 'deal breaker'.

Often these issues are not significant enough in the context of the broader arrangement, and it is worked out.



### Case study 1 – three organisations in a hurry to amalgamate

One of the other organisations, Mama Bear, Inc. has raised a concern during the brief due diligence process. Inner Strength has a loan with a regional bank, which they took out to set up their refuge about three years ago. They still haven't paid it off. If the organisations amalgamate, the new amalgamated organisation will take on this debt.

The organisations eventually agree that the small debt of Inner Strength is not a big enough issue to stop the amalgamation from happening, and so, after much discussion, Mama Bear agrees to go ahead with the amalgamation.



# Part 5

## Tax and charity status



# Tax and charity status

## This part covers:

- ▶ charity registration
- ▶ stamp duty, and
- ▶ payroll tax

**Organisations that work together need to think about how their arrangements with one another will impact their tax concessions and (if relevant) their charity status.**

This is a critical issue to consider because if organisations get tax issues wrong, they can lose their tax or charity status or may even have to back-pay tax to the Australian Taxation Office (**ATO**).



For a summary of the tax concessions available to not-for-profit organisations, see to [our tax webpage](#).

For more information about charities and registering as a charity, refer to [our webpage on charity registration](#).

Tax concessions are granted to an organisation if it satisfies the requirements for a particular category of tax concession. **A change in activities, objects or purposes may cause an organisation to no longer be eligible for a tax concession.**

### Tax concessions can provide a range of benefits, such as:

- exempting an organisation from income tax
- allowing donors to claim their donations as a tax deduction (these organisations are referred to as 'deductible gift recipients')
- allowing staff to claim certain salary sacrificing benefits,
- allowing the organisation to claim certain fringe benefits tax concessions, and
- allowing the organisation to report and calculate goods and services tax (**GST**) on a simplified basis

Each of these common not-for-profit tax concessions are discussed in more detail below.



### Caution

It is a good idea for your organisation to get tax advice from a lawyer:

- before deciding to work with another organisation, and
- when considering the arrangements your organisation is proposing to enter into with that other organisation



### Example

Some deductible gift recipients need to make sure that their governing body (their board of directors or committee of management) is made up of a majority of 'responsible persons' (these are usually people with certain professional qualifications or who have a role that the ATO recognises as having some responsibility to the public). These organisations must carefully choose the members of their governing body to ensure that they continue to meet the 'responsible persons' requirement at all times.

If two or more organisations decide to work together and merge their governing bodies, this may change the number of 'responsible persons' on their board or committee. This could put their ongoing entitlement to deductible gift recipient status at risk. Therefore, changes to the governing body of an organisation may also affect its continued eligibility for tax concessions.

Most federal tax concessions require an organisation to be a charity registered with the Australian Charities and Not-for-profits Commission (**ACNC**) (there are some exceptions – read [our fact sheet on the application process for endorsement as a Tax Concession Charity](#) to find out more). For this reason, maintaining registration as a charity can be a critical issue.

## Charity registration

A change in activities, objects or purposes may affect the charity registration of an organisation.



### Caution – registered charities

You may need to cancel your organisation's registration with the ACNC, and apply to register a new charity if your organisation:

- merges to create a new legal entity
- changes its charitable purpose, or
- changes its legal structure

For more information on cancelling your charity's registration, see the [ACNC Commissioner's statement on revocation](#). Your reporting obligations to the ACNC will still apply after your registration has been cancelled, subject to certain circumstances. Further, if there are any compliance issues with cancelling your charity's registration, the ACNC may refuse to cancel your registration until your organisation has lodged an Annual Information Statement.

You will not need to cancel your organisation's registration if only the ABN has changed. In this case, you will need to notify ACNC of the change in details by completing a [Form 3B](#) and apply to the ATO for your charity to keep its tax concessions.





### Case study 1 – three organisations in a hurry to amalgamate

All three organisations are registered charities with the ACNC.

The new organisation they are forming will be very similar to the three individual organisations, but because they are amalgamating, the three individual organisations will be wound up and will consequently lose their charity status. Once this happens and the new organisation is formed, the new organisation will need to apply for charity registration with the ACNC.

If your organisation changes its charitable purposes or activities when it merges, its entitlement to registration as a charity (or as a particular type of charity), will be reassessed by the ACNC.

Sometimes in the reapplication process it becomes clear that organisations have experienced ‘mission drift’ and their activities no longer match the purposes previously registered with the ACNC. It’s important to keep an eye on this issue in the lead up to a merger to ensure activities contemplated by the new organisation or consortia are charitable in nature, if being a registered charity is important to your organisation.



#### Tip

If you have concerns about how working with another organisation might impact your charity registration, you can contact the ACNC or refer to [their website](#) for more information.

## Stamp duty

Stamp duty is a tax that arises when there is a sale or transfer of assets, whether personal or business assets, and may include, (among other things) buildings, items fixed to land and intellectual property. Stamp duty may also arise on certain acquisitions in landholding entities.

The merger of two or more organisations can trigger a legal requirement to pay stamp duty to the relevant state revenue office on the assets transferred between the organisations. For example, if one organisation transfers assets to another (such as its equipment, cars or land), that transfer might be subject to stamp duty.

Most Australian states and territories exempt charities from having to pay stamp duty, but these exemptions are not always available. For example, there is no exemption from paying stamp duty in Victoria for the transfer of motor vehicles between charities. Also, exemptions are not always available to organisations that are not charities (for example, not-for-profits that are not charities). For an exemption from stamp duty to apply, most Australian states and territories require an application be made to the relevant state revenue office.



#### Tip

Organisations that want to work together may need to seek assistance from a lawyer to ensure they manage any stamp duty risks. This is particularly important if real estate is being transferred, as the stamp duty costs can be significant.



### Caution

States have their own definition of a charity. You should check if your organisation meets the relevant state definition.

## Payroll tax

If two or more organisations decide to work together, their payroll tax obligations might be affected. **A change in activities, objects or purposes may cause an organisation to no longer be eligible for a payroll tax exemption.** This is another state-based tax, and organisations will need to consider state definitions and requirements.

## Fundraising registration

If organisations are registered as fundraisers with state regulators, you should make sure your plans will not jeopardise this registration. If a new organisation is being created (either as a vehicle for a joint venture or as a result of a merger or amalgamation) you may need to reapply.



Find out more about fundraising laws on [our fundraising webpage](#).



# Part 6

## Real property and intellectual property

# Real property and intellectual property

## This part covers:

- ▶ real property and leases, and
- ▶ intellectual property

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## Property (including land, leases and intellectual property) can raise particular issues for organisations working together.

This part of the guide outlines the property issues that may arise when working with other organisations. It's important to remember that these are specialised areas of law and will often require the assistance of a lawyer.

## Property

If your organisation, or the organisation you want to work with, owns, leases or uses real estate (that is, land and buildings), you need to consider how this will affect your plans to work together.

Real estate issues are particularly important to think about if organisations are amalgamating or merging, because any assets and property owned by the individual organisations will usually become the assets and property of the new amalgamated or merged organisation.

### Where will your organisation (or organisations) work?

One of the first things to consider is whether the property arrangements that are currently in place will meet the requirements of the new project or merged organisation. For example, will staff from one organisation move into the offices of the other organisation, will you maintain the existing separate premises or will you move into new premises?

### Lease terms might affect your plans

If one or both organisations are currently leasing premises, your plans might be affected by the terms of the leases. For example, a lease may prevent the tenant from merging or changing its legal structure without first getting the landlord's consent. Also, if you are thinking about doing any renovations or making changes to a leased building to accommodate more staff, you will need to know whether this is allowed under the lease. There may also be a significant termination fee for ending a lease.

### Transfers of leases

If a new organisation is created through a merger or amalgamation, or if an organisation is becoming part of another organisation, you will need to consider how any existing leases are affected. If the organisation that is occupying premises is going to be wound up so it can merge into a new organisation, you might need to transfer the lease to the new organisation. The terms of a lease often restrict a transfer to the new organisation unless you first get the landlord's consent.



### Caution

If you don't transfer the lease, and your organisation is going to be wound up and deregistered, you must discuss this with the landlord to make sure your organisation doesn't breach the terms of the lease and validly terminates the lease.

If the other organisation (not your organisation) holds a lease, and that lease is going to be transferred to your organisation or the new organisation you are both merging into, ask for a copy of the lease as part of your due diligence so you can make sure you are happy with it. Look out for obligations such as payment of rent, repair and maintenance, and requirements when vacating the premises (such as an obligation to remove all property in the premises and repair any damage).



### Note

In the case of mergers or amalgamations, it is common for organisations to ask for copies of any leases the other organisation has as part of the due diligence process.

## Transfer of property

If either organisation owns any property (such as land), consider how this property will be dealt with as a result of a merger or amalgamation.

Will it be transferred to the new organisation? If so, is there anything about the land that would mean you do not want to become the owner of it (such as contamination or existing encumbrances)?

If the land is being transferred to the new organisation, you may also need to think about the contract terms of the transfer of the property and whether any taxes such as stamp duty will need to be paid.



### Tip

If you are transferring property, or receiving transferred property, you should always seek expert advice from a real estate agent or lawyer.



## Case study 2 – a small organisation merging with a larger organisation

Happy Eyes currently leases a small head office space close to the Royal Children's Hospital.

Because KidVision's offices are big enough to take on Happy Eyes' programs and staff after the merger, Happy Eyes' lease is no longer required. The terms of the lease state that Happy Eyes, as tenant, can terminate the lease with two months' notice. Happy Eyes needs to give its landlord notice of termination at the appropriate time.



# Intellectual property

When two organisations decide they want to work together, whether you are working together but maintaining separate organisations (such as in an MOU, partnership or joint venture) or merging or amalgamating with another organisation to form one single organisation, many intellectual (**IP**) issues can arise.



## Example

Not-for-profit organisations often create valuable brands and can get into IP disputes. In 1998, The Guide Dogs Owners' & Friends' Association Incorporated sued the Guide Dog Association of NSW and ACT and the Royal Guide Dogs Associations of Australia, trying to stop those organisations from using the expressions 'seeing eye' and 'seeing eye dogs'. The court dismissed the application, but not without great expense to all the organisations involved.



For more information, see our [guide to intellectual property law](#) which explains many of the key concepts and ideas behind the various forms of IP.

## Working together as separate organisations

### Creating, owning and using IP in a new project

If you are considering working with another organisation on a new project, it's a good idea to think about the following issues before you begin working together:

- What IP will be created? (IP is created when, for example, a new logo is created or new content such as web content or fact sheets are developed – see to our [guide to intellectual property law](#) for examples).
- Who will be creating the IP?
- Who will or should own the rights to any IP created? This should be clear in an agreement.
- What can each organisation do with the IP, for example, will one or both organisations control its use?
- Will third parties be allowed to use that IP, and on what conditions? Will both your organisation and the other organisation have to agree before this is allowed?

The answers to these questions will help to determine what legal arrangements you need to put in place.



## Note

IP laws are very technical and contain rules for ownership of IP. They set out some requirements which must be met to protect and make sure that the IP remains valid, including where the IP is being transferred from one owner to another, or where third parties are allowed to use that IP. For example, a trade mark must only be used by its legal owner or organisations which are allowed to use it – otherwise it can become invalid or open to challenge by third parties who want to use that trade mark.

## Put it in writing

If you don't have any written arrangements about these issues and end up in a dispute about IP, you may find that your legal position is not what you had expected or discussed with the other organisation.

For this reason, you should cover these issues in writing – for example, this could be included in your MOU, partnership agreement or merger contract, or could be set out in a separate IP agreement.



### Caution

Your organisation should seek legal advice at this point. You might like to approach an organisation like [Not-for-profit Law](#), [Arts Law Centre](#) or the [Australian Copyright Council](#).

## When working together, who will own the IP created?

Only certain types of organisations can legally 'own' IP. If the organisation you are working with can't legally own IP (such as an unincorporated association), the organisation's members or employees may own it on behalf of the organisation. If this is the case, you will need to think about the best IP ownership structure to suit everyone involved.

If you wish to have ownership of joint venture materials, you could enter into written agreements which state that any IP created for your joint project is transferred (or 'assigned') to your organisation. This will make sure that you have the right to continue to use that IP. If the members of the other organisation also wish to be able to use the materials, you can then give them permission (called a 'licence') to use that material.



### Example

Two organisations which promote healthy eating and exercise decide to form an unincorporated joint venture to run a new program called 'Running Water', which will promote drinking tap water instead of soft drink and juice in schools. They want to work together on this new program and partner with the Victorian Government to roll it out in all public schools.

They have made posters, stickers and little business card-sized flyers to hand out at the schools, which all have a 'Running Water' logo on them. They have also set up an Instagram account and a website which advertises events and runs competitions. For the purposes of the 'Running Water' project, the organisations have produced photos for Instagram and have created a logo, a website and a slogan, all of which is IP.

Before they started this project, both organisations signed a joint venture contract, which set out in writing that each organisation would own 50% of all of the IP, and that if they eventually wanted to register a trademark for the logo and slogan, they would each pay 50% of the costs of registration, and would own 50% of the trade mark. This makes everything clear from the outset.

## Using each other's IP

If you are using IP provided by the other organisation you should check that they either own that IP or have the right to allow your organisation to use it. Otherwise, you may end up infringing the rights of the actual IP owner.

If you are providing IP to another organisation, you should make sure you own that IP or have the right to allow other parties to use it. You may need to obtain written assignments of any IP created by people within your organisation (such as volunteers), to make sure you own the IP.



For more information, see our [guide to intellectual property law](#).

## When two or more organisations merge or amalgamate to create a new organisation

If two organisations merge or amalgamate to create a new organisation, they may each bring with them their own IP, as well as IP that they are licensed to use by a third party.

As with property, you will need to check that you can transfer your IP rights under licence agreements to a new organisation.



### Caution

When merging, transferring your IP rights can be very complicated. You should seek expert advice from an IP lawyer.

If a new organisation is being created, you may need to:

- transfer IP rights to the new legal organisation (this is usually done by a legal ‘assignment’ of the IP rights to the new legal organisation), and
- consider whether either of the original organisations uses any IP owned by a third party



### Example

If your organisation uses advertising material, the advertising agency that created the materials may own the copyright. If your organisation is planning to merge and create a new organisation, you will need to check whether the new legal organisation is able to continue to use that material.

Start by looking at any agreement you may have had with the third party. If it is not clear on this issue, or if there is no agreement, you may need to approach the third party to ask for their permission.





## Case study 2 – a small organisation merging with a larger organisation

Happy Eyes has a registered business name, a website (which has a domain name), a Facebook page and a logo. It never registered its logo as a trade mark. This means the IP in the logo was always unregistered, so there is not a registration that needs to be assigned or cancelled.

The IP transfer for this merger will be quite simple. Because Happy Eyes will be deregistered and will become part of KidVision, it no longer needs its logo, Facebook page or business name. It needs to contact the Australian Securities and Investments Commission (**ASIC**) to cancel its business name, and it will need to take down its Facebook page, after publishing a message referring its followers to KidVision's Facebook page. It decides to keep its website for the time being, so its clients can continue to use the online programs Happy Eyes offered. Happy Eyes therefore needs to transfer ownership of its website's domain name to KidVision, because Happy Eyes will be deregistered after the merger.



### Tip

Some organisations don't own their trade marks – instead they licence them from others.

Organisations which were started or based overseas may licence their IP to their Australian branches. If you work in an organisation that has a 'parent' organisation or affiliate, you should check what your agreements say about using that IP when working with other organisations or if you are planning to merge.

## Trade marks, company names and business names

If you are developing a new brand, name, or logo for your new organisation:

- it's important to check that no one else is already using it or has registered it as a trade mark, and
- you may wish to protect your new brand, name or logo by registering a trade mark

If you are creating a new project or organisation, you may also need to make sure that you register a business name (and possibly a company name, if a new company has been formed). There is often a lot of confusion between trade marks, business names and company names, what their purpose is, and what protections they offer. You may also like to purchase a web address (URL) that matches your chosen name. See the summary table below for more information.



### Tip

You may need a specialist trade mark lawyer to help you with these issues.



## Summary of the basic differences between trade marks, business names and company names

	Trade mark	Business name	Company name
Use	A trade mark is used to distinguish your goods or services from other organisations	The business name is the name your organisation uses to carry on business. It can be different from the company name	If your organisation is incorporated, you are required to have and use your company name for identification
Regulation	A trade mark should be registered with IP Australia (although in some limited circumstances, unregistered trade marks can also be protected)	A business name is recorded on a register by ASIC so consumers can identify the organisation behind a business name and contact the organisation. The selection and use of business names are governed by the <i>Corporations Act 2001</i> (Cth).  Names of incorporated associations are registered with the relevant state regulator	The selection and use of company names are governed by the <i>Corporations Act 2001</i> (Cth).  Names of incorporated associations are registered with the relevant state regulator
Rights	A trade mark gives you a property right in that trade mark which can be bought, sold or licensed	A business name doesn't give you ownership or the exclusive right to use the name	No other company can use exactly the same name as yours
Example	<b>Justice Connect</b> 	Justice Connect Not-for-profit Law Homeless Law	Justice Connect



# Part 7

**Integrating and transitioning backend services**



# Integrating and transitioning backend services

## This part covers:

- ▶ computer systems
- ▶ software licences, and
- ▶ data migration

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**When two organisations combine their operations (for example, if they decide to merge or amalgamate), practical issues arise.**

**Integrating backend services may also be relevant to other arrangements (for example, for consortia and sub-contracts) particularly where the parties are delivering government funded services. Sometimes certain software will need to be used by both parties to deliver on the contract and ensure consistent reporting.**

These practical issues can sometimes overlap with legal issues. When two organisations merge or amalgamate, combining their business operations can be a tricky process. New processes and procedures may need to be created to cover the newly-combined operations of the merged organisation and staff may need to be re-trained. Equipment leases, utility connections, council services, insurance policies and other contracts may also need to be updated or transferred.

## Computer systems

After a merger or amalgamation, ensuring all employees are using the same computer systems and software will help everyone in the new organisation work together as seamlessly as possible.

Unless the individual organisations were previously using very similar software, this can often present a challenge. The newly combined organisation will have to decide what computer systems to use, including:

- an operating system, such as Microsoft Windows, Apple OS X or an open source operating system such as Linux
- an email system, such as Microsoft Outlook or various web-based email services, such as Google's Gmail service
- word processing and document creation software, such as Microsoft Office, open source word processing software or web-based alternatives, such as Google Apps or Microsoft Office 365, and
- accounting and personnel software, such as MYOB, Xero or QuickBooks

Buying new software can be expensive, so smaller organisations might think about buying subscription-based web services or using open source software alternatives (which are usually free to use).



### Case study 1 – three organisations in a hurry to amalgamate

Each of the three organisations uses different combinations of software, which the committees think will pose a logistical problem when the operations of all three organisations become one.

After the amalgamation, the organisations will be keeping their own offices (given they are in different towns), but they decide to allocate some of the tender funding (should they win it) to buying the latest Microsoft Windows software for the new organisation, so that they are operating on the same system. They also decide to hire a small local IT company to help them.

Connecting Up can often provide discount software products to charities.

## Software licences

If two organisations combine to create a brand new organisation, the new organisation needs to be careful about using existing software that was previously licenced by one of the old organisations that formed part of the merger or amalgamation.

If the new organisation wants to transfer existing software licences (belonging to one of the old organisations) to the new organisation, it must check the terms of the software licence. The licence might not allow the transfer, or might specify that the transfer of the software licence needs to be approved by the software owner.

If a new organisation is not created as a result of a merger or amalgamation (such as if a smaller organisation becomes part of a larger organisation), the merged organisation may still need to buy more software licences for its increased number of employees, as software is often licensed on a per-user basis.



### Tip

Organisations should read the licence terms for any software that is to be transferred to see if there is a process that needs to be followed. Often that process is similar to the process of transferring contracts, referred to in part 4 of this guide above.



### Caution

It's important that your organisation does not have copies of any software installed on more computers than your organisation is licensed for. This may be copyright infringement, and could lead to your organisation being sued or unexpectedly billed for the extra users.

## Data migration

When two organisations combine, their documents and data (such as financial records) will also be combined. If new or different software is going to be used, it's important to make sure that the older documents and data can still be read and used on the new computer software.

While old data may not seem relevant at the time of the merger or amalgamation, your organisation could be requested to produce it to regulatory or compliance bodies like the Australian Tax Office, or a court in the future. Failure to produce the relevant records can result in penalties). Additionally, some data might need to be converted into a different format before it can be used on the new system.

**Tip**

Depending on how much data is involved, your organisation might need to seek assistance from an IT company to help you complete the migration process.



# Part 8

## People and safety

# People and safety

## This part covers:

- ▶ the health and safety of people, including employees and volunteers

**Managing people and safety are issues not-for-profit organisations address on an ongoing basis.**

**Working with other organisations can raise specific issues.**

This part of the guide briefly outlines the issues that can be triggered by different kinds of relationships with other organisations.

If your organisation is planning a merger or amalgamation, and employs staff or engages volunteers, it is very likely that you will need professional advice about your organisation's employment law obligations.

## People

Organisations must pay close attention to the laws which affect employees, especially where there will be transfers of employment when organisations amalgamate or merge.

When organisations join together to merge or amalgamate, often there will be a transfer of employment for all or some of the employees of the individual organisations to the new organisation.

Redundancies may be triggered – for example, one or more of the individual organisations will be wound up and deregistered, and some roles may not be needed in the new organisation, or someone's role may be changed detrimentally.

### Your organisation will need to consider the following key issues:

- which of the other organisation's employees will transfer to the new organisation, and what their employment conditions at the other organisation will be
- which of your organisation's employees will transfer to the new organisation, and what their current terms and conditions of employment will be
- for any employees who will transfer, what their periods of service and entitlements will be
- whether any employees will be made redundant, and
- whether any of your volunteers are actually employees



For more information, see [our webpage on managing people](#).





## Due diligence – the employees of the other organisations

Before merging with another organisation, you must investigate whether there your organisation may be taking on any legal issues.

If you are thinking about merging or amalgamating with an organisation which has employees, it's important to know who makes up their workforce – particularly those employees who will transfer to the new organisation.

A good starting point is to examine the employees' employment terms and conditions to identify whether they are employed under a written contract, modern award, enterprise agreement (or a combination of these). You can usually ask for this information during the due diligence process (see part 4 above for more detailed information about the due diligence process).



For more general information, please see [our webpage on managing employees](#).



### Tip

Ask a lawyer to look at these employment arrangements for you, so they can check whether they meet the requirements of the law and inform you of any potential risks.

Looking at figures in relation to staff turnover can provide insight to organisational culture and satisfaction of staff. Recent workplace disputes (around pay and conditions) and employment-based claims, such as unfair dismissal, might also give you an indication of whether the other organisation's employees enjoy working there.

## Transferring employees

There are strict rules for the transfer of employees.

It's important to understand each employee's length of service and accrued entitlements (such as annual leave and long service leave) because these entitlements may need to be recognised if their employment is going to be transferred to a newly-merged or amalgamated organisation via a 'transfer of business'. It's not compulsory to transfer all employees, but if you choose to do so there are rules around recognition of service and leave.

A 'transfer of business' is defined in the [Fair Work Act 2009 \(Cth\)](#) and involves an employee being transferred to a new employer and performing the same kind of work as they did at their previous employment.



### Tip

If you think a 'transfer of business' might be taking place, seek advice from a specialist employment lawyer.



# Redundancies

A redundancy occurs where an employee's employment is terminated (at their employer's initiative), because the employer no longer requires that employee's job to be done.



## Example

Redundancies can happen in the following merger or amalgamation situations:

**Redundancy type 1** - An employee rejects an offer to transfer to the new organisation in circumstances where the offer:

- is on terms and conditions which are not substantially similar to, and which are considered on an overall basis to be less favourable than, the terms and conditions they have with their current employer (either your organisation or the other organisation you are considering working with), or
- does not recognise the employee's service with their current employer (either your organisation or the other organisation you are considering working with) as service with the new organisation for the purpose of redundancy pay entitlements

**Redundancy type 2** - The individual organisation winds up and is deregistered after the merger or amalgamation. People who can't be moved to a similar role in the new organisation are made redundant.

To avoid the first type of redundancy:

- check the transferring employees' current employment terms and conditions, and
- make sure the employee is offered terms and conditions which:
  - are equal to, or better than, the conditions at the organisation they were employed, and
  - recognise their service with the old employer as service with the new employer for the purpose of redundancy pay

Often you can't avoid the second type of redundancy altogether, but employers need to go through a process to ensure that any redundancies following deregistration are 'genuine' redundancies. This will minimise the risk of a successful unfair dismissal claim.







## Caution

You must follow any process set out in the relevant employment contract, award or enterprise agreement relating to redundancy.

It's always a good idea to seek expert advice about employment issues.

The decision to merge or amalgamate organisations is a major change that is likely to have effects on employees – for example, through relocation, restructuring or redundancy.

**Example of a process that may be set out in a contract or award:**

<b>Notification</b> 	<ul style="list-style-type: none"> <li>Once the employer has made a definite decision to merge or amalgamate, it must notify employees and their representatives (if any) of the decision.</li> </ul>
<b>Consultation</b> 	<ul style="list-style-type: none"> <li>As early as practicable after the decision to merge or amalgamate has been made, the employer must consult with the affected employees and their representatives before making a final decision regarding their employment. The purpose of this consultation is to provide employees with an opportunity to make suggestions about how to avert or minimise the effects of the proposed changes on them.</li> <li>The employer must also consult with employees who are away from the workplace but whose positions are likely to be affected by the changes, such as employees on parental leave or employees away from work on workers' compensation payments.</li> <li>As part of consultation discussions, employees and their representatives must be provided with written information regarding the proposed changes and the likely effect on the employees' employment for the purpose of holding a discussion about the proposed changes (although confidential information is not required to be provided to employees).</li> </ul>
<b>Decision about ongoing employment</b> 	<ul style="list-style-type: none"> <li>Once discussions have been held and the employees' views have been considered, the employer can make a final decision about the ongoing employment.</li> </ul>
<b>Redeployment obligations</b> 	<ul style="list-style-type: none"> <li>If the redundancy will result in an employee's termination, the employer will also need to consider whether it is reasonable to redeploy that employee into other available roles. In the case of deregistration of the organisation, there will not be any other available roles within the organisation. However, redeployment obligations extend to considering available roles within the enterprise of 'associated entities' of the employer. This may or may not include the new organisation, depending on the structures of the two entities. If unsure, you will need to seek legal advice.</li> </ul>
<b>Redundancy outcome</b>	<ul style="list-style-type: none"> <li>If an employee is made redundant, they will be entitled to receive written notice of termination (or pay in lieu of notice), along with payment for any accrued, untaken annual leave and long service leave entitlements. They may also be entitled to a severance payment. You should seek legal advice to determine whether the employee is entitled to severance pay (for example, there are exemptions for casual employees, employees with less than 12 months continuous service, and for employees of 'small business employers').</li> </ul>

**Tip**

Consultation obligations may also apply even if the employee is not at risk of redundancy. If the proposed merger or amalgamation will have a significant effect on employees (such as transfer of employment, relocation or restructuring of operations), then consultation obligations may apply under a relevant modern award or enterprise agreement.



## Case study 2 – a small organisation merging with a larger organisation

Happy Eyes has three full-time employees and two part-time employees. KidVision has done its due diligence on Happy Eyes' employment arrangements. It has gained an understanding of the employees' length of service and entitlements, and has also reviewed their employment contracts. KidVision's lawyers have discovered that the employment contracts Happy Eyes has used for the part-time employees were poorly drafted letters which do not comply with the applicable modern award.

KidVision has committed to making offers of employment to each of Happy Eyes' employees, but it needs to make sure that it makes the employees offers on terms which are equal to, or better than, the terms they were on at Happy Eyes. KidVision will use its proper standard employment contracts to make the offers of employment, which are compliant with the applicable modern award. The offers of employment also recognise the employees' past service with Happy Eyes, and, if the employees accept KidVision's offer, all their accrued leave will be transferred to their new employment.

## Volunteers

A not-for-profit organisation is likely to have volunteers that provide their time without an expectation of being paid and where no employment relationship exists.

Organisations don't owe the same obligations to their volunteers as they owe their employees. However, there might be a risk that some of your volunteers are actually employees.

### Key characteristics of a genuine volunteering arrangement include:

- the parties didn't intend to create a legally binding employment relationship
- the volunteer is under no obligation to attend the workplace, and
- the volunteer does work for the main purpose of benefitting someone else, such as a charity or community organisation

The more formal that volunteer work arrangements become (for instance, if the volunteer is expected to work according to a regular roster), the greater the chance that an employment relationship will be found.

If you have concerns that a volunteer may in fact be an employee, seek legal advice.



For more information, see [our guide: employee, contractor or volunteer?](#)

## Safety

Safety is an extremely important part of any organisation and should be a top priority. Health and safety is particularly important – and should be a major issue you consider when thinking about working with another organisation.



## Examples

Examples of activities which usually require that particular attention be paid to health and safety include:

- working with people with mental health issues
- working with people with a history of violence
- working in places where there is a risk of violence
- sporting activities
- activities involving hazardous substances
- activities which require physical labour, and
- activities including children

All states and territories except Victoria have 'harmonised' their work health and safety (**WHS**) laws by enacting similar legislation, based on an agreed '[model' Work Health and Safety Act](#). This means that in most states and territories and at the Commonwealth level, WHS laws impose similar obligations.

Victoria has retained its own Occupational Health and Safety (**OHS**) legislation.



For more information, see [our national guide to 'community organisations and work health and safety laws'](#).

The people who run an organisation are in the best position to influence the culture of health and safety within the organisation.

While the law imposes health and safety obligations on people from all levels of an organisation, the law also requires that 'officers' of organisations exercise due diligence to ensure that the relevant duties and obligations imposed by the law are complied with.

This means an organisation must at least have appropriate governance, monitoring, reporting, and health and safety systems in place to reduce or remove risk of health and safety breaches.

When organisations do not comply with work health and safety law, the organisation and individual managers and directors can face heavy penalties and people can even be sent to jail.



## Note

The people in an organisation that can be held responsible for breaches of WHS (or OHS) laws include workers, the board of directors, management and any other person who makes decisions that affect the whole or a large part of the organisation.

For more information on the duties an organisation has, and who may be penalised, under workplace laws, [see our WHS webpage](#).

Before you decide to work with another organisation, it's important to consider whether extra duties might be created for your organisation and its officers, and whether there are risks of health and safety breaches and possible prosecution.

You should consider the issues discussed in this part of the guide during due diligence.



If you are not happy with the quality and implementation of the other organisation's elements of good governance (listed below), you should ask them to address the gaps or decide not to work with them at all.

## Health and safety governance arrangements

Good governance arrangements are a key to managing health and safety risks.

Elements of good governance include:	
<p><b>Leadership, commitment and safety culture</b> – each organisation should have strong leadership and visible commitment to health and safety by those who run the organisation.</p> <p>It's important to create a sustainable safety culture.</p> <p>A sustainable safety culture means a culture that focuses on risk management, compliance with processes, monitoring and continuous improvement.</p>	<input type="checkbox"/>
<p><b>Accountability</b> – each organisation should have clear and established roles, responsibilities and accountabilities for making decisions about health and safety.</p>	<input type="checkbox"/>
<p><b>Policies and procedures to drive risk management and compliance</b> – each organisation should have health and safety policies and procedures that set out what is required for compliance with health and safety laws clearly.</p> <p>This should include procedures for monitoring and reporting.</p>	<input type="checkbox"/>
<p><b>Organisational and committee structures</b> – each organisation should have the right committee structures to make sure that health and safety matters are discussed thoroughly and, ultimately, by the board of directors.</p> <p>Health and safety should be on the standing agenda for relevant committees and there should be a process for reporting health and safety issues to the board of directors.</p>	<input type="checkbox"/>
<p><b>Priorities and strategic directions</b> – just like any business, health and safety must be a priority and should underpin the organisation's overall strategic direction.</p> <p>There must be clear health and safety priorities and objectives in any strategic plan. Officers must be involved in and endorse these priorities and objectives and make sure they are implemented.</p>	<input type="checkbox"/>



### Case study 1 – three organisations in a hurry to amalgamate

During a due diligence meeting, the committees of the organisations realise that they have not been considering their occupational health and safety obligations, which is a big problem.

The work the organisations do is inherently risky – clients of these organisations can be very aggressive, and sometimes employees or volunteers of the organisations visit violent homes. Luckily, no one has been hurt yet. The organisations decide to get specialist legal advice when the new organisation is formed to make sure:

- they have proper policies in place
- their staff and volunteers are trained, and
- their workers and officers understand their duties



## Officers' duties

In essence, the officers of each organisation must take reasonable steps to comply with their work health and safety duties by:

- keeping up-to-date with work health and safety matters
- making sure they understand the risks associated with the organisation's activities
- making sure there are appropriate resources and processes to comply with the law, including resources and processes to remove or reduce risks to health and safety, and to receive and consider information about incidents and risks
- making sure there are appropriate processes in place for receiving and considering information regarding incidents, hazards and risks and responding to that information, and
- making sure there are appropriate processes implemented to make sure the duties imposed on the persons conducting the business are complied with, for example, processes for reporting incidents, and consulting with workers



For more information on the duties of a person under WHS laws, see [our WHS webpage](#).

## Reporting requirements

Reporting performance is a critical activity in health and safety governance. It helps to inform an organisation's officers of risks that may arise.

Management committees should discuss reports and given them to the board of directors so that policies can be introduced or changed to deal with issues that have arisen.

How often this occurs (every three, six or 12 months) will depend on the organisation. However, if a significant or notifiable incident occurs (this means an incident that needs to be reported to the relevant regulator), a report must be given to organisation's officers as soon as possible so that urgent measures may be implemented.

## Safety management system

Organisations should have a safety management system that is able to respond to the risks faced by the organisation.

You should ensure that the safety management system at any organisation you plan to work with is robust and meets or exceeds the standards that your organisation currently has in place.

### A safety management system should include:

- 1. Risk management policy and procedures** – managing health and safety risks is critical to compliance with health and safety laws. This will usually involve identifying hazards and risks, working out methods to reduce or remove the risks, and then monitoring those methods.
- 2. Reporting and investigating policy and procedure** – this is an important part of a safety management system. Incidents should be reported to make sure that measures are put in place so that similar incidents do not occur again. Investigation is also important as it helps to work out the 'root cause' of the incident. The level of investigation must depend on the severity or seriousness of the incident – the more serious, the more investigation will occur.
- 3. Consultative arrangements** – under law, organisations need to talk with their employees about health and safety matters when developing systems and processes, identifying hazards and assessing risks, making decisions about ways



to remove or reduce risk, and when suggesting changes that may affect how work is to be completed by employees. Organisations must also talk to any contractors that they get to work for them.

4. **Contractor management** – an organisation also owes health and safety duties to those whose work activities it is able to direct and influence (for example, contractors and subcontractors).
5. **Issue resolution** – an organisation should have policies and procedures on how health and safety issues will be dealt with to help resolve issues quickly and effectively, and when the involvement of the regulator is required.





# Part 9

## Privacy and dealing with information



# Privacy and dealing with information

## This part covers:

- ▶ personal information
- ▶ health information
- ▶ sensitive information, and
- ▶ confidential information

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**When you are considering working with another organisation on a project, it's likely that you will need to share information, possibly for only a set period of time.**

When two or more organisations decide to amalgamate or merge, then they will permanently share information. The act of sharing information between organisations can be covered by many laws, depending on the type of information that is shared.



## Note

For more information about privacy laws, please refer to [our privacy guide](#). Our guide explains the concepts of personal information, sensitive information and health information and details the laws that apply to these different types of information.

Our privacy guide will help you work out whether your organisation needs to comply with the various Australian privacy laws, as some not-for-profit organisations don't have to comply with these laws. For example, small organisations may not be required to comply with the *Privacy Act 1988* (Cth) because they don't meet the financial turnover threshold for that law to apply. Also, if organisations don't hold health information, then health records laws may not apply.

When organisations work together, such as on a joint project, the sharing of information involves two separate actions:

- a **disclosure** by the organisation that first collected or held that information, and
- a new **collection** by the other organisation that receives it

The amalgamation or merger of two organisations can result in a 'disclosure' by the old organisation that originally collected or held that information and also a 'collection' by the newly-merged or amalgamated organisation.

Both the 'collection' and the 'disclosure' of information need to be looked at carefully by your organisation, as different rules apply depending on the type of information that is shared.

# Personal information

Personal information encompasses a broad range of information. It may include:

- information about a 'person's private or family life' (such as, a person's name, signature, home address, email address, telephone number, date of birth, medical records, bank account details and employment details)
- 'health information' (see below)
- 'sensitive information' (see below)
- credit information, and
- tax file number information,

but does not include de-identified information, as it is no longer about an identifiable person or a person who is reasonably identifiable.

## Sharing (disclosing) personal information

If you want to disclose any personal information that your organisation holds to another organisation, your organisation can only disclose personal information:

- for the original purposes for which it was collected
- for any similar purpose that is related to the original purposes, (provided that the personal information is not sensitive information – see below – in which case the information may only be disclosed for a purpose directly related to the primary purpose) – the purpose would be 'similar' if a person would reasonably expect the secondary purpose to be connected to or associated with the primary purpose
- for any other purpose, but only if the person whose personal information it is consents to the disclosure for that other purpose
- if it's to a related body corporate (provided that the information is not sensitive information – see below), or
- in some other limited circumstances (such as where a court orders your organisation to disclose the information)

If the other organisation is located outside Australia, or if your organisation regularly deals with other organisations who are based outside Australia, there may be additional restrictions that apply. For more information about overseas restrictions, refer to [our privacy guide](#).

## Receiving (collecting) personal information

If your organisation collects personal information about a person from another organisation, your organisation still has a legal obligation to take reasonable steps before, or at the time, it collects personal information to notify or make the person aware that your organisation has collected their personal information. The easiest way to do this is to ensure that the person receives a **privacy notice** from your organisation in advance (paper, online or telephone script).

This privacy notice is sometimes called a 'collection notice' or a 'privacy collection statement'. If your organisation will be receiving personal information from another organisation, you should check with that other organisation:

- whether that organisation is allowed to disclose that personal information to you by asking the other organisation how it has complied with the legal requirements for collecting and sharing personal information, and
- what purposes the other organisation collected that information for, as your organisation will only be able to collect and use that personal information if the information is reasonably necessary for one or more of your organisation's functions or activities

If the personal information is sensitive information, additional restrictions may apply (see below).



For more information on the mandatory content of this notice, see [our privacy guide](#).

## Health information

Health information is any information or an opinion about a person's health or a disability, including prescription information, contact and billing details, test results and reports, dental records, Medicare number, admission and discharge records, and other sensitive information about an individual such as race, sexuality or religion.

Health information is regarded as one of the most sensitive types of personal information.

### Sharing (disclosing) health information

The same restrictions on the sharing of personal information will usually apply to the sharing of health information with other organisations.

However, when sharing health information for a purpose that was not the main or primary purpose for collecting that information, that other purpose must be directly and closely related to the primary purpose.



#### Example

If an organisation collects health information about a client but is unable to treat that client's medical condition, then it would be a directly related purpose for the organisation to disclose that person's health information if referring that person to a medical practice that is able to treat that client's medical condition.

### Receiving (collecting) health information

Organisations that collect health information can only do so with the person's consent and where the collection of that information is also reasonably necessary for one or more of that organisation's functions or activities.

Not-for-profit organisations can also collect health information if the information relates to the activities of their organisation and the information is solely collected about the organisation's members or other people who have regular contact with the organisation in connection with its activities (such as that organisation's ongoing or regular clients). Otherwise, the same requirements for collecting personal information also apply in relation to collecting health information – ie. that the person whose information is being collected should be notified before or at the time their information is collected (which can be achieved through a privacy notice).



#### Case study 2 – a small organisation merging with a larger organisation

When Happy Eyes becomes part of KidVision, it will continue to need its client files to carry on its programs. Because Happy Eyes will be deregistered after the merger, the client files will become the property of KidVision, and will be located at the KidVision head office. This amounts to a 'disclosure' by Happy Eyes, and a 'collection' by KidVision, of health information.

Because the operations of Happy Eyes will continue, and because the client files will continue to be used for the same purpose they were used before, Happy Eyes can share the client files with KidVision. However, to do this legally, KidVision must take reasonable steps to notify the clients of Happy Eyes about the transfer of their files, and KidVision must not use the client files for any other purpose without the clients' consent.

KidVision and Happy Eyes decide to send out a letter to all Happy Eyes' clients, letting them know that when the merger takes place, their files will transfer to KidVision and the files will be used for the same purpose as they were used before.

## Sensitive information

The same requirements for sharing, receiving and using health information also apply more generally to other types of sensitive information (which includes information about a person's race or ethnic origin, political opinions, religious beliefs or affiliations, philosophical beliefs, sexual orientation or practices, criminal record, and health information).

## Confidential information

### Receiving (collecting) confidential information

Generally, if an organisation receives information from another organisation and the receiving organisation is aware, or should have been aware, that the disclosing organisation's information is confidential, then the receiving organisation has an obligation of confidentiality.

The receiving organisation can only use that confidential information for the purposes for which it was disclosed originally, and must not further use, threaten to use, disclose or threaten to disclose that information without the permission of the disclosing organisation.



#### Tip

Confidential information can include documents or other data that is noted as being confidential or proprietary (such as a confidentiality notice in the header or footer of a Word document or a confidentiality section in a contract), but this is not legally required for it to be considered confidential.

The confidential information must also not be common knowledge or publicly available. For example, commercially sensitive information is the type of information that would be considered confidential.

### Sharing (disclosing) confidential information

If your organisation has confidential information that it wants to share with another organisation, you should consider about entering into a contract with the other organisation before sharing that information. If your organisation doesn't have an existing contract in place with the other organisation, you should ask the other organisation to sign a non-disclosure agreement or confidentiality deed first before sharing the information.

If your organisation has received confidential information from an organisation, your organisation can generally only share that confidential information with another organisation with the permission of the organisation that disclosed the information to your organisation in the first place.

