Merging with other organisations

Legal information for community organisations

This fact sheet covers:

- what is a merger?
- what is the effect of a merger?
- potential advantages and disadvantages of a merger
- the merger process
- what does your organisation need to do after merging?

This fact sheet summarises legal issues for community organisations to consider before deciding to merge with another organisation.

Disclaimer

This fact sheet provides information on merging 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 fact sheet.

A merger involves the formal combination of two or more entities to form one legal entity.

If you are an incorporated association looking to merge with another incorporated association in the same state or territory, then the statutory process of 'amalgamation' is also an option for you (except for the Northern Territory, where a statutory transfer process can be used instead).

This fact sheet does not cover the amalgamation process. You can read more about amalgamation on our amalgamation and mergers webpage.

What is a merger?

A merger is a contractual agreement between two or more organisations to form a single organisation. It is a final process that is difficult to undo. For this reason, all parties need to have confidence in the plan to merge the entities before signing any binding agreements (including by seeking independent legal advice).

A merger can happen in a variety of ways, depending on the preferences and structures of the organisations involved, including:

- one or more organisation (or organisations) becoming a part of another organisation, or
- two or more organisations merging to create a new organisation

Factors that drive the approach to the merger may include:

- strategic – does one organisation have a stronger brand?
- legal – is one approach simpler to implement?
- tax – are there beneficial tax outcomes for a particular approach?

Note

The organisations involved in a merger should always seek independent legal advice before deciding to merge and to assist them through the merger which will include:

- drafting the relevant documents to effect the merger, and
- providing advice on legal, financial and tax implications

Make sure you seek appropriate advice before entering into a merger so that you understand the likely consequences and outcomes of the merger for your organisation.

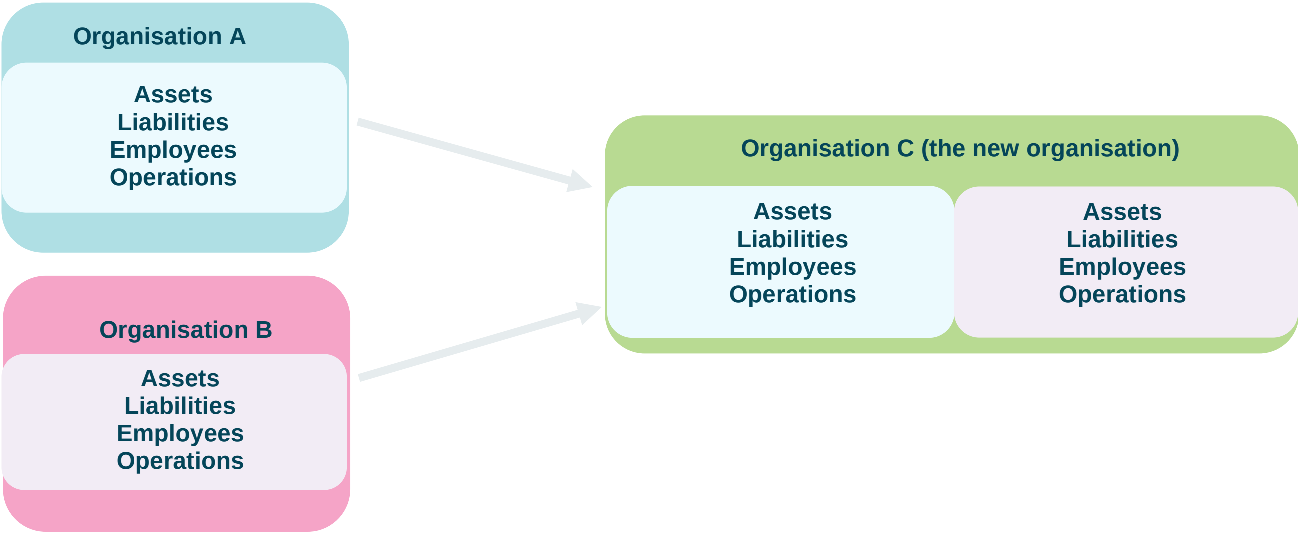
The two most common merger pathways

We've set out a high-level summary of the two most common structures for a merger in Australia. You may wish to seek legal advice about what is the most appropriate structure for the type of merger you are considering.

Option 1 – two or more organisations combine to create a new organisation

The existing organisations enter into an agreement to merge, a new organisation is incorporated and the merging organisations transfer their assets, liabilities, employees and operations to the new organisation. Once this happens, the merging organisations are usually wound up and deregistered (once all of their legal assets, obligations and liabilities have been transferred to the new entity).

The newly merged organisation is usually brand new, with a new name, website and redesigned brand. Members of the former entities are usually provided with an opportunity to become a member of the newly merged organisation.



Organisation A and Organisation B create new Organisation C and transfer all their assets, liabilities, employees and operations to Organisation C.

Following completion of the merger, Organisations A and B will be wound up and deregistered.

Organisation C can have purposes that encompass both Organisation A and B. However, the organisations will need to seek advice about the merger if Organisation C's purposes are different to their own (this is particularly relevant from a taxation perspective and for assets held on trust).

Because the parties will need to transfer everything that is held by Organisation A and Organisation B into Organisation C, it is important to understand exactly what your organisation will need to do to move to Organisation C.

Typically, organisations will conduct due diligence on the other organisation (or organisations) that it is intending to merge with. This helps the parties understand whether they have any significant liabilities, such as being involved in litigation or owing a debt to the Australian Taxation Office (**ATO**), that may be inherited by the newly merged entity.

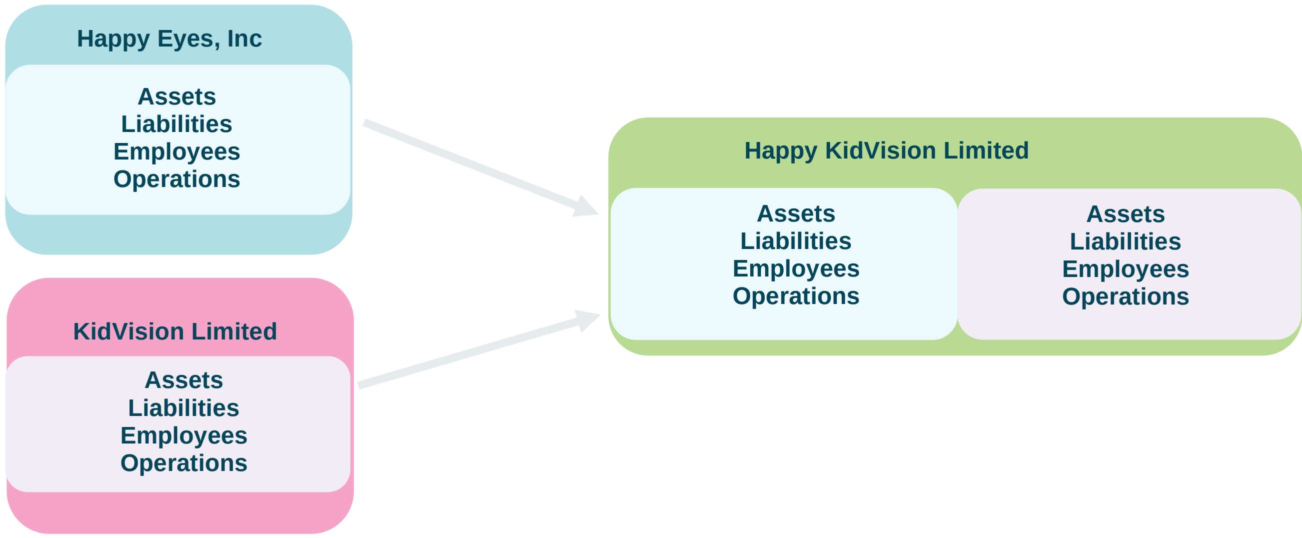
Example – Happy Eyes, Inc and KidVision Limited

Happy Eyes, Inc (**Happy Eyes**) is a small incorporated association that conducts educational programs for the parents of young children who are visually impaired.

KidVision Limited (**KidVision**) is a larger company limited by guarantee that also works with young children who are visually impaired.

Happy Eyes and KidVision currently conduct different, but complementary, programs with the same clients at Melbourne's Royal Children's Hospital. Last month, Happy Eyes was informed that their government funding (which funds 80% of their operations) will be cut at the end of the financial year. The committee of Happy Eyes is concerned that it will not be able to continue to operate without continued government funding. It decides to approach KidVision with a merger proposal. KidVision sees value in operating as a combined entity, utilising the staff and activities of both entities, and their existing cash reserves.

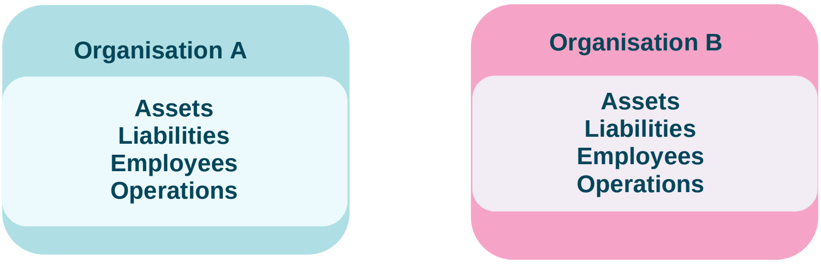
They consider a merger is the most sensible way to make this happen. After seeking independent legal and tax advice, the two organisations form a new organisation named **Happy KidVision Limited**. To effect the merger, the assets, liabilities, employees and operations of both entities will be transferred to Happy KidVision Limited. Happy Eyes and KidVision will wind up and deregister.



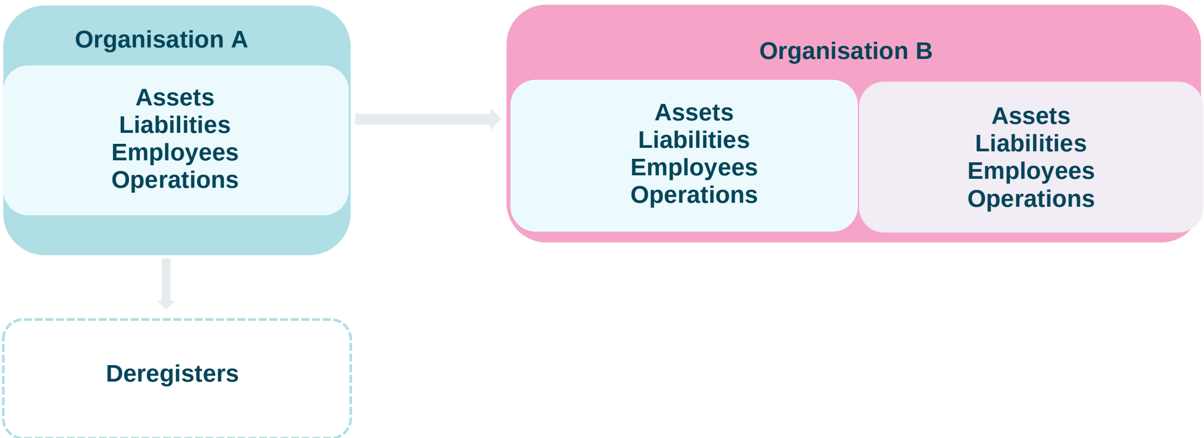
Option 2 – one organisation becomes a part of another organisation

One organisation takes on all of the assets, liabilities, operations and employees of another organisation which then winds up and deregisters. Going forward, the organisations operate together under the name and brand of the merged organisation.

Before the merger:



After the merger:



What is the effect of a merger?

A merger is a contractual agreement between two or more organisations to form a single organisation.

When 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 (generally, all assets will be transferred, unless there are good reasons not to)
- only those debts and liabilities that the organisations want to become the debts and liabilities of the merged organisation will transfer across, and each individual organisation will need to deal with its debts and liabilities that do not transfer across
- the organisations can decide which activities will continue
- the organisations may restructure staffing arrangements, which may include redundancies. It's important that each organisation considers the potential implications of any relevant employment law requirements on staffing decisions that the newly merged entity makes
- the particular purposes of the new organisation will need to be considered, and
- the members of the individual organisations may not automatically become the members of the merged organisation. Generally, the members of the organisation will be given the option of becoming members of the merged organisation. However, members may agree unanimously to forfeit their membership rights as part of the merger process

Tip

When dealing with membership issues it’s important to seek legal advice to ensure that members are not being treated in a way which contravenes any relevant laws

Potential advantages and disadvantages of a merger

Potential advantages of a merger include:	• reduced overheads (where the merger offers economies of scale and eliminates duplicated functions) • shared knowledge, skills and managerial experience • access to a larger network of contacts • ability to offer more services or service a larger area (for example, changing from a state and territory focus to a national focus) • attract fresh board or committee expertise to increase viability • better ability to seek and obtain funding, and • stronger brand and influence
Potential disadvantages of a merger include:	• legal and accounting fees (as part of the merger process) • management time spent on the merger negotiations • loss of existing name and brand recognition • potential member disengagement and loss in membership numbers • potential integration costs and delays • potential difficulties transferring important contracts such as funding contracts, subcontracting arrangements or lease agreements • potential loss of control and greater potential for management disputes • impact on employees, volunteers and members, including potential staff cuts or resignations (if not in favour of the merger) • cultural incompatibility between merging organisations • loss of existing funding arrangements • potential loss of existing tax endorsements and charitable registrations (with related impact on funding and concessions) • changes in the ability to salary package, and • administrative steps post-merger (see below)

The merger process

Every merger will look different, depending on the merger pathway that is chosen, and the nature of the contract between the parties.

An example of a merger process is set out below.

The board of one of the merging organisations decides to explore a merger as a strategic priority and identifies two or three organisations to approach, or it might decide to speak directly to an organisation it already works with on an informal basis.

The boards or committees of the relevant organisations will have preliminary meetings about a potential merger and will usually seek legal advice and carry out due diligence on each other to understand the risks involved in merging with the other organisation (or organisations).

Any issues identified in the due diligence process should be resolved 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 documentation

Once the organisations have decided to pursue the merger, each will usually hold a board or committee meeting, and make an official decision to seek member approval of the proposed merger by passing a resolution.

Relevant documentation to effect the merger will then need to be prepared. Organisations should always seek independent legal advice to assist with this including obtaining advice on financial and tax implications of the merger.

After all relevant documentation is signed to effect the merger, the organisations can begin the process of logistically merging together and transitioning their activities, clients and staff. Once that is complete, the organisation that will no longer operate will need to be wound up and deregistered.

For more information about the due diligence process and key legal issues for merging organisations, see our webpage on working with other organisations.

What does your organisation need to do after merging?

Once your organisation competes a merger, you may need to complete the following steps:	
• If a new entity has been formed, apply for an Australian Business Number (**ABN**) for the new entity	☐
• Notify all relevant stakeholders of the new entity name and ABN, which may include: – the Australian Tax Office (**ATO**) – the Australian Charities and Not-for-profits Commission (**ACNC**) – the Australian Securities and Investments Commission (**ASIC**) – workplace injury insurer (for example, WorkCover) and other insurers – superannuation funds – funding bodies – banks – fundraising registrations – lessors (for example, of equipment, properties, vehicles) – suppliers (for example, of power, telephone, internet service provider, office supplies) – relevant road and traffic authority in relation to any motor vehicles (for example, VicRoads, Department of Transport) – relevant land title office in relation to any real estate (land) holdings (transfer forms will need to be completed) – lenders – employees	☐
• Change letterhead, logo, website, printed materials	☐
• Wind up, deregister or cancel organisations that are no longer required	☐
• If the amalgamation has had an impact on taxation concessions, seek endorsement of the merged entity with the ATO as a DGR or TCC. This should be discussed with a tax specialist.	☐

This list is intended to act as a guide only.

You should always seek independent legal advice to ensure all necessary steps are taken taking into account your particular circumstances.