Merger TOOLKIT

A Practical Guide for Charities and Not-for-Profits

This toolkit has been developed to assist organisations in undertaking a merger. Mergers can be very rewarding, but require significant time and resources in order to be done successfully. The toolkit reflects our experience and the current literature in the area and has been developed into checklists and tables for ease of use.

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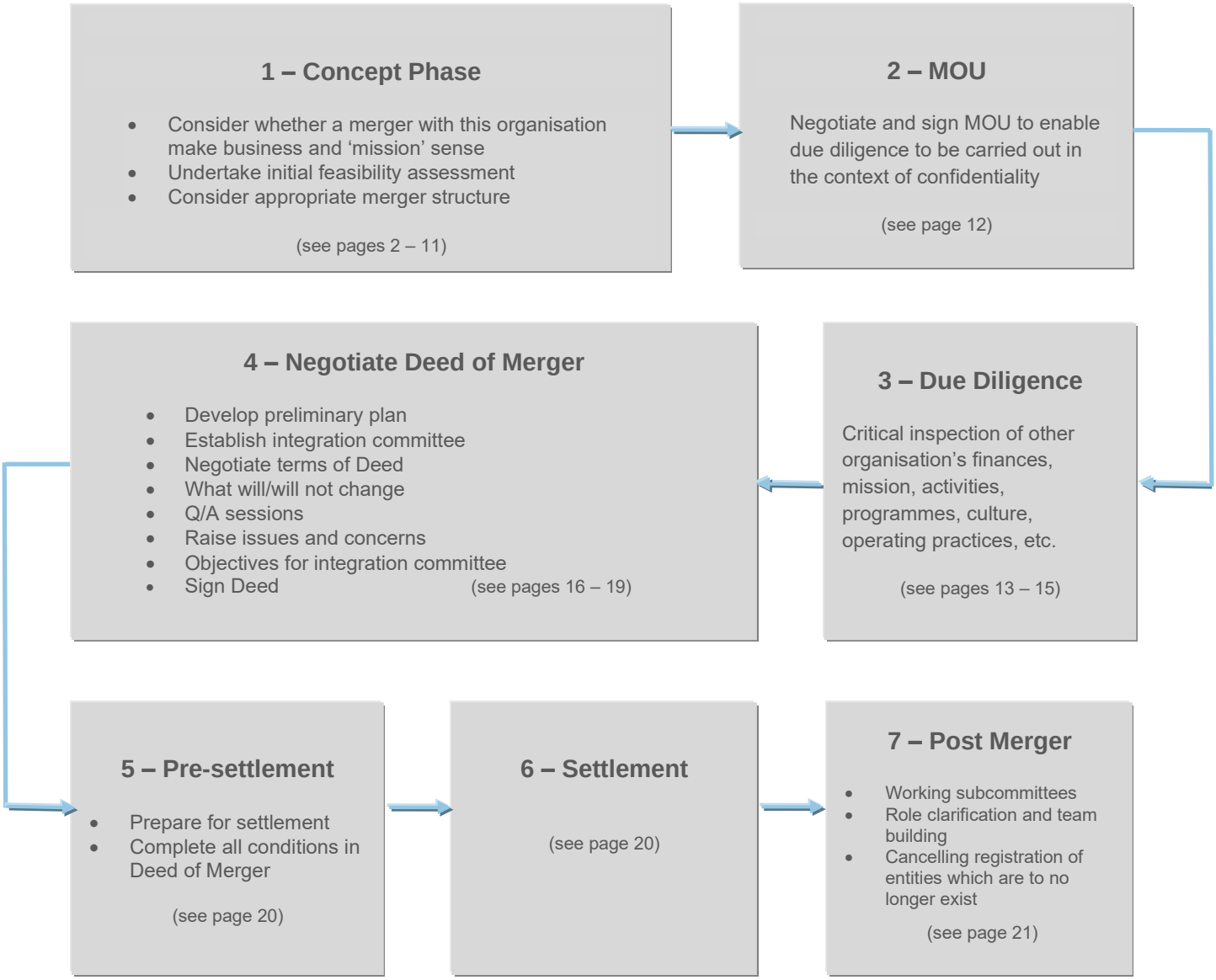
Some tips before starting

1. The merger should be in the best interests of members/beneficiaries.
2. A shared vision or goal should be agreed early in the process to provide positive motivation and clarity.
3. The organisations should be compatible in terms of culture and values.
4. Effective communication is vital from the outset – processes, outcomes and requirements of each party must be clear.
5. Identify key roles and responsibilities in the merger process.
6. Anticipate difficulties and develop a process for resolving issues.
7. Ensure that there are sufficient resources to meet agreed deadlines (resources are often underestimated).

Merger Integration Process



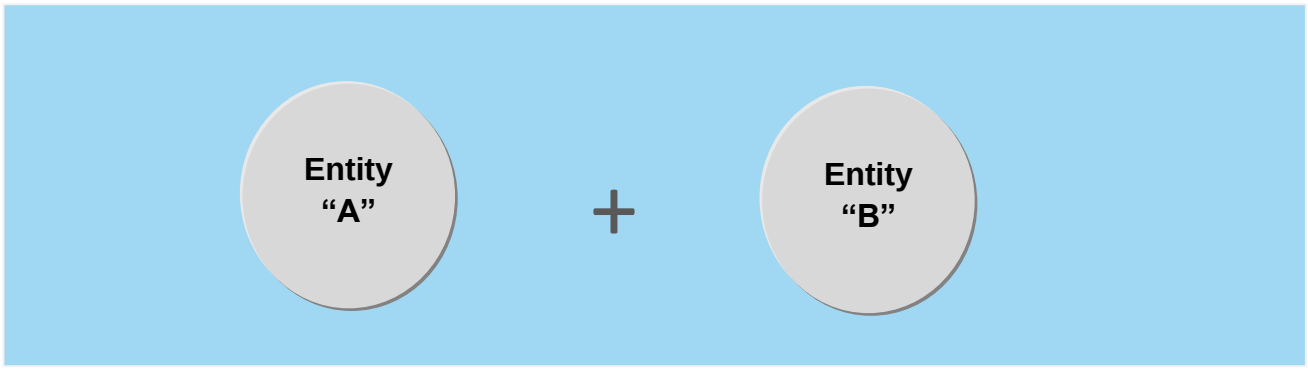
01 Concept Phase

1.1 Summary of Merger Options

Option 1 – Entity "A" subsumed by Entity "B"

Entity "A" agrees to transfer all of its property, employees, contracts, assets etc to Entity "B" (i.e. becomes subsumed by Entity "B") and then Entity "A" ceases to exist. The end result is that only one organisation remains, which is Entity "B".

Before



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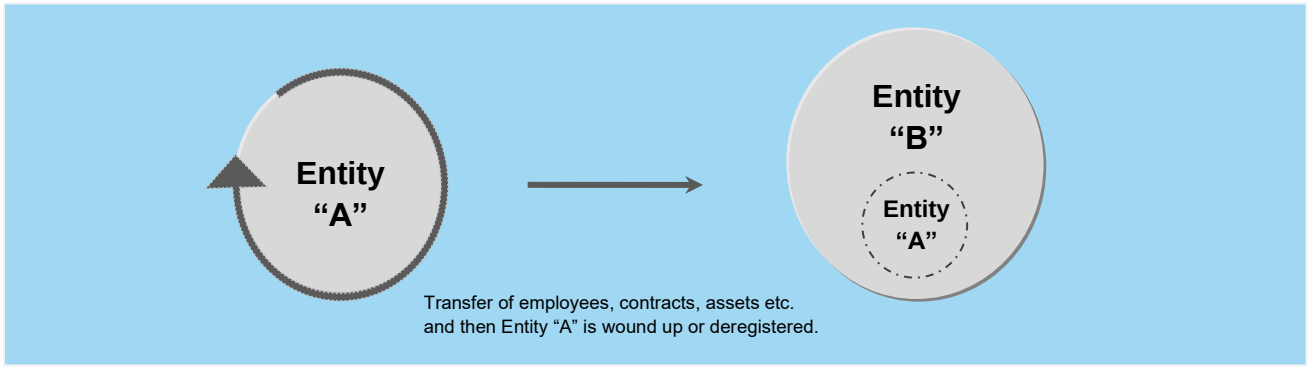
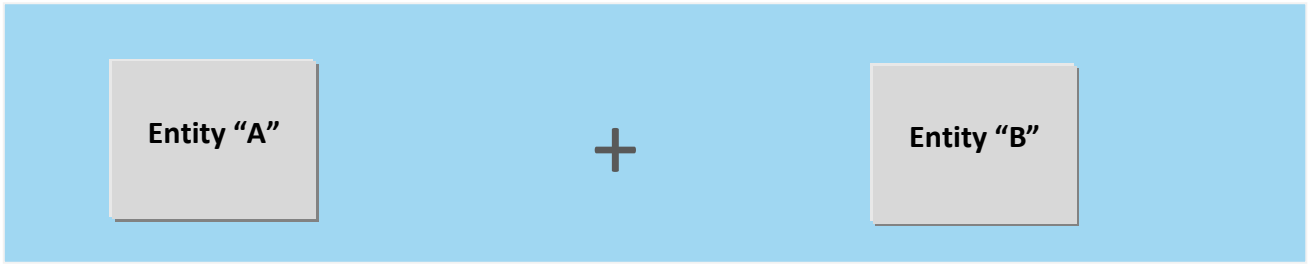


Option 2 – Entity “B” as subsidiary

Entity “B” can change its structure so as to have Entity “A” as the controlling (and/or sole) member of Entity “B”. The result is that Entity “A” becomes the parent of Entity “B”, and Entity “B” becomes the subsidiary of Entity “A”. This means that the end result is that both organisations remain in existence and generally have separate legal liability.

Before



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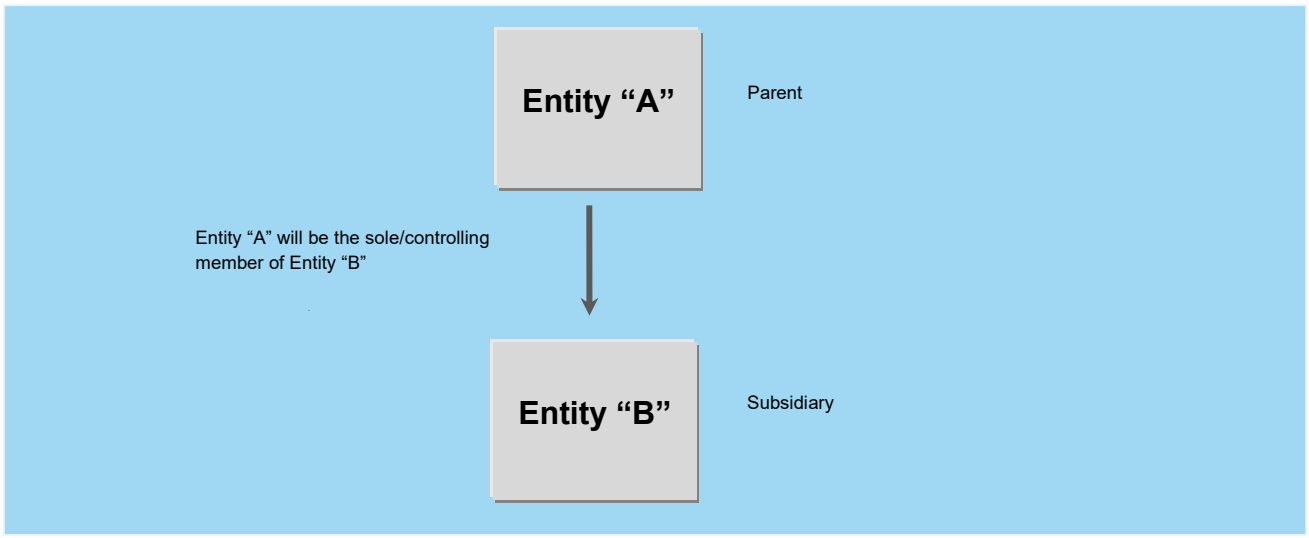
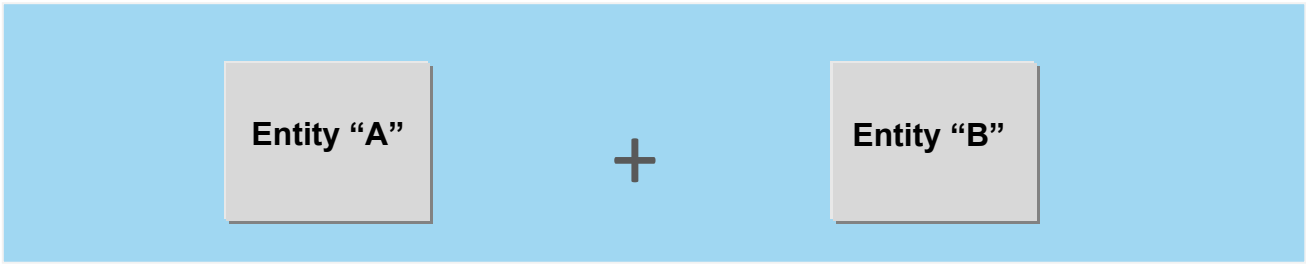


Option 3 – New parent entity

Create a new parent which sits above both Entity “A” and Entity “B”. This has the end result of both organisations remaining in existence, without one organisation feeling as if it has been “taken over” by the other. It is also most suitable where both Entity “A” and Entity “B” are of a similar size, meaning it is not appropriate for one entity to become the parent of the other (which is option 2 above). In this instance both Entity “A” and Entity “B” remain as they are, with a new parent entity sitting above both entities.

Before



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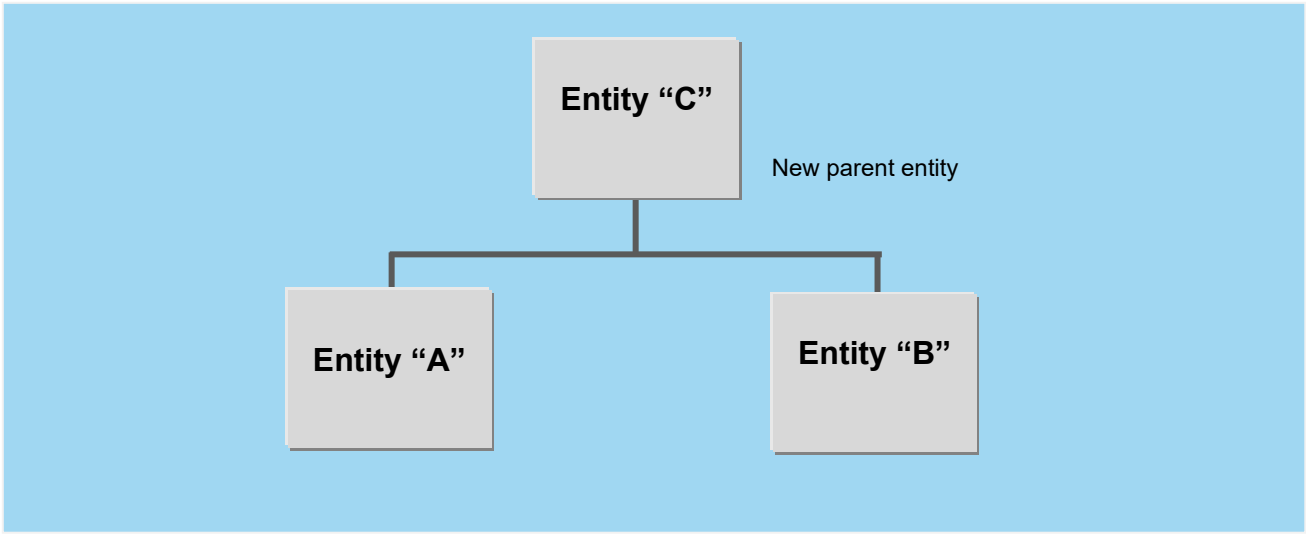
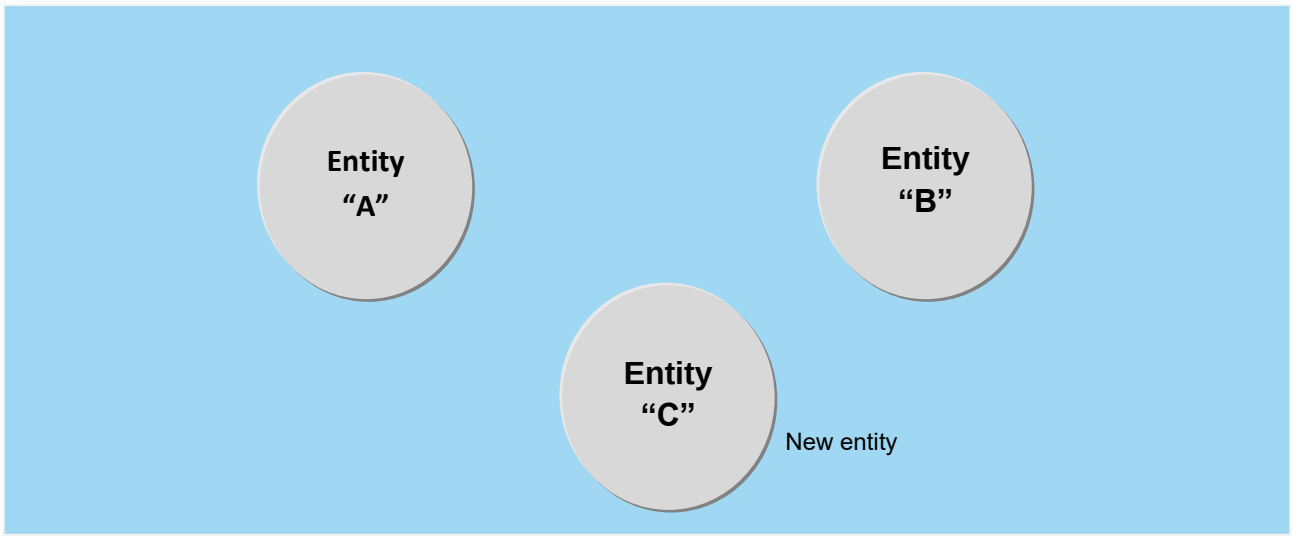


Option 4 – New entity and Entities “A” and “B” cease to exist

Create a new parent entity. Both Entity “A” and Entity “B” agree to transfer all of their property, employees, contracts, assets etc to the new entity, Entity “C”. Then Entity “A” and Entity “B” are wound up or deregistered.

Before



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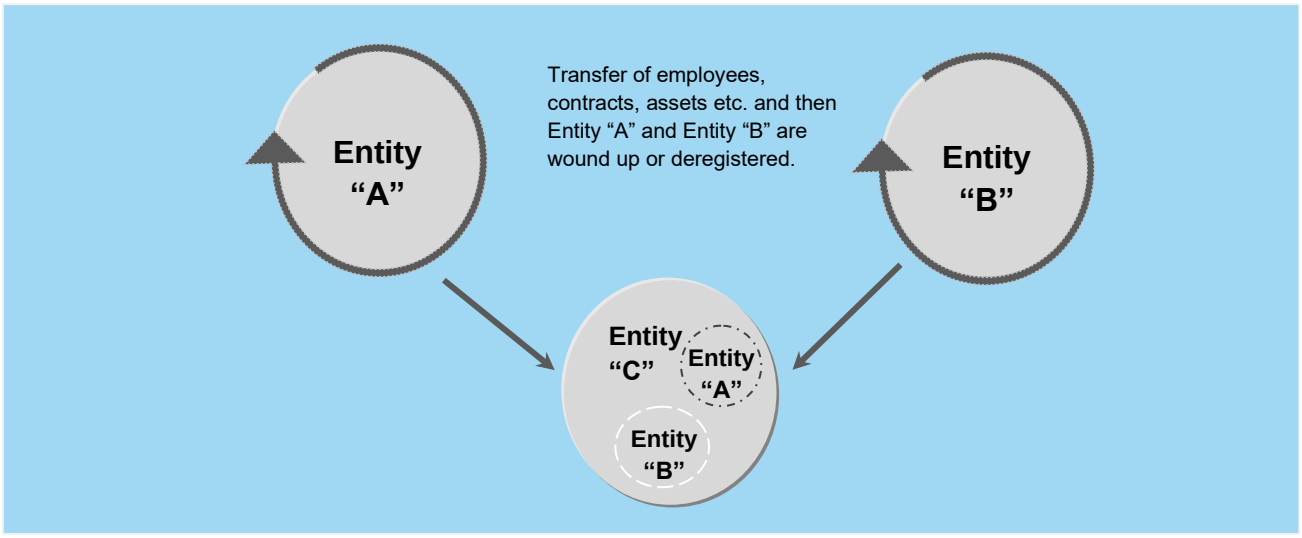

Option	1. Control	2. Funds	3. Identity	4. Ability to create economies of scale
Option 1 – Entity "A" subsumed by Entity "B"	- Entity "B" could consist of a limited number of representatives from Entity "A", so that Entity "A" could still retain some control over issues at Board level. - Entity "B" would have complete control of every aspect of Entity "A", as Entity "A" would be a part of Entity "B".	- Entity "B" can tender for and negotiate contracts on behalf of Entity "A" as Entity "A" would legally be a part of Entity "B". - Entity "A" must transfer to Entity "B" any contracts it has. - The funds of the two companies would be completely merged, but some Entity "A" monies could remain protected. - This option would also mean that Entity "B" would assume responsibility for any liabilities of Entity "A" (both known and unknown).	- It is possible that Entity "A"'s brand could be subsumed by Entity "B"'s brand. However, with sufficient planning, it is possible for Entity "B", on behalf of Entity "A", to retain, protect and promote Entity "A"'s good brand name. Entity "B" register the Entity "A" name as a business name or trademark. - Entity "B" may have a stronger influence in the relevant sector and generate more income due to the increase in size and developing a stronger brand.	- Entity "B" would be more powerful in lobbying Government due to its increased size. - Entity "A" and Entity "B" could enjoy significant efficiency savings as they will be one organisation. - Exploiting synergies. This structure would create opportunities to exploit links and contacts and to share knowledge and skills between Entity "A" and Entity "B". - Entity "B" would have greater authority with potential corporate donors or sponsors due to its larger size.
Option	**1. Control**	**2. Funds**	**3. Identity**	**4. Ability to create economies of scale**
Option 2 – Entity "B" as subsidiary	- For Entity "A", the Board structure and membership structure would remain the same. - For Entity "B" there are two options: (i) Entity "A" could be the sole voting member and the other current members	- Entity "A" can tender for and negotiate contracts on behalf of Entity "B" as Entity "B" will legally be a part of the Entity "A" Group. It could then distribute funds to Entity "B" pursuant to a subcontract. - The funds of the two entitites would remain separate. However, with appropriate	- Entity "A" and Entity "B" would retain separate identities (including separate tax endorsements). - Entity "B" can retain its individual brand and reputation. - At any time in the future, Entity "B" could still be subsumed into Entity "A" if it	- Entity "A" would be able to lobby Government on behalf of Entity "B" as Entity "B" would legally be a part of the Entity "A" Group. - Entity "A" and Entity "B" could enjoy significant efficiency savings. Administrative duplication can be reduced by centralising some of the

	of Entity "B" could become non voting members; or (ii) Entity "A" could be the sole member. - As the sole/controlling member of Entity "B", Entity "A" could dictate the membership of the board of Entity "B" (being mindful of shadow directorship issues). - Entity "B" would still retain control over its operations, including programmes, employees etc. - The constitution of Entity "B" could provide that any decisions made by the Entity "B" board could be made in the best interests of its parent, being Entity "A". - No contracts would need to be transferred from Entity "B" to Entity "A".	changes being made to the Entity "B" constitution in certain limited circumstances, Entity "B" could pay dividends to Entity "A". - Lending institutions may require guarantees from Entity "A" before lending to Entity "B". - Entity "A" may need to lend capital to Entity "B" to fund Entity "B's" operations (which could involve the payment of interest). - This option would mean that Entity "A" would <u>not</u> assume responsibility for any liabilities of Entity "B" (both known and unknown apart from limited circumstances). - Donations would be made separately to each entity.	was considered to be worthwhile.	administrative functions within Entity "A". These administrative functions could be provided to Entity "A" for a reasonable fee. - Exploiting synergies. This structure will create opportunities to exploit links and contacts and to share knowledge and skills between Entity "B" and Entity "A" as they are part of the same corporate group. - Entity "A" and Entity "B" will maintain their existing authority with potential corporate donors or sponsors. - This operating structure allows for greater diversification and increased efficiencies, partly because senior management in Entity "A" does not have to be involved in the operational details of Entity "B". - This structure would allow Entity "A" to attach other organisations in the future as additional subsidiaries.
Option	**1. Control**	**2. Funds**	**3. Identity**	**4. Ability to create economies of scale**
Option 3 – New parent	- For Entity "A", the Board structure would remain the same. The membership structure would have to change to allow the parent to become the sole (voting)	- Both Entity "A" and Entity "B" can continue to separately tender for and negotiate contracts. Alternately, the parent could tender on behalf of the entire group and then	- Entity "A" and Entity "B" would retain separate identities (including separate tax endorsements). - Each organisation can also retain its individual brands and	- The new parent would be able to lobby Government on behalf of both Entity "B" and Entity "A", as all three entities would legally be a part of the same group.

entity	member of Entity “A”. - For Entity “B”, again the board could remain the same, but there would have to be changes to the membership structure to allow the parent to become the sole (voting) member of Entity “B”. - Both Entity “A” and Entity “B” would have to negotiate with their current respective members to arrange for them to agree to resign from their membership, or at least cede voting control. - As the sole/controlling member of both Entity “B” and Entity “A”, the new parent could dictate the membership of the boards of both Entity “B” and Entity “A” (being mindful of shadow directorship issues). - Both Entity “A” and Entity “B” would still retain control over their respective operations, including programmes, employees etc. - The constitutions of both Entity “B” and Entity “A” (if they are companies) could provide that any decisions made by the boards of either organisation could be made in the best interests of their new parent. - No contracts would need to be transferred from either Entity	distribute funds to Entity “B” and Entity “A” pursuant to subcontracts. - The funds of the two organisations would remain separate. However, with appropriate changes being made to the constitutions of both organisations, both Entity “B” and Entity “A” could pay dividends to the parent in certain circumstances. - This option would mean that Entity “A” would <u>not</u> assume responsibility for any liabilities of Entity “B” (both known and unknown), and vice versa. - Donations would be made separately to each entity.	reputations. - However, all three entities could also be marketed as a single group.	- Entity “A” and Entity “B” could enjoy significant efficiency savings. Administrative duplication could be reduced by centralising some of the administrative functions within the parent. These administrative functions could be provided to both Entity “A” and Entity “B” for a reasonable fee. - Exploiting synergies. This structure would create opportunities to exploit links and contacts and to share knowledge and skills between Entity “B” and Entity “A” as they are part of the same corporate group. - Entity “A” and Entity “B” would maintain their existing authority with potential corporate donors or sponsors. - This operating structure would allow for greater diversification and increased efficiencies, partly because senior management in Entity “A” would not have to be involved in the operational details of Entity “B”. - This structure would allow Entity “A” or Entity “B” to attach other entities in the future as additional subsidiaries. - This structure would also

	"B" or Entity "A" to the new parent.			allow the parent to attach other entities in the future as additional subsidiaries.
Option	**1. Control**	**2. Funds**	**3. Identity**	**4. Ability to create economies of scale**
Option 4 – New entity and Entities "A" and "B" cease to exist	- Entity "C" could consist of a number of representatives from Entity "A" and a number of representatives from Entity "B". - Contracts would need to be transferred from both Entity "A" and Entity "B" to the new parent entity.	- Entity "C" can tender for and negotiate contracts on behalf of Entity "A" and Entity "B" as Entity "A" and Entity "B" would legally be a part of Entity "C". - Entity "A" and Entity "B" must transfer to Entity "C" any contracts they have. - The funds of the two entities would be completely merged into new entity.	- It is possible that Entity "A"'s and Entity "B" 's brand could be subsumed by Entity "C"'s brand. However, with sufficient planning, it is possible for Entity "C", on behalf of Entity "A" or Entity "B", to retain, protect and promote Entity "A"'s or Entity "B"'s good brand name. Entity "C" could register the Entity "A" or Entity "B"'s name as a business name or trademark. - Entity "A" and Entity "B" cannot retain separate identities nor separate tax endorsements.	- The new Entity "C" would be able to lobby Government on behalf of both Entity "A" and Entity "B" due to its increased size. - Exploiting synergies. This structure would create opportunities to exploit links and contacts and to share knowledge and skills between Entity "A" and Entity "B" as they are now merged.

1.2 Checklist

Considering merger		
1.1	Have we properly considered what our purpose is as a NFP?	❒
1.2	Is our proposed partner compatible in terms of its objects, strategic vision, culture, values, governance arrangements, organisational structures and funding base?	❒
1.3	**Have we considered what this company/association can contribute to our company/association?** research and development members/beneficiaries/accounts service range market segment (geography, industry, price point, etc.) specialised technology human capital revenue stream financial assets distribution channel strength to lobby Government	❒
1.4	**Have we considered the options for obtaining the capabilities this company/association has?** merger/acquisition joint venture joint marketing/distribution agreement strategic alliance agreement licensing commission/royalty agreement consulting services patent/technology internal development	❒
1.5	Is a merger in the best interests of our organisation and its beneficiaries? Will a merger enable us to achieve cost savings as well as improve the quality and/or	❒

quantity of service we offer?

1.6	Have we approached our stakeholders and beneficiaries for their views? If not, how and when are we going to?	❒
1.7	What will be the risks and benefits for our organisation as a consequence of a formal merger? Have we considered the wider impacts on our organisation?	❒
1.8	Are there any other forms of collaborative working we could explore that might achieve the same benefits?	❒
1.9	Have we estimated the full cost of merging? This should include issues such as staff time, rebranding, professional fees, relocation and unanticipated costs.	❒
1.10	Does our governing document or the law require the consent of the members in order to merge?	❒
1.11	Are we carrying out a due diligence exercise? Can we do it in-house or do we need professional advice?	❒

Financial considerations

2.1	**Have we considered the financial strength the other company/association?** assets liabilities revenue streams	❒
2.2	**Have we checked their financial projections for the next 1-3 years (and assessed the validity of any underlying assumptions in the projections)?**	❒

Culture considerations

3.1	**Have we considered what is the prevailing culture of the other company/association?** bureaucratic autocratic entrepreneurial egalitarian high performing market drive/technology driven	❒
3.2	**Would there be any potential cultural conflicts during integration?**	❒

Legal considerations

4.1	Do we have the relevant legal powers to achieve our plan, or will we need help from a Government regulator?	❒
4.2	Have we decided on a legal structure for the merged organisations?	❒
4.3	Are we taking the appropriate professional advice and in what areas?	❒
4.4	Are there any employment issues we need to consider? These could include issues such as superannuation, liabilities and compliance with employment law.	❒
4.5	Have we considered the impact on any tax endorsements or other grants that we may have?	❒
4.6	Are there restrictions on our organisation's sources of income? These could include special trusts, restricted funds, bequests or permanent endowments.	❒

02 Memorandum of Understanding

Key Terms

Once it is agreed that the two entities will seriously investigate a merger, it would be beneficial for the entities to agree upon and sign an MOU to set out how they will relate to each other up to the time that they agree to officially merge. Once they agree to merge, the entities will then enter into a formal merger agreement.

The key points to be included in the MOU are as follows:

2.1 which merger option has been chosen (out of the four options set out above in this paper);

2.2 how long the entities will have to decide whether to proceed with the merger or not;

2.3 confidentiality – both entities would need to promise to keep any information collected about the other entity confidential;

2.4 what rights each entity has to conduct due diligence of the other entity;

2.5 how long the entities have to reach agreement on the merger agreement if they agree to merge;

2.6 what rights of access each entity has to the other entity's staff, records, programme materials etc;

2.7 who in each entity will be the main contact person;

2.8 the fact that each entity will be responsible for its own costs in conducting the due diligence (unless agreed otherwise);

2.9 the fact that each entity can walk away from the discussions at any time (before any merger agreement is signed); and

2.10 the fact that each entity will deal exclusively with the other throughout the MOU period.

03 Due Diligence

3.1 Documents to Exchange during Due Diligence

1.	**Corporate documents**	
1.1	Incorporation papers	❒
1.2	Tax exemption letters	❒
1.3	Constitution and by-laws	❒
2.	**Financial documents**	
2.1	Most recent internal financial statements and budget	❒
2.2	List of significant assets (e.g. property, major equipment, major intangible assets such as intellectual property and leases)	❒
2.3	List of insurance coverage	❒
2.4	Statement regarding any current or anticipated debt	❒
2.5	Statement regarding pending, anticipated or threatened litigation	❒
3.	**Fundraising documents (if any)**	
3.1	List of foundation of corporate funders with amounts, restrictions and expiration dates	❒
3.2	List of government grants and contracts with amounts, restrictions and expirations dates	❒
3.3	Description of individual donor gifts	❒
4.	**Personnel documents**	
4.1	List of employees, titles and pay rates	❒
4.2	Personnel policies	❒
4.3	Employment contracts	❒
4.4	Enterprise agreements (if relevant)	❒
4.5	Schedule of employee benefits, costs and utilisation rates	❒
5.	**Contracts**	
5.1	Supplier contracts	❒
5.2	Service contracts	❒

5.3	Leases of premises	❒

3.2 Checklist

Financial records		
1.1	**Have we conducted a more detailed examination of financial records, including an examination of the following:** patterns of maintenance and capital expenditures patterns of marketing, sales, general and administrative expenses unexposed liabilities valuation methods for assets determination of goodwill	❒
1.2	**Executive compensation**	❒
Legal Exposure		
2.1	Have we checked the following: pending, probable or possible litigation trademark/patent protection/violation environmental exposure (real estate, compliance record) safety and health practices and exposure potential actions by employees tax exposure	❒
Visual/Onsite Inspections		
3.1	Have we conducted a detail examination of any contracts (terms, length, termination provisions, etc.)?	❒
Services		
4.1	Have we conducted a detailed examination of the current services provided?	❒
4.2	**Have we considered their future service plans:** extension of current service line (enhancements)? new service line?	❒
4.3	**Have we considered what resources have been allocated to future service/product development:**	❒

capital (equipment, buildings, or acquisitions)

personnel (headcount)

technology

Human Resources Administration

5.1 **Have we examined their compensation philosophy? How do their pay structures compare to ours? Will there be internal equity issues that we will have to address?** ❒

5.2 Have we considered how their benefit plans compare to ours? ❒
- education reimbursement
- vacation/holidays
- leave/time off policies
- superannuation

5.3 Will we need to maintain separate benefits plans or can they be integrated with ours? ❒

5.4 Is this company/association in compliance with major State and Federal regulations? This includes wage and labour standards? ❒

Workforce Competency

6.1 Have we examined the technical competence of the workforce? ❒

6.2 Have we examined the areas of technical competence and technical weakness? ❒

6.3 Have we examined the educational level of the workforce? Are there concentrations of well educated or poorly educated? ❒

6.4 Have we considered the managerial competence level of this organisation? ❒
- planning/budgeting
- leadership
- project management
- financial stewardship

6.5 Have we considered who the key technical, managerial and executive people are? Why are they considered key? What would happen if one or more of them left? ❒

Culture

7.1 Have we considered decision-making processes in the company/association? ❒
- what is the predominant style of making decisions?
- who makes what decisions? With what input from whom?
- what is the risk taking quotient?
- how are failures/mistakes dealt with?

7.2 Are there cross-functional structures (Steering Committees, Project Teams, temporary teams, etc.)? How well do they work? ❒

7.3 Have we considered their reward structure? ❒

- what do people get formally rewarded for?
- on what basis do people get promoted or otherwise recognised?
- what is most important to this company/association?

7.4 Have we considered the general norms of this company/association? ❒

- how are mediocre/poor performers dealt with?
- to what degree is conflict encouraged or tolerated?
- what are the typical responses to conflict?
- how well are deadlines set and met?
- how detailed is project planning?
- how is input from various parties obtained and used?
- what are the general modes of communications (written, verbal, phone, etc.)?
- how are various stakeholders dealt with (members, volunteers, employees, etc.)?

7.5 Have we considered the general values of this company/association? Eg quick response/flexibility, creativity, etc. ❒

04 Negotiate Deed of Merger

4.1 Terms to Consider in Negotiating a Deed of Merger

1. Transferring control		
1.1	Control of and interest in the old entity is to be transferred to the new entity. This is to include any and all: • tangible assets; • intangible assets (such as intellectual property and goodwill); • liabilities; • debtors; and • creditors.	❒
1.2	The interest, property and risk of the old entity are to remain with the retiring directors and members until completion.	❒
2. Conduct pending completion		
2.1	With regard to the old entity, the retiring directors must until completion: • manage and conduct the operations prudently; • maintain and protect the assets; • not incur any liabilities; • not hire, terminate or alter the employment terms of any employees; • not enter into, terminate or alter any material contract; or • dispose of any interests in the old entity's assets.	❒
2.2	The retiring directors must grant the new entity reasonable access to the premises to observe any operations, examine the records and affairs of the old entity and consult the old entity's auditor.	❒
2.2	The old entity must supply to the new entity with any information reasonably requested, which the new entity must treat as confidential.	❒
3. Completion		
3.1	Specify the time, date and place of completion.	❒
3.2	**The old entity must endeavour to contact and recommend to all members to:** agree to the merger; retire from their membership (if necessary); and/or vote in favour of the new constitution.	❒
3.3	**Convene a special general meeting at completion to pass a special resolution to:** agree to the merger; adopt the new constitution; and	❒

finalise the retirement of the retiring members (if necessary).

3.4 **The retiring directors must:** ❒

deliver all necessary documentation to the members of the new entity; and

do everything necessary to hand over operating control to the directors of the new entity.

3.5 **The new entity must:** ❒

arrange for the consent of all directors to be appointed to the new entity;

do all necessary acts required at completion; and

arrange for all necessary ASIC or Office of Fair Trading (or equivalent regulator) and, if necessary, ACNC forms to be prepared and lodged.

Warranties and confirmations

4.1 **The retiring directors must warrant that they:** ❒

have full legal power and capacity to enter into the deed of merger;

will take all necessary action to perform their obligations under the deed of merger;

affirm the accuracy of all financial reports of the old entity; and

have provided the directors of the new entity with all relevant information.

4.2 **The new entity warrants that it:** ❒

has full legal power and capacity to enter into the deed of merger;

is bound to its obligations under the deed of merger; and

confirms the deed of merger is legal, valid and binding.

Notices

5.1 The method of giving notice to any party to the merger must be outlined. Usually notice is required to be given in writing. ❒

5.2 The time of receipt and address of the parties must be specified. ❒

Default

6.1 Default of the deed of merger should be defined. ❒

6.2 The method of providing notice of default must be provided. ❒

6.3 The rights of the non-defaulting party must be specified. ❒

General

7.1	The method of amending the deed of merger must be specified.	❒
7.2	Both parties must maintain the confidentiality of the arrangements outlined in the deed of merger (and each other's information).	❒
7.3	Indemnities should be considered.	❒
7.4	The jurisdiction that will govern the merger must be specified.	❒

4.2 Preliminary Planning

1.	**Preliminary Plan**	
1.1	**Have we considered what areas of this company/association are unique and should be maintained? What are the core competencies we are trying to access? What areas/competencies of this company/association are redundant with ours?**	❒
1.2	**What is the appropriate structure for this relationship (and has our understanding of the best structure changed since it was first considered)?**	❒
	merger/acquisition	
	joint venture	
	joint marketing/distribution agreement	
	strategic alliance agreement	
	exclusive partnering agreement	
	licensing	
	commission/royalty agreement	
	consulting services	
	patent/technology option	
	internal development	
1.3	**Have we considered the costs associated with the different options:**	❒
	severance costs	
	relocation expenses	
	licensing fees	
	commissions/royalties	
2.	**Planning and communicating**	
2.1	Have we identified an individual to manage the overall process?	❒
2.2	Do we have a project plan with milestones in place to manage the process?	❒
2.3	Have we established a project board, committee or group to oversee the project and to link into the respective governing bodies?	❒
2.4	What interim governance arrangements should we put in place during the merger process?	❒

2.5	Have we conducted a stakeholder analysis and established a communications plan that covers all existing and new stakeholders and audiences? This should cover communicating the merger to existing funders and staff.	❒
2.6	Have we identified the risks associated with merging, such as reputational or operational risks, and put systems in place to mitigate those risks?	❒
2.7	Have we identified ways to monitor the success of the merger and how it will be evaluated?	❒

3. Information Systems

3.1	What is the basic structure of the information system? How compatible is it with ours?	❒
3.2	What are the basic data models used? How compatible are they with ours?	❒
3.3	What metrics do they use and how are they tracked? How compatible are they with ours?	❒
3.4	What information systems/linkages will need to be established between the two companies?	❒

05 Pre-Settlement and Settlement

The Process

The process to be followed in the lead up to, and to effect, settlement will vary depending on the merger structure option which was chosen (see pages 4 - 7). However, it would generally involve any of the following:

06 Post Merger

6.1 Checklist

1. Assistance		
1.1	During the period of several months following completion of the merger, the retiring directors should make themselves available to assist the directors of the new entity with advice or guidance concerning the operations of the old entity.	❒
2. Employees		
2.1	Draft new employment contracts.	❒
2.2	Ensure that employment benefits and pay scales are consistent across all employees.	❒
2.3	Draft new office policies and procedures and ensure all staff are familiar with them.	❒
3. Office		
3.1	Ensure a smooth transition of all people and property to the new office, if required.	❒
3.2	Ensure a smooth cultural transition between the two entities. This involves constant and transparent communication with all staff and events for team-building.	❒
3.3	Change all letterheads and formal documentation.	❒
3.4	Change emails addresses and passwords	❒
4. Assets		
4.1	Update bank accounts and signatories.	❒
4.2	Transfer the assets of the old entity into the name of the new entity.	❒
4.3	Amalgamate both entities databases/CRMs or, if necessary, create a new database/CRM.	❒
5. Documents and contracts		
5.1	The new entity will arrange for appropriate ASIC forms, Office of Fair Trading (or equivalent regulator) forms and ACNC forms to be prepared and lodged as soon as possible after completion.	❒
5.2	Update all insurance documents and deeds to ensure that the new entity is covered.	❒
5.3	Ensure that notice and/or approval is given for contracts that require this.	❒
5.4	Cancel all of the old entity's contracts and, if necessary, transfer any to the new entity.	❒
5.5	Provide safekeeping for all important documents with respect to the merger.	❒

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