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NFP AND CHARITY

**Mergers, Collaborations
and Strategic Alliances**



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MERGERS, COLLABORATIONS AND STRATEGIC ALLIANCES

Based on a paper presented on 10 May 2018 at

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1 THE CURRENT PRESSURE COOKER

1.1 Let's set the scene:

1.1.1 from the March 2018 Joint Research project of RMIT and CPA Australia:

... the NFP sector is experiencing unprecedented pressures to reform in the face of funding shortage, growing demand for human services, changes in government funding policies, and increased marketisation and competition. Many Australian charities and NFP entities are compelled to review their strategic stance and alliances, and undertake organizational restructure through mergers, amalgamations and acquisitions (M&As) with the hope of gaining scale efficiencies, expanding market size and remaining competitive.¹

1.1.2 and then from the 2017 NDIA Price Review Discussion Paper² (emphasis added):

There are currently two forms of price control used by the NDIA:

- *price limits, which are maximum prices that providers can charge for a particular support; and*
- *price benchmarks that indicate **the NDIA's view of the cost of efficient service delivery**, which should be achievable by most providers. Benchmarks act as thresholds that, if exceeded, trigger requirements for additional justification or review by the NDIA.*

...

Table 1 - Assumptions applied in estimating the efficient cost of provision for attendant care

...

Corporate overhead - *Corporate overhead is equal to 15% of total salary, management and non-client facing expenses. ... The NDIA is considering whether the current assumption is appropriate for the current state of the NDIS and what path of reduction would be appropriate going forward.*

Margin - *Margin allowance is equal to 5% of total costs (before or after tax). The return that a provider receives is to compensate for deploying funds to run their business (ie, through investment and working capital) and the risk they adopt in doing so. (emphasis added)*

1.1.3 Australians are generous donors and those giving are giving more, but fewer of us are doing so:

Some 80.8% of adult Australians – 14.9 million of us – contributed financially to charities and non-profit organisations in 2015-16. At A\$12.5 billion, total giving was well up from \$4.7 billion a decade ago. The average donation of \$764.08 was up too in real terms, by \$210.16.

However, the percentage of people donating dipped from 87% over the same period.³

1.1.4 In 2015, smaller charities relied more heavily on donated income; circa 38% of income, reducing to 4% for large charities, with the other parts of income being

¹ *Mergers, Amalgamations & Acquisitions in the Australian Not-for-profit Human Services Sector*, A Joint Research Report by RMIT University & CPA Australia, March 2018.

² National Disability Insurance Agency, '2017 Price Controls Review' (Discussion Paper, National Disability Insurance Agency, March 2017).

³ Wendy Scaife and Christopher Baker, *There's cause for celebration and concern in how Australians are giving to charity* (14 March 2017) The Conversation <<https://theconversation.com/theres-cause-for-celebration-and-concern-in-how-australians-are-giving-to-charity-72969>>.

Government Grants or other income (e.g. user pays services)⁴. The margin of user pays services, especially when those services are Government funded (e.g. NDIS), is being squeezed.

- 1.2 **Mergers** in the charity and NFP sector have been an effective strategy to combat some of these challenges. According to most commentators and limited studies, the number of mergers in the last five years has been increasing, especially by way of one organisation “taking over” another organization⁵. It is noted that “take over” language can be unnecessarily inflammatory.
- 1.3 Charities and NFPs are also employing alternative methods of alliance without a full merger, which include collaboration, auspicing and strategic alliances. In some cases this can provide a time of “courtship” before a more permanent union. I will collectively call this group “**Collaboration**”.

2 RECENT STATISTICS – THIN ON THE GROUND BUT INDICATIONS OF VOLCANIC ACTIVITY

Merger - Australian Statistics

- 2.1 A 2016 not-for-profit governance and performance study conducted by the Australian Institute of Company Directors (“**AICD**”) in collaboration with the Commonwealth Bank of Australia, which surveyed 1,822 AICD members in May 2016 and **1,140 NFPs**, reported:
 - 2.1.1 35% had discussed a merger in the last year;⁶
 - 2.1.2 8% of the NFP directors reported they are currently undertaking a merger;
 - 2.1.3 6% of the NFP directors reported that they have completed a merger in the last year;
 - 2.1.4 8% discussed a winding-up merger;
 - 2.1.5 Circa 33% considered it likely that they would merge in the next 2 years and a further 20% considered it somewhat likely;⁷
 - 2.1.6 Rates of merger did not change from 2015 to 2016.
- 2.2 **If the 8% figure is taken as a very rough bench mark and applied to the approximately 54,000 registered charities (as sub-set of NFPs), this indicates that 4,320 of them each year may be looking to merge.**
- 2.3 The number of charities de-registered on the basis of ceasing to operate cannot be taken as a proxy to measure merger activity, as it will often be the case in practice that all entities remain in place (at least for some significant time post merger) and that the “merger” is achieved by a change in control.
- 2.4 Reasons for merger from that same report are set out below and remained largely consistent from 2015 to 2016:

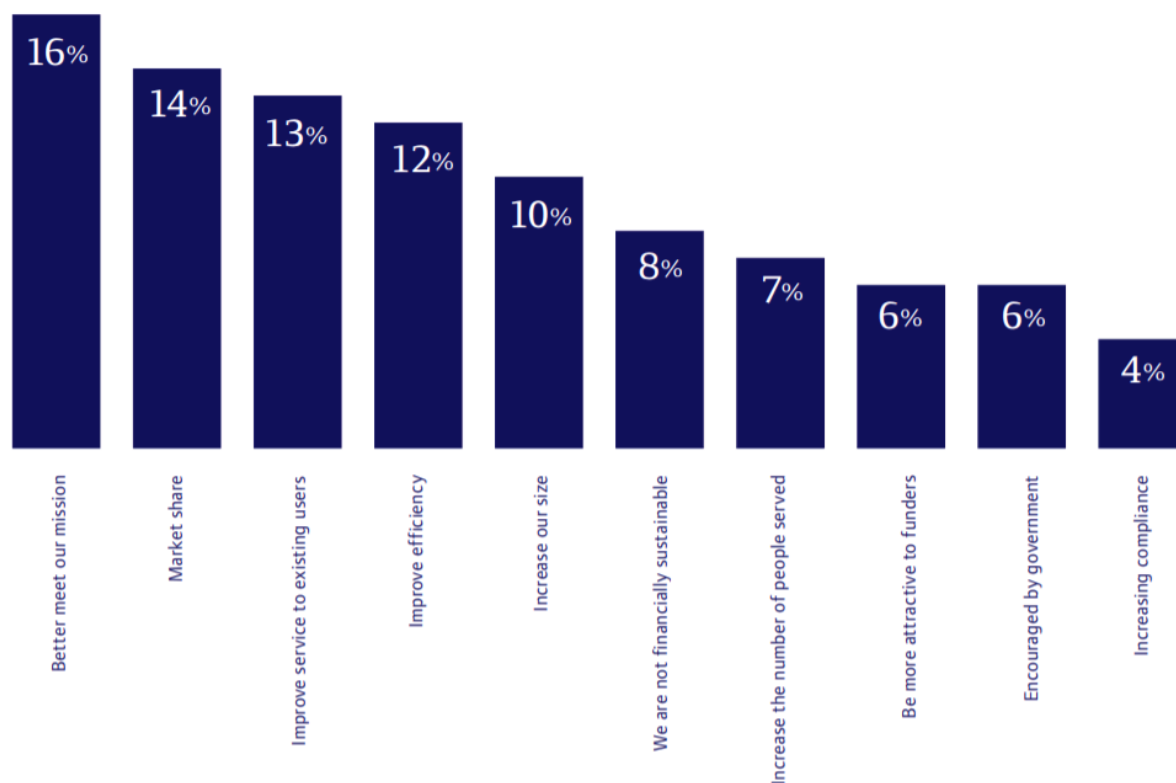
⁴ Michael Courts and Wes Mountain, *Infographic: a snapshot of charities and giving in Australia* (14 March 2017) The Conversation <<https://theconversation.com/infographic-a-snapshot-of-charities-and-giving-in-australia-66672>>.

⁵ O’Keefe, Darragh, ‘NFP providers join forces in record numbers to survive [online]. *Australian Ageing Agenda*, Sep/Oct 2015: 26 – 27. Availability: <https://search.informit-com-au.ezp01.library.qut.edu.au/documentSummary;dn=611445082253564;res=IELFSC> issn: 1836-7348. [cited 9 April 2018].

⁶ Australian Institute of Company Directors, ‘NFP Governance and Performance Study’ (Commonwealth Bank, 2016), 17.

⁷ Australian Institute of Company Directors, ‘NFP Governance and Performance Study’ (Commonwealth Bank, 2016), 18.

Reasons for merger (n=488)



Collaboration - Australian Statistics

2.5 That same study⁸ reported that:

- 2.5.1 70% collaborate to advocate for the sector of those they serve;
- 2.5.2 43% sub-contract some services to other NFPs;
- 2.5.3 39% have agreements or MOUs to refer or service clients (expected to increase to 55%);
- 2.5.4 26% share resources (expected to increase to 35%);
- 2.5.5 15% share back office functions (expected to increase to 29%).

2.6 I am also aware of the qualitative research conducted by RMIT University & CPA Australia as published in its report dated March 2018. This was however based on 21 interviews and so will be disregarded for the purposes of statistics.

No public reporting of NFP Mergers

2.7 There is no obligation on NFPs to report mergers to a regulator, or seek authorization to merge from any authority (aside from unique and exceptional cases such as cy-pres applications in the case of a frustrated charitable trust).

UK Jurisdiction – Merger Activity

⁸ Ibid 17, 18.

- 2.8 Though prevalent, merger activity in NFPs in the United Kingdom is relatively obscure; 70 reported mergers occurred in 2017 in the context of 167,000 registered UK charities.⁹ The Good Merger Index, an annual review of NFP merger activity in the UK, found that a good portion of merging NFPs (44% of transferors) had merged after falling into weak financial positions.¹⁰ On the other hand 68% of transferees were trading with financial surplus. The 2017 UK trends also revealed that 56% of mergers involved a larger corporation wholly acquiring smaller NFPs.¹¹
- 2.9 These statistics may indicate that NFPs are not proactively seeking mergers, particularly in the circumstances where roughly half of merging transferors are *only* combining with other NFPs when the transferor NFPs are too weak to survive independently. This in turn raises questions about the steps NFPs are taking to become and remain financially sustainable; that is, relying on mergers to save a flailing entity as opposed to proactively seeking out collaboration early on and ultimately building a financially strong NFP with an equally strong ability to serve its beneficiaries.
- 2.10 Secondly, and as acknowledged by the Good Merger Index, mergers which involve wholly acquired smaller NFPs usually result in the weaker NFP losing its identity.¹²

The 2017 NFP Governance and Performance Survey¹³ - Australia

- 2.11 As opposed to the 2016 report, this report focused on Culture, Management of risk, Financial sustainability and Reputation.
- 2.12 One of the key findings was that circa 50% of NFPs were reporting profitability at less than sustainable levels. The Report was not drawn on what a sustainable level might be, other than saying it was certainly more than 2% and that more than 5% was “doing well”.¹⁴
- 2.13 The following extracts from the Report are telling (emphasis added):

The 2016 study found that there was widespread misunderstanding in the sector about the importance of profit for NFPs. Many directors in our focus groups expressed misgivings about the appropriateness of NFPs making a profit, or had not even considered it as an objective at all. “If we made a profit, we would have to give the money back,” said one director in the 2016 focus groups.

At the launch of the 2016 study, Australian Charities and Not-for-profit Commission Commissioner Susan Pascoe AM FAICD said: “Profit is not a dirty word.” As a sector, we must accept that making profit is essential to building the financial strength needed to achieve our missions now and into the future.¹⁵

⁹ Elliot Bidgood, ‘The Good Merger Index’ (Eastside Primetimes, 2017), 3.

¹⁰ Ibid.

¹¹ Ibid 4.

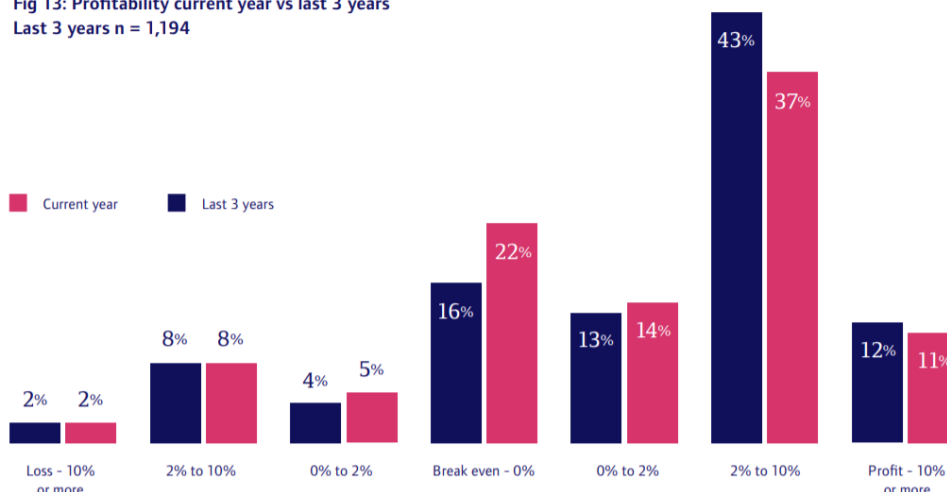
¹² Ibid.

¹³ Australian Institute of Company Directors, ‘NFP Governance and Performance Study’ (Commonwealth Bank, 2016).

¹⁴ Ibid 20, 21.

¹⁵ Ibid 19.

Fig 13: Profitability current year vs last 3 years
Last 3 years n = 1,194



- 2.14 With the NDIS pricing guide setting a maximum benchmark profit margin of 5%, what is this saying about the financial sustainability of NDIS service providers? Is such a benchmark systemically weakening the long term viability of the service providers as group?
- 2.15 NFPs are subject to the non-distribution constraint, by which they are prohibited from distributing profits or capital on winding up to private persons. Rather profits and capital must be applied to the purpose of the NFP. Sustainable profitability in the NFP sector is not lining the pockets of individuals but assisting to build both sustainability and capacity in the sector.

3 WHY MERGE OR COLLABORATE?

Financial pressure / overhead cost sharing

- 3.1 There is significant commentary which suggests that some charities and not-for-profit organisations are merging and collaborating on the basis that they can no longer financially sustain themselves by remaining as a “silo” organisation.

Donor fatigue

- 3.2 There is also commentary that there are so many charities undertaking the same work and competing for the same grants and donations, that donors are becoming fatigued and confused about which entity will most appropriately apply their donation. It has been suggested that this can be solved by merging some of these “duplicate” charities, making it “simpler for the donor” to give.¹⁶

Less competition for grants

- 3.3 Merging can also reduce competition for government grants.¹⁷

Philanthropist and donor influence

- 3.4 Given ‘declining trust’ in the charity sector, donors appear to be choosing charities who have less overheads¹⁸ and therefore more available funds to apply to the tangible outworking of the charitable purposes (as the term “charitable purpose” is understood by a lay person).

¹⁶ Manny Tsigas, *Call to merge charities to beat donor fatigue* (21 December 2015) SBS News <https://www.sbs.com.au/news/call-to-merge-charities-to-beat-donor-fatigue>.

¹⁷ Fiona Smith, *Better Together: Why Charities Should Merge* (13 February 2018) Pro Bono Australia <https://probonoaustralia.com.au/news/2018/02/sponsoredcontent-better-together-charities-merge/>.

¹⁸ Manny Tsigas, *Call to merge charities to beat donor fatigue* (21 December 2015) SBS News <https://www.sbs.com.au/news/call-to-merge-charities-to-beat-donor-fatigue>.

- 3.5 There is a growing trend for corporate donors and philanthropists to favor donating to organisations which can demonstrate financial sustainability.
- 3.6 Occasionally significant funders exercise influence in encouraging charities to merge. Michael Traill, chair of non-profit consulting firm Social Ventures Australia, described a situation where a significant funder had two applications from two similar entities which undertook similar work to service youth at risk. The funder told the two applicants that he had written a \$500,000 cheque to each of them, but only if they combined resources. In that case, the two charities responded and merged.¹⁹

Increased complexity and social / political landscape

- 3.7 Escalating community demand, changes in the socio-economic landscape and changes in demographics (such as the ageing population) all impact upon the complexity of the goods and services required to be offered by NFPs.²⁰
- 3.8 Government encouragement to merge is also an influencing factor, fuelled by the government's preference to achieve greater economies of scale through lead funding agency who in turn need to sub-contract other NFP service providers.²¹
- 3.9 There has also been a recent trend surrounding social impact investing, social enterprise, corporate social responsibility and entrepreneurialism²² which has led to entities "teaming up" to create cost-effective sustainable change in their areas of focus, and deploying more creative methods of operating in order to maximize donor giving and obtaining funding.

Introduction of the NDIS

- 3.10 The NDIS has seen a shift from a state-based government block funding model for disability service providers to a "pay-per-user" insurance scheme.²³ It is expected to become fully operational in July 2019 and was introduced in response to a 2011 Productivity Commission report that found that the then disability services were "underfunded, unfair, fragmented and inefficient".²⁴ Under that system, the respective State governments contracted and funded disability service providers to deliver disability services. Disabled persons were generally assigned to the disability service provider (which presented limitations as to the kind of disability services that they could access). The Commission suggested that the solution to this problem would be to replace the system with flexible funding packages for the individual that could be used to purchase disability support²⁵ from providers of the individual's choice.
- 3.11 These service providers face uncertain futures with governments ending their block funding. They have to compete to attract customers who choose their services and significant benchmarking is placed on financial performance. The government has been successful in

¹⁹ Fiona Smith, *Better Together: Why Charities Should Merge* (13 February 2018) Pro Bono Australia <https://probonoaustralia.com.au/news/2018/02/sponsoredcontent-better-together-charities-merge/>.

²⁰ O'Keefe, Darragh, 'NFP providers join forces in record numbers to survive [online]. *Australian Ageing Agenda*, Sep/Oct 2015: 26 – 27. Availability: <https://search.informit-com-au.ezp01.library.qut.edu.au/documentSummary;dn=611445082253564;res=IELFSC> issn: 1836-7348. [cited 9 April 2018].

²¹ O'Keefe, Darragh, 'NFP providers join forces in record numbers to survive [online]. *Australian Ageing Agenda*, Sep/Oct 2015: 26 – 27. Availability: <https://search.informit-com-au.ezp01.library.qut.edu.au/documentSummary;dn=611445082253564;res=IELFSC> issn: 1836-7348. [cited 9 April 2018].

²² O'Keefe, Darragh, 'NFP providers join forces in record numbers to survive [online]. *Australian Ageing Agenda*, Sep/Oct 2015: 26 – 27. Availability: <https://search.informit-com-au.ezp01.library.qut.edu.au/documentSummary;dn=611445082253564;res=IELFSC> issn: 1836-7348. [cited 9 April 2018].

²³ Valerina Changarathil, *NDIS throws up new challenges for SA disability services providers* (27 May 2014) The Advertiser <http://www.adelaidenow.com.au/business/sa-business-journal/ndis-throws-up-new-challenges-for-sa-disability-services-providers/news-story/cdbd1111648a38797714818f31013a47>.

²⁴ Australian Government Productivity Commission, *Disability Care and Support* (10 August 2011) <http://www.pc.gov.au/inquiries/completed/disability-support/report>.

²⁵ Carmel Largy (Senior Research Fellow, RMIT University), *Understanding the NDIS: how does the scheme work and am I eligible for funding?* (6 July 2016) <https://theconversation.com/understanding-the-ndis-how-does-the-scheme-work-and-am-i-eligible-for-funding-58726>.

stimulating competition, and the service provider market is evolving in response.²⁶ In our experience this is leading to both merger and collaboration activity.

Aging and fatigued Governors / Members

- 3.12 Anecdotally a number of mergers have come through our office as the founders and volunteer board members age, unable to find next generation volunteers to step into the roles and therefore seek to fold their assets and undertaking into a larger NFP and then wind-up. This is a type of merger.

Simplifying complex multi–entity structures

- 3.13 Again anecdotally from files in our office, there are a number of NFPs who historically have added new entities for new ventures. This is a typical “commercial law” approach of seeking to quarantine risk by cutting a failing entity loose. NFP governors don’t seem to use entities in this manner for reputational reasons and end up asking why they have a number of reporting entities for the same charitable purposes. Merger and de-registration seems to be a constant task.

4 ADVANTAGES AND DISADVANTAGES OF MERGING

Advantages

- 4.1 Advantages of merging include:
- 4.1.1 **Economies of scale / Survival** - the pooling of resources resulting in spreading the overhead costs over more front line services – mergers achieve this more effectively than collaborations, auspicing or strategic alliances (due to the cost of contracting in collaborations). But larger does not necessarily mean more efficient;
 - 4.1.2 **Increased buying, negotiating and tendering power** when applying for government funding or sub-contracting services;
 - 4.1.3 The **right people on the bus and the wrong people off the bus**,²⁷ especially at Board and Senior Executive levels. This is especially in respect of volunteer boards;
 - 4.1.4 **Increased donor pool** and donor favour;
 - 4.1.5 **Diversification** – diversifying an organisation’s activities provides an element of protection in a changing economic environment.

Disadvantages

- 4.2 Some disadvantages of merging include:
- 4.2.1 **Loss of identity** and connection with grass roots community and volunteers;
 - 4.2.2 **Culture clashes** even if charitable purpose is aligned. More below;
 - 4.2.3 **Large unworkable Boards** - A 2017 survey report conducted by Pitcher Partners and Russell Kennedy Lawyers found that the average size of boards in the NFP sector is now nine board members. The survey report noted that “mergers in the sector result in a board that must manage large, complex, diverse NFP operations across larger regions”. Pitcher Partners and Russell Kennedy Lawyers correctly raise the problems with large boards of 9 people (particularly where the ASX listed companies average directors is 7.5). These concerns include: difficulty of scheduling

²⁶ Carmel Largy (Senior Research Fellow, RMIT University), *Understanding the NDIS: how does the scheme work and am I eligible for funding?* (6 July 2016) <https://theconversation.com/understanding-the-ndis-how-does-the-scheme-work-and-am-i-eligible-for-funding-58726>.

²⁷ Jim Collins, *Good to Great*.

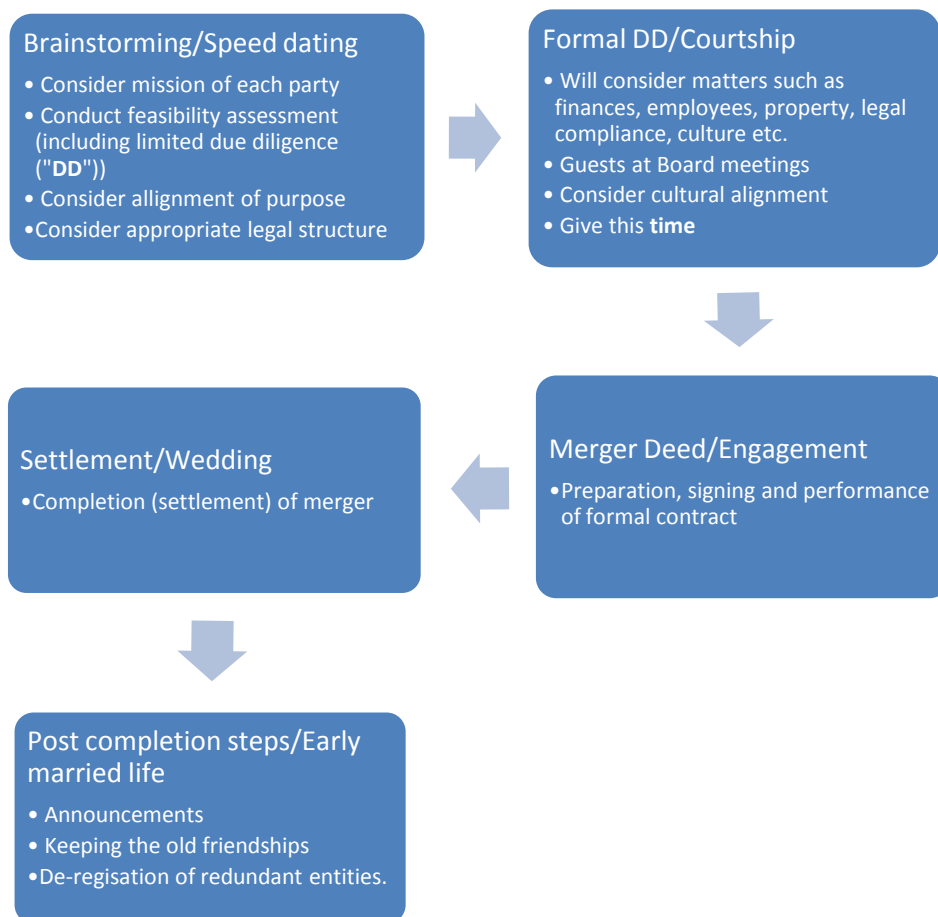
meetings, lack of contribution from some board members and lack of ability to be able to remunerate board members.²⁸ It may not be practical to simply combine both boards into one, but rather elect board members based on skill mix. Again, this is covered further in this paper.

4.2.4 **No exit plan or path** – given that NFPs do not have shareholders once entities are merged, de-merging is almost impossible unless this is hard-wired into the merger arrangement.

4.2.5 **Merging of financially unsustainable organisations may make one large financial disaster** - Susan Rix AM, partner in tax and business advisory at BDO Australia, has cautioned that it is important to identify that bigger does not always mean better. Merging two financially unsustainable organisations will not guarantee the creation of a viable new entity if the pre-merger entities have systematic issues that created the financial struggle in the first place.²⁹

5 RELEVANT CONSIDERATIONS FOR MERGERS

Merger Process



²⁸ Pitcher Partners and Russell Kennedy Lawyers, 'NFP Benchmark Survey Report' (2017), 6.

²⁹ Susan Rix AM - BDO Australia, *Under Pressure* (1 May 2015) Australian Institute of Company Directors <http://www.companydirectors.com.au/director-resource-centre/publications/company-director-magazine/2015-back-editions/may/not-for-profit-under-pressure>.

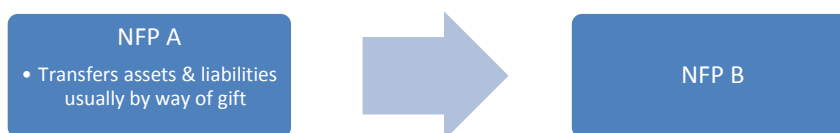
Alignment of charitable / NFP purposes

- 5.1 Purpose is what an “organization has been set up to achieve.”³⁰
- 5.2 A charity existing for the *advancement of education* cannot transfer its assets to a charity that exists for the *advancement of religion*, as the Governors of the transferor would be acting in breach of their obligation to apply their assets in accordance with their purposes.
- 5.3 Non-alignment of purpose is normally dealt with one of two ways:
- 5.3.1 Considering if purposes can be changed pre-merger (and along with that considering if this is conditional on the merger being settled). More below; or
- 5.3.2 Retaining both entities along with their distinct purposes post merger.

Legal Structure

- 5.4 Common types of mergers are:

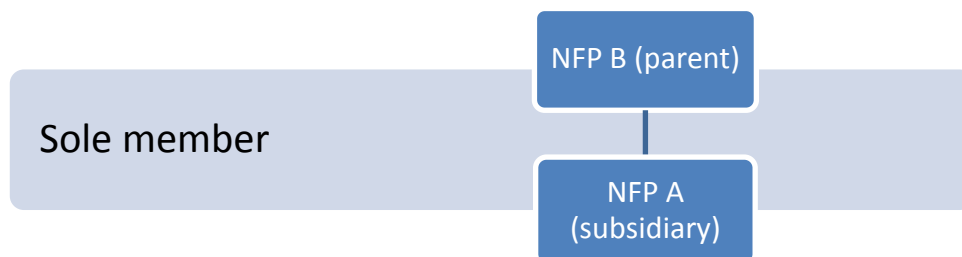
5.4.1 **Asset Transfer:**



- a *Feels like:* A takeover; ❌
- b *One less entity:* NFP A wound up or deregistered; ✓
- c *Control:* Representative of NFP A could become members or Directors of NFP B, but depending on the number of members of NFP B this may be scant “control”; ❌
- d *Cash:* All funds of NFP A would be transferred to NFP B at completion. NFP A needs to indemnify from NFP B for deregistration costs; 😐
- e *Identity:* The name of NFP A could be retained as a Business Name of NFP B or names combined. Failing this loss of goodwill in NFP A brand; ✓
- f *Material Contracts:* If there are material contracts in NFP A, these will need to be assigned and novated to NFP B. ❌
- g *Roadblocks:*
- i Different charitable purposes; ❌
- ii Contingent liabilities in NFP A. These will prevent NFP from winding up or deregistering. ❌

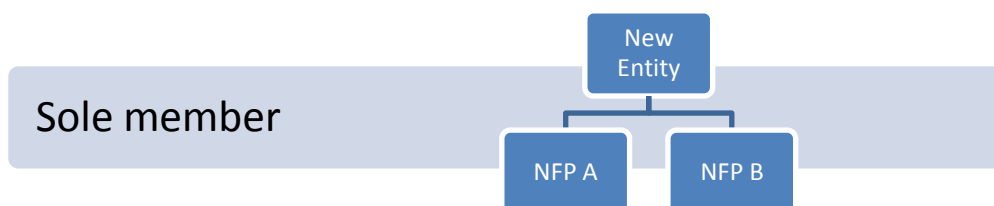
³⁰ Australian Government, *Charitable Purpose*, Australian Charities and Not-for-profits Commission
http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Charitable_purpose.aspx.

5.4.2 Membership ‘Transfer’:



- a *Feels like:* A takeover; ❌
- b *Both entities remain in existence:* NFP B (or its representatives) becomes the sole member(s) of NFP A, resulting in NFP A becoming a subsidiary of NFP B. The existing members of NFP A will need to resign at settlement. Under this model, NFP B is “inheriting” all potential problems (including liabilities and historical transgressions) of NFP A. Both entities remain in existence; 😐
- c *Control:* Ultimate control is the hands of the members. Whatever the Constitutions may say, the members can change the Constitution. This means that NFP B is in control. 😐
- d *Cash:* Each NFP retains its own funds following completion. If entities exist for same charitable purposes gifting of cash between entities may be possible. If not, subcontracting, licensing, secondment or loan arrangement (which would need to be properly documented on arms length commercial terms) allow sharing of resources and movement of money. Lending institutions may require a guarantee from NFP B as a precondition to lending to NFP A; 😐
- e *Identity:* Each entity retains its identity, branding and reputation and hopefully enhanced by being part of a larger group; ✅
- f *Material Contracts:* If there are material contracts in NFP A, these just stay with that entity but check deemed assignment clauses by change in control. ✅
- g *Removed road blocks:* If NFP A and NFP B have different charitable purposes, then great care needs to be taken in inter-entity arrangements. However, they generally need to be on arms length terms ✅

5.4.3 New Parent Entity:

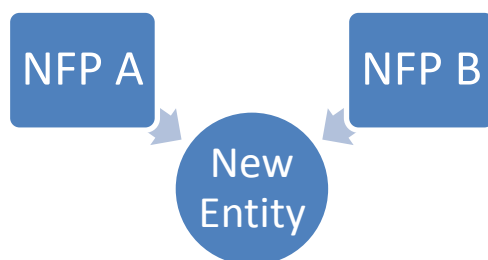


- a *Feels like:* A merger with an exit path; ✅
- b *Another entity:* A new parent entity is created which is the sole member of both NFP A and NFP B. This structure is beneficial to allow both entities to remain in

existence and retain their identities, without either entity feeling like it has been “taken over” by the other entity. 😊

- c *Control:* 😊
 - i The Board of the new parent entity could be comprised of equal representatives from each of NFP A and NFP B;
 - ii The membership of each of NFP A and NFP B would need to change to make the new entity the sole member of each of them. The Board of each of NFP A and NFP B initially remains the same, however the new Entity would be able to ultimately “hire and fire” the Boards of each of those NFP’s in its position as sole member;
 - iii The Constitutions of the subsidiaries NFP A and NFP B would need to be amended to hard-wire control mechanisms in, back to the parent entity, such as the parent entity being required to approve certain decisions of the subsidiaries before they are actioned as well as any appointments to the Board of the subsidiaries;
 - iv In many of these cases, assets (such as intellectual property and real property) may be owned (controlled) by the parent entity and generally licensed to the subsidiaries;
- d *Cash:* Each of NFP A and NFP B retains their own pre-merger funds. Same as Member ‘transfer’; 😊
- e *Identity:* Each entity retains its identity, branding and reputation and hopefully enhanced by being part of a larger group; ✓
- f *Material Contracts:* If there are material contracts in NFP A, these just stay with that entity but check deemed assignment clauses by change in control. ✓
- g *Removed road blocks:* Different charitable purposes although then great care needs to be taken in inter-entity arrangements being on arms length terms ✓

5.4.4 **New Single Entity:**



- a *Feels like:* A merger with **no** exit path; ✓
- b *Another entity:* A new entity is created. NFP A and NFP B both transfer their negotiated assets and liabilities to the new entity usually by way of gift. NFP A and NFP B are generally wound up or deregistered; 😊

- c *Control*: The Members and Directors of the new entity (and both NFP A & B from settlement) would be comprised of individuals from both NFP A and NFP B; ✓
- d *Cash*: All funds of NFP A and NFP B would be transferred to the new entity at completion with indemnities from the new entity for deregistration costs; ✓
- e *Identity*: Both identities would be subsumed by the new entity (which could contain references to each of NFP A and NFP B in its name or Business Names). This may lead to the loss of some brand value of both if not managed well; ✓
- f *Material Contracts*: All material contracts in NFP A and NFP B need to be assigned and novated to the new entity. ✗
- g *Roadblocks*:
 - i Different charitable purposes ✗
 - ii Contingent liabilities in NFP A and NFP B. These will prevent NFP A and NFP B from winding up or deregistering. ✗

5.4.5 **Some 'spanners' that may be 'thrown into the works' or clever safe guards (depending on your perspective)**

- a **Structures**
 - i In any merger, thought must be given to the structure of the entities that are merging and any requirements attaching to those structures. Each entity will generally be one of the following:
 - A Company limited by guarantee;
 - B Incorporated association;
 - C Unincorporated association;
 - D Letters patent (plus unincorporated association);
 - E Statutory body;
 - F Charitable trust (with or without a corporate trustee).
 - ii The most appropriate vehicle to conduct the post-merger operations will be influenced by the form of the merging entities and type of merger that is decided upon.
 - iii **Spanner / safe guard 1**: Check whether incorporated associations in the relevant State can have a sole member, being another NFP entity. Normally there is a minimum number of members (such as 7 in Queensland). This can potentially be worked around by the Board from time to time being the members but careful drafting of machinery and maintenance of the Members Register is required. Sometimes there is a migration to a company limited by guarantee as part of a merger to allow a single charitable entity member.
 - iv **Spanner / safe guard 2**: Charitable trust obligations are often more specific and difficult to change than charitable purposes in the Constitution of an incorporated entity. However beware, charitable trust obligations may be impressed on the assets of incorporated charities. More below.

- v **Spanner / safe guard 3:** Bequests made in Wills may fail if they were made to a specific incorporated charity for its general purposes. This encourages revisiting bequest clauses, re-engagement with donors and possibly preservation of all entities to save bequests. More below.
 - vi It is noted however that entities such as letters patent and incorporated associations have the ability to migrate into a company limited by guarantee, which may need to be considered as a pre-merger step.
- b **Assets impressed Charitable Trust obligations (Spanner / safe guard 2)**
- i Ordinarily, structures A – E above are easier to structure into a merger, given that these entities are generally able to amend their governing documents (including their charitable purposes) by way of a special resolution of members.³¹
 - ii Charitable Trusts can be more problematic in respect of a change of charitable purposes.
 - iii If a Charitable Trust contains an express power of amendment, the trust terms can be amended in the manner permitted by that power of amendment including in my view a change in charitable purpose as long as the power of amendment extends to include this. Consider the following two judgments.

ATTORNEY-GENERAL (NSW) v GRANT [1976] HCA 38; (1976) 135 CLR 587

The High Court Justice Gibbs (in delivering the majority judgment, 4:1) cited with approval the following passage from the 1904 House of Lords decision *General Assembly of Free Church of Scotland v Lord Overtoun* (1904) AC 515 from the Judgment of Lord Davey which he said fully and accurately states the law on this point...(emphasis added):

I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association. But the existence of such a power would have to be proved like any other tenet or principle of the association.

The substantive outcome in that case was that the trust property purposes could be changed as part of the formation of the Uniting Church.

IN THE MATTER OF THE PUBLIC TRUSTEE OF QUEENSLAND AS TRUSTEE OF QUEENSLAND COMMUNITY FOUNDATION [2016] QSC 276 Justice Ann Lyons at paras 28 and following said:

The Power of Amendment

[28] ... Dal Pont in his book, Law of Charity expresses the view that a charitable trust can be varied pursuant to its own express terms and Hubert Picarda QC in his work The Law and Practice Relating to Charities (4th ed) considers that charitable trusts can be revoked, varied or added to pursuant to a valid power of appointment or revocation contained within the trust deed. In this regard Picarda refers to Re Holloway's Trusts and Re Harrison to support a power to vary.

³¹ Paul Paxton-Hall, 'Mergers & Acquisitions in the Not-for-profit Sector' (Paper presented at TEN 3rd Annual Charities and Not-for-profits Conference, Melbourne, 8 May 2015), 13.

[29] Counsel for the applicant has referred me to a more recent analysis of the power to vary a charitable trust pursuant to its own express terms in *Attorney-General for NSW v Homeland Community Ltd*. In that decision Windeyer J was concerned with a power of variation set out in a deed and a subsequent amendment which was made by deed. The case proceeded on the basis that the power of variation set out in the deed was not to be impugned because of any limits in relation to the law of charitable trusts.

Limits to Power

[37] There is no doubt an issue as to whether the power of amendment can be used to alter or defeat the main purpose of the trust. That question was considered by Douglas J in *Jenkins v Ellett* by reference to the text *Thomas on Powers* in the following terms:

“[15] ...

‘A power of amendment or variation in a trust instrument ought not to be construed in a narrow or unreal way. It will have been created in order to provide flexibility, whether in relation to specific matters or more generally. Such a power ought, therefore, to be construed liberally so as to permit any amendment which is not prohibited by an express direction to the contrary or by some necessary implication, provided always that any such amendment does not derogate from the fundamental purposes for which the power was created. Thus, a power of amendment will undoubtedly be capable of making amendments which are essentially ancillary to, and for the better execution of, such fundamental purposes, e.g. so as to substitute an easier form of communication or service for the one originally stipulated, or so as to make other powers exercisable in writing rather than by deed, or, indeed, introduce other amendments which are not simply administrative or managerial in nature. It does not follow, of course, that the power of amendment itself can be amended in this way. Indeed, it is probably the case that there is an implied (albeit rebuttable) presumption, in the absence of an express direction to that effect, that a power of amendment (like any other kind of power) cannot be used to extend its own scope or amend its own terms. Moreover, a power of amendment is not likely to be held to extend to varying the trust in a way which would destroy its ‘substratum’. The underlying purpose for the furtherance of which the power was initially created or conferred will obviously be paramount.’”

[38] Whilst in *Douglas J* held that the proposed amendment to the deed was not allowed in that case because it was in fact akin to destroying the substratum of the deed that would not seem to be the case here.

[40] Having considered the words used in cl 25, I am indeed satisfied that the power of amendment is wide and would in my view permit the changes proposed here. I agree with the submission of counsel for the applicant that the changes proposed to be made in the description of the purposes are within the substratum of the trust constituted by the Deed.

- iv Simply because a charity is incorporated does not mean that there are no charitable trust obligations impressed on the assets.

If there are express trust terms there is clearly a charitable trust. Express trust terms may also arise from donor specified charitable purposes at the time of the donation accepted by the charity.³²

³² Gino Dal Pont, *The Law of Charity*, at para 17.66 says, Money or property given to a (charitable or non-charitable) incorporated body for a specified charitable purpose is treated as trust property. It is its dedication to a specified charitable purpose, thus restricting the incorporated body from using the funds for any or all its (charitable) purposes, that serves to impress those funds with a trust. As explained by a Canadian judge extrajudicially:

[T]he feature that distinguishes the trust from the outright gift is the continuing exercise of control by the donor through the terms of the trust ... [A]ny special restrictions imposed by a donor on the management or application of the property that is the subject matter of the gift or perhaps evidence that sufficiently indicates the existence of an intention that the property is

If the incorporated entity's assets are impressed with more specific charitable trust obligations, "unless permitted by a cy-près scheme, the use of the money for other than the purpose prescribed is a breach of trust by the directors or managing committee of the incorporated body."³³

In respect of assets held by an incorporated charity for its general purposes, are those assets impressed with charitable trust obligations? This is an uncertain area. In my view, no, unless there is something extra in the language of the constitution which leads to this conclusion for example the use of the language, for example - 'in trust for' in the constitution.³⁴ The following observations, absent such language can, in my view, be made:

1. The incorporated charity and its Governors are still bound to apply its assets in accordance with its charitable purposes;
2. In the English case of *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] 1 Ch 193, Slade J said, "[T]he so-called rule that the court's jurisdiction to intervene in the affairs of a charity depends on the existence of a trust, means no more than this: the court has no jurisdiction to intervene unless there has been placed on the holder of the assets in question a legally binding restriction, arising either by way of trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes; for the jurisdiction of the court person or body who is subject to such obligation and against whom the court can act in personam so far as is necessary for the purposes of enforcement."

However, that case concerned the destination of assets on a winding up when there were no members who could make the decision;

3. Just as a charitable trust can be amended in a manner permitted by an express power of amendment, a Constitution can be amended in accordance with a power of amendment and such a power of amendment normally extends to all parts of the Constitution including the Objects (charitable purposes);

not to be dealt with in all respects as part of the general assets of the body in accordance with its corporate powers, may be sufficient to give rise to a trust.

³³ Ibid 453.

³⁴ [NSW MASONIC YOUTH PROPERTY TRUST v A-G \(NSW\) BC200910837](#) cited the following: In *RSL Veterans' Retirement Villages Ltd v NSW Minister for Land* [2006] NSWSC 1161 Palmer J observed (emphasis added):

32. The question then arises: are the purposes of the War Veterans' Home, incorporated by reference as the terms of the trust, the objects of the company as they appeared in the company's Memorandum of Association at the time of the grant in 1959 or are the purposes of the trust the objects of the company as appearing in its Constitution as amended from time to time? The Plaintiff urges the latter construction, saying that the purposes of the trust are now defined by its 1999 constitution. The Defendants contend for the former construction.

33. The Plaintiff submits that the Crown, knowing that the grant was to a company and that a company may change its purposes over time by amendment to its constitution, must be taken to have intended that the purposes of the Trust should be the purposes of the Plaintiff from time to time. In other words, the purposes of the Trust have been changed in accordance with the procedures of Corporations Law.

34. The Defendants place strong reliance on the word in the grant "upon trust for ... the purposes hereinafter declared ... and for no other use, trust or purpose whatsoever". They say that those words indicate that the purposes of the trust were identified in the grant and fixed immutably at the time of the grant.

35. In my opinion, the Defendants' submission is correct. The Plaintiff, being a corporation, has an indefinite existence. Like any corporation, its purposes can change over a long period of time, as circumstances change. So, in the present case, a little more than 60 years after the Plaintiff's incorporation, its constitution already gives eligibility for residents in the Village to a much wider range of people than was given in the 1942 Memorandum of Association.

...
37. In my opinion, the words of the grant, particularly in their insistence that the trust assets be used only for the declared purposes, indicate strongly that the purposes of the trust are those stated in the Memorandum of the Plaintiff as at the date of grant in June 1959 and that those purposes may be altered in accordance with the law of trusts, not in accordance with the law of corporations.

4. If it had been the intention of a donor or members of an incorporated charity to lock assets in specific charitable purposes it would always have been open to them expressly impress the assets with such obligations (for example by specific Charitable Trust Deed with limited power of amendment or amendment to part of the Constitution that could not be altered without a court approved Cy Pres scheme).³⁵ In practice we are seeing this occur as part of M&A activity to preserve charitable assets and their use in particular geographic regions.

c ***Saving Bequests (Spanner / safe guard 3)***

- i If an entity is being wound-up or deregistered as part of a merger, the parties also need to consider any bequests made to that entity.
- A Gifts made to an entity which ceases to exist will prima facie fail.
- Methods that may help safeguard against this include:
- B Incorporating a clear provision into the Constitution of the post-merger entity that that entity is the successor of the pre-merger entity;
- C Advising all Willmakers with known Will bequests to the pre-merger entity that they will need to amend their Wills – the problem with this is of course that an entity is never able to know all persons who may have made bequests to it, and invariably some persons will not change their Will even if they have been notified of the necessity to do so.
- D However, the validity of the gift will ultimately depend on the language contained in the Will.
- ii There is no “bulletproof” way to ensure that bequests made to a pre-merger entity do not fail, short of keeping the pre-merger entity open for the purpose of receiving any bequests that may be made.

Tax Considerations

5.5 GST

- 5.5.1 If there is money being paid for assets, does GST apply, or can the going concern rules be relied upon (including requiring both entities to be registered for GST)? If it is a gift, there is no GST and no rules deeming a supply for market value.

5.6 Capital Gains Tax

- 5.6.1 Does the disposing entity have Income Tax Exemption (which includes Capital Gains Tax)? Normally yes, but check it on ABN Lookup.

5.7 Transfer (stamp) duty

- 5.7.1 In most states charities will generally be exempt from the obligation to pay transfer duty on the transfer of the assets, provided that they satisfy the criteria in the relevant state or territory. This will generally include the requirement to apply the assets to the new or acquiring entity's charitable purposes.

³⁵ “It is a fundamental principle that, once a charity has been founded and its trusts have been declared, those Trusts cannot be revoked, varied or added to by the founder or founders unless a valid power of appointment or revocation was reserved at the time the Trusts were declared.” [Para 124] [NSW MASONIC YOUTH PROPERTY TRUST v A-G \(NSW\) BC200910837](#)

- 5.7.2 One of the authors, Andrew Lind, has undertaken a state by state review of the transfer duty exemptions and concessions available to charities in extensive detail in a 2016 paper presented at the 4th Annual TEN Charities and Not-for-profits Conference titled *“More Bang for your Buck”? A State by State Review of duty, land tax and payroll tax exemptions available to Charities.*
- 5.7.3 While each state has its own nuances, in order to qualify for an exemption or concession from transfer duty, the common requirement across all State duties legislations is that the entity must be a not-for-profit entity, and it must be established exclusively for “charitable purposes”.³⁶ The term “charitable purposes” is defined differently in each State jurisdiction and often takes its common law meaning rather than the meaning under the *Charities Act 2013* (Cth).
- 5.7.4 If charitable trust purposes are changed, trust re-settlement duty implications need to be considered.

Governance Changes

- 5.8 Key company documents will need to be amended in the merger process to enable the harmonious facilitation of the entities post-merger. This will most likely include Constitution amendments especially in relation to any decisions that must be reserved for a special majority of member/s (or occasionally third party consent).
- 5.9 The adoption of the amended documents by the relevant parties should be a condition of completion.
- 5.10 In our experience, the amendments that can be made to the company constitution to facilitate the wishes of both parties to the merger can be wide and varied. For example:
- 5.10.1 the entity may wish to establish specific post-merger business units for each party to the merger, with the requirement that at least two people from each business unit sit on the board of the Company, and a Board decision cannot be passed without an affirmative vote from at least one board member from each business unit.
- 5.10.2 Alternatively, the parties may wish to simply ensure that key staff persons are ex-officio members of the new company’s Board (such as the CEOs of each respective company prior to the merger, for the duration of time that they are employed with the new company), but intentionally not go any further than that in regulating decision-making.
- 5.10.3 Experience teaches us that being less prescriptive in Constitutions is better.
- 5.11 Another consideration to document is which party is authorised to tender for government grants and material contracts (especially where there will be multiple entities in the same group) on behalf of all of the entities in the group.
- 5.12 A common Board for all group entities is desirable to prevent conflicts of interest. Board Committees for Business Units can keep a broader group of talent engaged.

Employees

- 5.13 Consider the transmission of business rules under the Fair Work Act, including the amount of notice (my rule of thumb is 6 weeks) that needs to be given to employees.
- 5.14 Advice needs to be taken on redundancy obligations to those employees who may not be able to be kept.
- 5.15 The other thing to consider is whether the staff heading each respective pre-merger organisation (usually the CEOs) have the skills and experience required to run the larger

³⁶ <https://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TAAUAABAABAAE&refPt=TAAE&pubTreeWidth=23%25>

merged group. Sometimes, the board will decide that neither of the CEO's are appropriate to head up the new organisation, so they look to bring in a new CEO with higher-level experience.³⁷

Alternatives to Mergers

- 5.16 Prior to committing to a formal merger, many parties prefer to trial their relationship on a more informal basis. This can take place by way of collaborating, auspicing, entering into an MOU to share certain resources or establishing a joint venture for a one-off project. These are discussed below in this paper. Indeed, many parties undertake these arrangements on a formal basis and never proceed to a merger.
- 5.17 These are ways of extending the courtship and testing the cultural fit in circumstances where hard decisions need to be made.

6 AUSPICING AND COLLABORATING

What is auspicing?

- 6.1 To "auspice" means to provide support, sponsorship or guidance.³⁸
- 6.2 An auspicing relationship is generally comprised by an organisation (called the 'auspicator') providing support or guidance to an individual or smaller group (called the 'auspicee') for a specific project or series of projects. Under this arrangement, the auspicee carries out the project/s under the 'auspices' (or guidance) of the auspicator. It is the auspicator who enters into the relevant agreements and receives funding for the project. It is also the auspicator who assumes the legal and financial responsibility for the auspiced project.³⁹

When is auspicing appropriate?

- 6.3 At a high level, auspicing is appropriate for quickly establishing projects, quickly meeting grant funding requirements or for trialing a new idea or relationship with a group or individual⁴⁰ without making the commitment of merging with them or bringing them into the stable of the auspicator organisation.
- 6.4 Some funding bodies, as a prerequisite to distributing grants, require the recipient to demonstrate an established track record in the particular area being funded⁴¹, or hold certain tax concession endorsements from the Australian Taxation Office.
- 6.5 As the entity entering into project-related contracts and agreements and the entity receiving the funding for the project in question, it is the auspicator who possesses the charity registration, tax concession charity endorsement and who generally also has the proven track record of experience in the same or a similar area as that of the project.
- 6.6 It is acknowledged that a prospective auspicee group which seeks to run a project is generally able to incorporate an entity and obtain its charitable registrations and endorsements. However, this takes time, can be expensive and is often not appropriate for groups that want to undertake a short-term or one-off project.⁴²
- 6.7 Unincorporated groups also often find it difficult to source funding, as many funding organisations either do not understand their structures or as a policy prefer dealing with incorporated structures or particular kinds of incorporated structures such as companies

³⁷ Ellie Cooper, *Merge to Create Super-Charities – Expert* (29 October 2015) Pro Bono Australia <https://probonoaustralia.com.au/news/2015/10/merge-to-create-super-charities-expert/>.

³⁸ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 5.

³⁹ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 6.

⁴⁰ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 5, 9.

⁴¹ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 9.

⁴² Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 9.

limited by guarantee (as opposed to incorporated associations).⁴³ In this case, an auspicing arrangement with an incorporated entity would be beneficial for an auspicee.

Advantages of Auspicing

- 6.8 Auspicing arrangements are beneficial for the auspisor in that they provide an easy avenue for the auspisor to support new projects and areas; diversify their activities; provide mentoring to less established groups; and assist and promote the not-for-profit sector in their area of expertise.
- 6.9 They are beneficial for the auspicee in that the auspicee can benefit from the auspisor's incorporation, charitable registrations, endorsements, insurance, legal protection, track record, expertise and experience; and the auspicee's network and community profile may benefit from the project and the auspicee's association with a reputable auspisor.⁴⁴

Disadvantages of Auspicing

- 6.10 Auspicing also comes with its disadvantages. From the perspective of the auspisor, the main concern is the new risks, personalities and administrative burdens introduced to their organisation through the auspicing arrangement. The auspisor will be responsible to any funding body for the proper application of funding monies, and will be responsible to all other parties with whom contracts are signed, should those contracts be breached by the auspisor/auspicee group (it is noted that many of these risks can be managed by taking out appropriate insurances and striking a well-considered auspicing agreement). Some auspisors also charge a fee to auspicees to cover the additional administrative burden that the auspicing arrangement will impose upon the auspisor.⁴⁵
- 6.11 The main disadvantage for the auspicee is that the auspicee loses control and "ownership" over the project (which may have originally been their initiative). They may be required to agree to terms or amendments to the original idea imposed by an auspisor, which the auspicee may not originally have desired.⁴⁶

Some checks for Governors – it this appropriate / best?

- 6.12 Prior to entering into an auspicing arrangement, auspisors need to consider whether:
- 6.12.1 Alignment with purpose and market rates if their is no direct alignment;
 - 6.12.2 for the Governors – compliance with their duties including the Governance Standards contained in the *Australian Charities and Not-for-profits Commission Regulation 2001* (Cth)⁴⁷;
 - 6.12.3 spare capacity in the executive team of the auspisor or material benefit to the auspisor;
 - 6.12.4 the auspicee's ability and capacity to deliver the project;⁴⁸
 - 6.12.5 a robust auspicing agreement (more below).
- 6.13 Auspicing is not appropriate where:
- 6.13.1 There is doubt that the auspisor and auspicee (and the persons that are their main points of communication) will be able to work collaboratively with each other and be able to resolve disputes should they arise;

⁴³ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 5.

⁴⁴ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 13.

⁴⁵ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 14.

⁴⁶ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 14.

⁴⁷ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 22.

⁴⁸ Justice Connect, 'Auspicing: A Guide to auspicing organisations and those delivering auspiced projects' (2014), 22.

- 6.13.2 Where the project for which the auspicing relationship is proposed involves significant risk or liability, or is particularly complex. In that case, the proposed auspicee should take front line risk and consider incorporating an entity to run the project, for quarantining the risk of the project (so far as is possible) into that legal entity;⁴⁹
- 6.13.3 The parties do not have similar missions and purposes (unless it is profit driven);⁵⁰ and
- 6.13.4 The parties wish to conduct for-profit ventures. In this case, a joint venture or partnership would be more appropriate.⁵¹

Auspicing agreements

- 6.14 It is important to have a carefully considered auspicing agreement which would govern matters such as:
 - 6.14.1 Details of funding activities;
 - 6.14.2 Insurance;
 - 6.14.3 Publicity;
 - 6.14.4 Intellectual property ownership and use;
 - 6.14.5 Term of agreement and critical dates;
 - 6.14.6 Indemnities from the auspicee to the auspicor;
 - 6.14.7 Dispute resolution;
 - 6.14.8 Auspicee obligations, which commonly include:
 - a Form and frequency of reporting required to be made to the auspicor;
 - b The extent to which the auspicee will be responsible for securing premises, equipment, staff, consents and licences for the project;
 - c A requirement to assist the auspicor to secure adequate funding for the project;⁵²
 - 6.14.9 Auspicor obligations, which commonly include how funding must be applied for and administered and any support that the auspicor agrees to provide (administrative support, software, staff etc);⁵³ and
 - 6.14.10 Termination and walk away rights and obligations.

Collaboration

- 6.15 Collaboration is defined as a “united effort put into a project”⁵⁴ by two or more parties. It is a very broad term of reference and encompasses many different types of relationships and arrangements. Many entities will have more than one simultaneous collaborative relationship, and each may look very different in terms of structure and formality.
- 6.16 There are many practice models for collaboration, a detailed explanation of each being beyond the scope of this paper. Some common models that are seen include less formal agreements such as the shared use of resources and space, running one-off events and

⁴⁹ Justice Connect, ‘Auspicing: A Guide to auspicing organisations and those delivering auspiced projects’ (2014), 11.

⁵⁰ Justice Connect, ‘Auspicing: A Guide to auspicing organisations and those delivering auspiced projects’ (2014), 17, 21, 22.

⁵¹ Justice Connect, ‘Auspicing: A Guide to auspicing organisations and those delivering auspiced projects’ (2014), 11.

⁵² Justice Connect, ‘Auspicing: A Guide to auspicing organisations and those delivering auspiced projects’ (2014), 36.

⁵³ Justice Connect, ‘Auspicing: A Guide to auspicing organisations and those delivering auspiced projects’ (2014), 36.

⁵⁴ Macquarie Dictionary Publishers, *Collaboration* (6 April 2018) Macquarie Dictionary

https://www.macquariedictionary.com.au/features/word/search/?word=collaboration&search_word_type=Dictionary.

establishing referral networks, and extend to formal and involved arrangements such as consortia, partnerships and shared service delivery. At the very end of the collaboration spectrum is moving into the mergers and acquisitions territory.

- 6.17 They differ from auspicing in that the parties enter the relationship on a more equal footing as “partners” who each have autonomy in the relationship, rather than the leading entity dictating the relationship and assuming most of the risk (although in practice, some collaborations may feature many of these dynamics as one entity is likely to have greater resources and influence than the other).
- 6.18 A not-for-profit governance and performance study conducted by the Australian Institution of Company Directors in collaboration with the Commonwealth Bank reported that 70% of directors of NFPs reported that their NFPs actively **collaborate** with others and includes:
- 6.18.1 43% **subcontracting** the provision of some services to other NFPs;
 - 6.18.2 39% having **agreements or memoranda of understanding** to refer or service clients;
 - 6.18.3 26% **sharing resources**; and
 - 6.18.4 15% **sharing back office functions**.⁵⁵
- 6.19 In addition to this, the same study reports that nearly all directors are expecting to increase the amount of collaboration that their entities undertake in the next year⁵⁶.

When is collaboration appropriate?

- 6.20 Collaborations are utilized by charities and NFPs either as a stand alone arrangement, or as a precursor to a formal merger as a means by which to first “test the waters” between the parties.
- 6.21 They are appropriate (and preferred over auspicing) where one party does not need to depend on the credentials or charitable registrations of the other party, but where both parties are able to contribute similar value to the relationship, and where such arrangement will be mutually beneficial.
- 6.22 They can provide greater efficiency and influence for otherwise silo organisations, for example a consortia approach to a competitive funding tender for a shared project can reduce costs, increase the reach to potential beneficiaries and incentivize funders to fund the project.⁵⁷
- 6.23 Issues can arise in collaborations surrounding key issues like logistics, branding and distribution of returns. These can be documented in an agreement or memorandum of understanding which manages the expectations of the parties.

⁵⁵ Australian Institute of Company Directors, ‘NFP Governance and Performance Study’ (Commonwealth Bank, 2016), 17.

⁵⁶ Australian Institute of Company Directors, ‘NFP Governance and Performance Study’ (Commonwealth Bank, 2016), 17.

⁵⁷ Community Door, *Benefits of Collaboration* (6 April 2018) <https://communitydoor.org.au/organisational-resources/collaboration/benefits-of-collaboration>.