NEW ZEALAND
COMPANIES OFFICE

# Short-form amalgamation checklist

## Important notes

Amalgamations require careful preparation and drafting. This summary checklist is designed to answer frequently asked questions and avoid errors that lead to documents being rejected.

The information provided here is general in nature. For advice in specific instances, consult your accountant and solicitor.

Section ('s'), Part and Schedule references relate to the Companies Act 1993 ('the Act').

Terms such as 'directors', 'secured creditors' and 'shares' include the singular.

'Registrar' means the Registrar of Companies.

## Preliminary notes

1. A short-form amalgamation under Part 13 is 'short' in that there is no shareholder involvement, no notice to shareholders and no public notice. The directors of each amalgamating company authorise the amalgamation and give the related certificates.

2. A short-form amalgamation is suitable for companies in a group (s222(1)) or with common ownership (s222(2)). They can also use the long-form procedure (s220 and s221) or apply to the High Court (Part 15 and s238(a)).

3. Two or more companies can amalgamate into one of them or into a new company (s219).

   **Note —** If the amalgamated company will be a new company, please contact the Companies Office in advance to co-ordinate the incorporation and the amalgamation.

4. Directors do not need to resolve or certify that the amalgamation will be in a company's best interest. This is implicit in a short-form amalgamation.

5. The directors of each amalgamating company do not need to disclose that they are directors of, shareholders in, or otherwise interested in, another amalgamating company. Such interests may be present, but they are also implicit in a short-form amalgamation.

6. An amalgamation is not a 'major transaction' (s129).

## To prepare for a short-form amalgamation

1. Check the names and numbers of the amalgamating companies; that they are currently registered; that their annual returns have been filed; and that they are not at risk of removal.
2. Draw a diagram of the group structure based on the amalgamating companies' own share registers to determine if a short-form amalgamation is possible (s222(1) or s222(2)).
3. Identify the intended amalgamated company.
4. Identify which companies have a constitution and which do not.

   **Notes —**

   - Schedule 3 regulates how directors make decisions, but can be varied in a constitution (s160).
   - This is relevant when:

     i. approving the amalgamation (refer also to paragraph 7 below);

     ii. identifying the constitution of the amalgamated company; and

     iii. preparing the s223(c) certificates.

5. Identify which companies have creditors.

   **Note —** s223(e) requires the board of the intended amalgamated company to certify that the amalgamation will not be prejudicial to the creditors of one company (in a two-company amalgamation) or at least one (in a multi-company amalgamation) where both, or at least two, as the case may be, have creditors.

6. Check if there are any secured creditors.

   **Note —** Secured creditors are entitled to 20 working days' notice (s2 for 'working day' and s222(3)).

7. Determine:

   › the directors of each amalgamating company;

   › who the directors of the amalgamated company will be. This includes alternate directors;

   › whether their residential addresses (s2(5)) are up to date. This relates to the Form 13 consents for the amalgamated company (s223(f));

   › if someone new is to be named as a director of the amalgamated company (s153(1));

   › if any director of the intended amalgamated company is not continuing; and

   › how the decision to amalgamate will be made. Will a meeting have to be called and recorded in minutes (paragraphs 1-6 of Schedule 3)? Is a resolution in writing (paragraph 7(1) of Schedule 3) possible, in counterpart, if the directors are in different places (paragraph 7(2) of Schedule 3)?

     **Note —** It is usual when signing in counterpart for the pages to be dated when they are collated to form one document.

8. Are there any special features? Examples are:

   › Does the intended amalgamated company not have a constitution? If so, it is worth noting this in the resolutions: 'The amalgamated company will not have a constitution, as [name] does not have a constitution'.

   › Is the amalgamation into a subsidiary? If so, consider which shares are to continue into the amalgamated company (s222(2)). Will they be its current shares, to be held by the holders of the shares in the removed holding company, or will the shares of the holding company or those of another amalgamating company become the shares in the amalgamated company?

   **Notes —**

   - The constitution of the amalgamated company will be that of the amalgamating company whose shares are not cancelled (s222(2)(b)(ii)).
   - The resolutions must cover these points.

   › Is the amalgamation to take place on a future date? If so, this needs to be specified in the resolutions (s224(2)).

   **Notes —**

   - s224(2) refers to the 'amalgamation proposal' which, for a short-form amalgamation, means the resolutions (s222(4)).
   - The documents must be filed on or before that date to retain it – before, if the date is not a 'working day' (s2 and s224(2)).

   › Will the amalgamated company be a new company or change its name as part of the amalgamation (s223(d))? If so, and the intended name is a new name, reserve it online. If it is that of an amalgamating company due to be removed on amalgamation, prepare a Form 4 application to reserve the name.

   **Notes —**

   - The change does not require separate notice (s23), as the resolutions themselves will be registered.
   - Refer to 'Filing and paying the fee' below for further information.

9. Check with the companies' accountants for preliminary work relating to:

   › the solvency test grounds (s4(3)); and,

   › possible prejudice to creditors, (if applicable), (s223(e)).

10. Prepare notices to secured creditors (s222(3)).

**Notes —**

- s391 and s392(1) set out the procedure for serving these.
- Not all secured parties on the Personal Property Securities Register (PPSR) will necessarily be secured creditors. A creditor is secured if the company concerned owns the property (collateral) and has charged it as security for repayment of a debt or performance of an obligation, as noted in the definitions of 'secured creditor' and 'charge' (s2).
- If there are security interests registered against a company to be removed on amalgamation, inform the secured party so it can register a 'financing change statement' after amalgamation, adding the name of the amalgamated company as a debtor. That way, a person searching either company will learn of the interest of the amalgamated company in the collateral. Refer also to 'After registration' below.

## To prepare the resolutions

1. Select either:

   › s222(1) for an amalgamation where a holding company and one or more directly or indirectly wholly owned subsidiaries are to amalgamate, with the holding company becoming the amalgamated company; or

   › s222(2) for an amalgamation of two or more directly or indirectly wholly owned companies into one of them.

   **Notes —**

   - The term 'person' in s222(2) includes the plural (s33 Interpretation Act 1999).
   - The long-form procedure or a Part 15 application would have to be considered, subject to any preliminary adjustments, instead of s222(2) where:

     i. the common ownership is not the same percentage in each company, for example, 50/50 and 70/30, or where voting rights differ. Whichever becomes the amalgamated company, the shareholders in one would benefit and those in the other be disadvantaged unfairly;

     ii. a limited liability company is to amalgamate into an unlimited company, which could prejudice shareholders in the limited liability company.

     **Notes —**

     - The Act does not require the holdings to be the same in each amalgamating company. Common ownership is the test with 'directly or indirectly wholly owned by the same person'. Whether the short-form procedure is appropriate would have to be assessed on a case-by-case basis.
     - If the amalgamation were to proceed, affected shareholders might have a remedy on application to the High Court under Part 9. This could be averted by using a more suitable means of amalgamating.
     - When the amalgamation is into a subsidiary, refer above to the requirements of paragraph 8 under 'To prepare for a short-form amalgamation'.

2. Draft the resolutions as closely as possible to the wording of the section, ensuring the directors:

   › approve the proposal that the amalgamating companies will amalgamate, identifying the intended amalgamated company;

   › cancel the shares of companies being removed without payment or other consideration;

   › state that the constitution of the amalgamated company will be that of the holding company (s222(1)) or the company in which the shares are not cancelled (s222(2));

   **Note —** When the intended amalgamated company does not have a constitution, and when the amalgamation is into a subsidiary, refer above to paragraph 8 under 'To prepare for a short-form amalgamation'.

   › state that the board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test;

   **Note —** Do not include grounds here; these belong in the certificates under s222(5).

   › name the persons who will be the directors of the amalgamated company.

   › include any other provision, for example, that:

      i. the amalgamation is to become effective on a specified date;

      ii. the amalgamated company is to change its name on amalgamation.

3. Try to use the same wording for each resolution, as this makes drafting and checking easier. This can be achieved by using:

   › the full names of the amalgamating companies throughout for the pre-amalgamation aspects – approving the amalgamation, cancelling the shares of the company or companies to be removed, and identifying the constitution of the amalgamated company; and

   › the term 'the amalgamated company' – without repeating its name – on and after amalgamation – regarding the solvency test and the future directors, as with 'The directors of the amalgamated company will be [names]'.

4. When there are three or more amalgamating companies, consider listing them in a schedule: in paragraph 1 approving the amalgamation of the companies listed in the schedule – with [name] becoming the amalgamated company – and in paragraph 2 cancelling the shares of those companies without payment or other consideration except for those in [name]. This avoids repeating lists of names in the text.

5. If the amalgamation is to take place on a specified future date, include this in the approval paragraph or add a new paragraph to cover this.

6. If the amalgamated company is to change its name, include a paragraph stating this.

   **Notes —**

   - The change does not require separate notice (s23), as the resolutions themselves will be registered.
   - Refer below to 'Filing and paying the fee' for further information.

## To prepare the certificates under s222(5)

1. Review the most recent financial statements of each amalgamating company, prepared in accordance with the Act or other enactment (s4(3)(a)(i)).

   **Note —** Refer above to paragraph 9 under 'To prepare for a short-form amalgamation' regarding consulting the companies' accountants and to the Notes on company accounting and financial reporting at the end of this section.

2. Review the accounting records for the company whose directors are certifying (s4(3)(a)(ia)).

   **Note —** This is a variable, so check that the name in the text matches the name in the heading – 'the accounting records of [name]'.

3. Review all other circumstances that would or might affect the value of the amalgamated company's assets and liabilities, including contingent liabilities (s4(3)(a)(ii)).

   **Note —** An amalgamating company might be party to a lawsuit or have given a guarantee, for example.

4. Include other relevant grounds; for example, that a particular company has ceased or not commenced trading, and has no assets of liabilities, or that the directors have relied on a report from a reliable and competent employee, a professional adviser or an expert (s138).

5. Draft the certificates, ensuring the directors:

   › name the amalgamating companies and identify the amalgamated company.

   › certify that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test; and

   › state the grounds for this, following the wording of s4(3) 'In determining whether the value of the amalgamated company's assets will be greater than the value of its liabilities including contingent liabilities, [I/we] have had regard to: [grounds of s4(3) and any others].'

   **Notes —**

   - These certificates are given personally, so use '[I/we]' not 'the board'.
   - Company accounting and financial reporting are generally under Part 11 or the Tax Administration (Financial Statements) Order 2014. These replaced the Financial Reporting Act 1993 repealed on 1 April 2014.
   - Certificates can be signed in counterpart (s394). It is usual when signing in counterpart for the pages to be dated when they are collated to form one document.

## To prepare the certificates under s223(c)

1. Check which companies have a constitution.

   **Note —** These certificates cover compliance with internal procedures starting with Schedule 3. The whole or any part of the Schedule can be altered in a constitution (s160). This is why 'and the constitution' must be added if a company has one, to sign off for the Registrar on any possible alteration.

2. Draft the certificates, ensuring each board certifies that the amalgamation of [names] has been 'approved in accordance with the Companies Act 1993', adding 'and the constitution' if the company whose board is giving the certificate has one.

## To prepare the certificate under s223(e)

1. Check if both companies in a two-company amalgamation have creditors or, in a multi-company amalgamation, if at least two have creditors. If just one or neither/none has creditors, the section will not apply and no certificate can be given.

2. Compare the ratio of creditors' claims to assets for each amalgamating company, then compare each against the ratio calculated for the amalgamated company.

3. Disregard creditors of an amalgamating company whose future position will be improved by greater asset-backing.

4. Consider if other creditors will be prejudiced by the amalgamation, by having repayment to them or performance of an obligation put at risk. If not, the board of the intended amalgamated company will give the certificate.

## To prepare the consents (Form 13 of the Companies Act 1993 Regulations 1994)

1. Check the date in the top right corner to ensure this is the latest version (currently 1 July 2017).

2. Enter the full names and residential addresses (s2(5)(a)) for those named in the resolutions as being the directors of the amalgamated company.

3. Complete the form, inserting the name and postal address of the presenter at the foot.

## To prepare the director information (s223(ba))

1. Obtain the date and place (town or city, and country) of birth of each director of the intended amalgamated company.

2. Head a page with the name of the amalgamated company and set out the information. There is no prescribed form for this. It does not need to be dated or signed.

   **Note —** This information is privileged and will not appear on the register (s367A).

## Filing and paying the fee

1. Date all documents for the day of signing. Do not post-date them to the future effective date, if one is specified, as that is just a feature of an amalgamation, akin to a settlement date for a property purchase.
2. If notice has to be given to secured creditors, allow the 20 working days (s222(3)) to elapse before filing.
3. Collate the documents as follows:
    - resolutions
    - certificates under s222(5)
    - certificates under s223(c)
    - certificate under s223(e) – if applicable; and
    - Form 13 consents.

    **Note —** Put the document for the intended amalgamated company first, then the others in alphabetical order. This will help when these are checked at the Companies Office.
4. Exclude:
    - notices to secured creditors
    - the IR432 Form
    - a covering letter if filing online.
5. If no effective date is specified in the resolutions, aim to file early on the desired day.
6. If an effective date is specified, file on or before that date – before, if that date is not a working day.

    **Note —** The documents will be held – marked 'Pending' if filed online – until registration.
7. File the documents and the fee of $402.50, in one of the following ways:
    - Online by going to the Help Centre on the Companies Office website, select 'Manage and Maintain' then 'All Tasks,' and scroll to 'Other Tasks' and 'File an amalgamation'. Upload the resolutions, certificates and consents as 'Amalgamation Documentation'. Enter a specified future date in the field provided, otherwise enter the day of filing. File the director information as a 'Supporting Document';
    - Email to Compliance@companiesoffice.govt.nz;
    - Delivery to Companies Office, Level 18, Auckland Council Building, 135 Albert Street, Auckland 1010;
    - Fax to (09) 916-4559; or
    - Post to Companies Office, Private Bag 92061, Victoria Street West, Auckland 1142 (ref Amalgamations).

    **Note —** The resolutions, certificates and consents will be registered and viewable. The director information will not appear on the register.

8. When filing online, pay the fee by debit to an online account with the Companies Office or by credit card. When filing by delivery, fax or post, the fee can be paid by cheque, credit card or debit to an online account. Payment can also be made directly into the Companies Office's bank account by prior arrangement.
9. Draw any unusual feature to the Registrar's attention by entering a note in the online 'Comments' field, if filing online, or as appropriate using other means of filing.
10. Where the amalgamated company is to change its name as part of the amalgamation, please file by delivery, email, fax or post with:
    - the name reservation letter where the name is new; or
    - a Form 4 application to reserve the name where it is that of an amalgamating company to be removed, with the additional fee of $11.50.

## Registration

1. If no future date is specified in the resolutions, registration will be the day of filing.
2. If a future date is specified that is a working day, filing must be on or before that day. Registration will be that day.
3. If the future date is not a working day, filing must be before that day. Registration will be the next working day. For example, if the specified date is a Saturday, filing must be no later than the Friday. Registration will be on the Monday, effective for the Saturday.
4. The certificate of amalgamation is recorded against each amalgamating company.
5. Companies other than the amalgamated company are removed from the register.
6. If filing is online, the certificate of amalgamation will be issued by email.
7. If filing is by delivery, fax or post, the certificate of amalgamation will be sent by post.
8. If the amalgamated company is to change its name on amalgamation, the Registrar will attend to this as part of the registration.
9. If the amalgamation under s222(2) is into a subsidiary, the Registrar will record the altered shareholding as part of the registration. If the shareholding will be that of the removed holding company or another amalgamating company, the Registrar will also record the corresponding change of constitution.

   **Note —** Draw such changes to the Registrar's attention (refer above to paragraph 9 under 'Filing and paying the fee').

# After registration

## General

1. The assets and liabilities of removed companies vest by operation of law in the amalgamated company (s225).

2. Property in the name of a removed company on a register can be put into the name of the amalgamated company (s225A). This does not have to be attended to immediately (s225A(1)). It can be part of a later registration (s225A(2)) or take place on notice to the registrar concerned (s225A(3)). Where shares are concerned, the board of the company in which these are held will – after notice to it (s225A(3)) and entry of the amalgamated company's name on its share register – notify the Registrar of the change in its next annual return or earlier, using the informal online service the Registrar makes available.

## Specific

1. Notify secured parties with a security interest on the PPSR registered against a removed company, to file a 'financing change statement' adding the amalgamated company as a debtor. Refer above to paragraph 12 under 'To prepare for a short-form amalgamation'.

2. Give notice to Inland Revenue (IR432 Form).