

Long-form amalgamation checklist

(including amalgamations by order of the High Court)

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 long-form amalgamation under Part 13 is 'long' in that it involves the shareholders of the amalgamating companies and requires at least 20 working days' advance public notice.
2. It is generally used for unrelated companies but is available to related companies when the short-form procedure of s222(1) or s222(2) is unsuitable.
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, contact the Companies Office in advance to co-ordinate the incorporation and the amalgamation.

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

Applications to the High Court under Part 15

1. Application can be made to the High Court under Part 15 for an order approving an amalgamation (s236), even though the long-form procedure may be available (s238(a)).
2. A 'code company' (s2) cannot use the long-form procedure (s219(2)). Instead, application is must be made under Part 15 with notice to the Takeovers Panel (s236A).
3. Part 15 is also relevant when an overseas company, registered on the overseas register under Part 18, is an amalgamating company (s235). If the amalgamated company is to be:
 - › the New Zealand company – the overseas company will be removed from the overseas register and the New Zealand company will succeed to its assets and liabilities in New Zealand. The overseas company will continue in its country of incorporation to which the Act does not extend. If its removal, by way of amalgamation, were desired, it would first have to transfer its incorporation to New Zealand under Part 19.
 - › the overseas company – the New Zealand company will be removed from the register and the overseas company will succeed to its assets and liabilities.
4. A copy of the order must be filed within 10 working days (s236(4)).
5. There is no fee payable to the Registrar.

To prepare for a long-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. Identify the ultimate holding company for each amalgamating company and the intended amalgamated company.
3. Draw diagrams showing the present shareholdings in the amalgamating companies and the proposed shareholding for the amalgamated company.
4. Check for any cross-holdings (s220(3)).
Identify the shareholders whose shares will not be converted into shares in the amalgamated company, and calculate the compensation they will receive instead (s220(1)(g)).
5. Identify which companies have a constitution and which do not.

Notes —

- Schedule 3 regulates how directors make decisions, but this can be varied in a constitution (s160).
- This is relevant when preparing the section 221(1) resolutions and the s223(c) certificates.

6. 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.

7. Check if there are any secured creditors.

Note — Secured creditors are entitled to a copy of the amalgamation proposal (s221(4)(a)).

8. 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)(a)) are up to date. This affects 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)); and
- › if any director of the intended amalgamated company is not continuing.

9. Decide if the amalgamation is to take place on a future date. If so, that date needs to be specified in the amalgamation proposal (s220(2)).

Note — 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)).

10. Consider whether the amalgamated company will 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 amalgamation proposal itself will be registered.
- Refer to 'Filing and paying the fee' for further information.

11. Consult the companies' accountants relating to:

- › the solvency test grounds (s4(3));
- › the consequences of any shareholder seeking to exercise buy-out rights, as this could result in a cost to the company if it has to borrow to buy the shares (s221(3)(e)); and
- › possible prejudice to creditors, (if applicable), (s223(e)).

To prepare the amalgamation proposal (s220)

1. Follow s220(1) that sets out the contents of an amalgamation proposal.
2. If the intended amalgamated company is to change its name as part of the amalgamation, include this in the amalgamation proposal (s223(d)).

Note — The amalgamation proposal does not need to be dated or signed.

To provide information to shareholders, secured creditors and the public

Attend to the following three requirements not less than 20 working days before the amalgamation is due to take effect (s221(3) and s221(4)).

1. Send to the shareholders in each amalgamating company (s221(3)):

- a copy of the amalgamation proposal;
- copies of certificates given by the directors of each board;
- a summary of the principal provisions of the constitution of the intended amalgamated company;
- a statement that a copy of that constitution will be delivered to any shareholder who requests it;
- a statement setting out the rights of shareholders under s110, compelling the company to buy their shares if they vote against the proposal but it is approved nevertheless.

Note — This is on the basis that they should not be bound to remain where the company has changed fundamentally.

- a statement of any material interest of the directors in the proposal, in that capacity or otherwise; and
- such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications of the proposed amalgamation for the company and its shareholders.

Note — s391 and s392(1) set out the procedure for serving these.

2. Send to secured creditors a copy of the amalgamation proposal (s221(4)(a)).

Notes —

- s391 and s392(1) set out the procedure for this.
- 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.

3. Give public notice of the proposed amalgamation (s221(4)(b)).

Note — This means publication in at least one issue of the New Zealand Gazette and one issue of a newspaper circulating in the area where an amalgamating company has its (principal) place of business or, if it is inactive, where it has its registered office (s3(1)).

To prepare the board resolutions (s221(1))

1. Determine if a meeting will have to be called, and decisions recorded in minutes (paragraphs 1-6 of Schedule 3), or if a resolution in writing (paragraph 7(1) of Schedule 3) is possible, in counterpart, if the directors will be 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.

2. Ensure the board of each amalgamating company resolves that:
 - › in its opinion, the amalgamation – as described in the amalgamation proposal presented to the board – is in the best interest of the company; and
 - › it is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

To prepare the associated certificates (s221(2))

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 12 under ‘To prepare for a long-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 may, 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 or 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:

- › certify that the amalgamation will be in the best interest of the company;
- › certify that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test;
- › state the grounds for the opinion expressed in the resolution that the amalgamation will be in the best interest of the company; and
- › state the grounds for the opinion expressed in the resolution that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test, 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 special resolutions for shareholders to approve the amalgamation proposal (s221(5))

1. Determine if a meeting will have to be called, and decisions recorded in minutes (Schedule 1), or if a resolution in writing (s122(1)) is possible, in counterpart if the shareholders will be in different places (s122(3A)).

Notes —

- For the latter, at least 75% of the shareholders in number holding at least 75% of the voting shares must sign (s122(1)), with copies sent to those who did not sign (s122(5)), with a statement setting out the rights of shareholders under s110.
 - It is usual when signing in counterpart for the pages to be dated when they are collated to form one document.
2. The agenda or the resolution, as the case may be, will provide for approval of the amalgamation proposal as presented to the meeting or as annexed to the resolution.

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, naming the amalgamating companies and certifying that the amalgamation '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)

5. Check the date in the top right corner to ensure this is the latest version (currently 1 July 2017).
6. Enter the full names and residential addresses (s2(5)) for those named in the amalgamation proposal as directors of the amalgamated company.
7. Complete the form, inserting the name and postal address of the presenter at the foot.

To prepare the director information (s223(ba))

8. Obtain the date and place (town or city, and country) of birth of each director of the intended amalgamated company.
9. 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 (s223)

1. Date the resolutions, certificates and consents 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. Collate the documents as follows:
 - › amalgamation proposal
 - › certificates under s221(2)
 - › certificates under s223(c)
 - › certificate under s223(e) – if applicable, and
 - › Form 13 consents.

Note — Put the certificate for the intended amalgamated company first, then the others in alphabetical order. This will help when these are checked at the Companies Office.

3. Exclude:
 - › all resolutions
 - › notices to shareholders
 - › notices to secured creditors
 - › the public notice
 - › the IR432 Form
 - › a covering letter if filing online.
4. If no effective date is specified in the amalgamation proposal, aim to file early on the desired day.
5. If an effective date is specified, file as soon as convenient, taking into account the 20 working days required for notifying shareholders and secured creditors, and the public notice.

Note — The documents will be held – marked ‘Pending’ if filed online – until registration on that date.

6. Submit the documents, with the fee of \$402.50, on or before the specified date, if the amalgamation proposal provides for this – before, if that date is not a working day. These can be filed in 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 the end to ‘Other Tasks’ and ‘File an Amalgamation’. Upload the amalgamation proposal, 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@companies.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 amalgamation proposal, certificates and consents will be registered and viewable. The director information will not appear on the register.

7. 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.
8. Draw any unusual feature to the Registrar's attention by entering a note in the online 'Comments' field, if filing online, or as appropriate to another means of filing.
9. 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 amalgamation proposal, 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 amalgamation results in fewer shares in the amalgamated company, notify the Registrar, who will record the lower total as part of the registration. You can then update the holdings online or ask the Registrar to assist.
9. If the amalgamation results in more shares in the amalgamated company, notify the Registrar online of the increase (s41(b) and s43) and update the holdings online.
10. If the amalgamated company is to change its name on amalgamation, the Registrar will attend to this as part of the registration.

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.

Specific

1. Write up any changes to the share register of the amalgamated company resulting from the amalgamation proposal.
2. Notify secured parties with a security interest on the PPSR registered against a removed company to file a 'financing change statement' to add the amalgamated company as a debtor. Refer above to paragraph 2 under 'To provide information to secured creditors, shareholders and the public'.
3. Give notice to Inland Revenue (IR432 Form).