

Short-form amalgamation checklist

Preparation

1. Check the names of the amalgamating companies, that they are currently registered, their annual return has been filed (or will be filed as at the amalgamation date) and that they are not at risk of removal.
2. Determine whether the amalgamation is captured by s 222(1) or s 222(2) of the Companies Act 1993 ('Act'):
 - › 222(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
 - › 222(2) for an amalgamation of directly or indirectly, commonly owned, companies into one of them.
3. Identify the proposed amalgamated company.
4. Identify the shareholders of the amalgamated company. Will any of the shareholder companies be removed as part of the amalgamation?
If so, ensure the resolutions specify the new shareholder's name(s) and share allocation(s).
5. Identify which companies have a constitution (this affects the resolutions regarding the intended amalgamated company and the boards' 223(c) certificates) and which do not.
6. Identify which companies have creditors (for s 223(e) that require the board of the intended amalgamated company to consider if the amalgamation will be prejudicial to the creditors of one company (in a 2-company amalgamation) or at least one (in a multi-company amalgamation)).
7. Check if there are any secured creditors (notice under s 222(3) and timing).
8. Determine:
 - › who are the directors of each amalgamating company
 - › who will be the directors of the amalgamated company
 - › whether their residential addresses (s 2(5)) are up to date (for the Form 13 consents for the amalgamated company under s 223(f)).

9. Consider whether there any special features. Examples are:

- › Does the amalgamated company not have a constitution?
If so, this can be noted in the resolutions.
- › Will a new director be named as a director of the amalgamated company (s 153(1))?
- › Is any director of the intended amalgamated company not continuing?
- › Will the amalgamated company change its name as part of the registration (s 223(d))?
Note any change of name in the resolutions and file a Form 4 application to reserve the name in the 'Supporting Documents' tab.
- › Is the amalgamation into a subsidiary? If so, consider which shares are to continue in the amalgamated company (s 222(2)).
Will they be its current shares, to be held by the holder 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?
Note that the constitution follows the shares of the amalgamating company whose shares are not cancelled. The resolutions need to cover these points.
- › Is the amalgamation to take place on a specific future date?
If so, this needs to be stated in the resolutions (s 224(2)).
Note — The documents must be filed on or before that date to retain it – before, if the date is a non-working day.
- › Are any of the amalgamating companies registered as a foreign company in the ASIC register?
If so, any removed company will also be removed automatically from ASIC's register.
- › Are any of the amalgamating companies registered as financial service providers on the Financial Service Providers Register?
Check the amalgamated company holds the licence, as licences are non-transferrable.
- › Are there any other issues?
- › Seek professional advice on your application.

Please note any special features in the presenter's comments box when submitting your application.

10. Check with the companies' accountant regarding:

- › the solvency test grounds (s 4(3)); and
- › possible prejudice to creditors, (if applicable), (s 223(e)).

11. Prepare notices to secured creditors (s 222(3)) but do not file these with your application.

Resolutions

Follow the wording of the section:

- › Approve the proposal that the amalgamating companies will amalgamate, identifying the intended amalgamated company.
- › Cancel the shares of the company or companies being removed.
- › State that the constitution of the amalgamated company will be that of [name the company].
- › State that the board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.
- › Name the individual(s) who will be the director(s) of the amalgamated company. Full legal names please. This should reflect what is on the Companies Register and Form 13 consents. If not, update their details online.
- › State that the amalgamated company is to change its name on amalgamation to [*insert name of company*] (if this is occurring with your amalgamation).

Tips

- › Use singular “I” for one director and plural “we” for more than one director.
- › Ensure all the resolutions, certificates and Form 13 consents are signed and dated.
- › Ensure the company is up to date with the filing of annual returns.
- › File documents at least 2 weeks before the amalgamation date to ensure sufficient time to review and amend documentation, if required.
- › With 5 or more amalgamating companies, consider listing them in a schedule. Resolve that the amalgamation of the companies listed in the schedule be approved with [*name] becoming the amalgamated company, and cancel the shares of those companies except for those in [*name].
- › Use full company names – don’t define the particular company as “the company”, as this may lead to drafting errors when referring to other companies.

Director certificates under s 222(5)

1. Contact the companies’ accountants for information relating to the ability of the amalgamated company to satisfy the solvency test (s 4(3)).
2. Review the *most recent financial statements* of each amalgamating company, prepared in accordance with the Companies Act 1993 or other enactment (s 4(3)(a)(i)).

Review the accounting records for the company for which the directors are certifying (s 4(3)(a)(ia)). The reference to accounting records is in respect of **one company** only – not all amalgamating companies.

3. Review all other circumstances that would or might affect the value of the amalgamated companies assets and liabilities including contingent liabilities (s 4(3)(a)(ii)).

Draft the certificates

- › naming the amalgamating companies, identifying the amalgamated company;
- › certifying that it will, immediately after the amalgamation becomes effective, satisfy the solvency test; and
- › stating the grounds for the directors' opinion following the wording of s 4(3)
"In determining whether the value of the amalgamated company's assets will be greater than the value of its liabilities including contingent liabilities, we have had regard to: [Grounds]."

Notes

1. Company accounting is under Part 11 of the Companies Act 1993. This replaced the Financial Reporting Act 1993 repealed on 1 April 2014. The Financial Reporting Act 2013 is not relevant here.
2. Certificates can be signed in counterpart (s 394).

Director certificates under s 223(c)

1. Check which companies have a constitution.
Check the documents tab online on the register to ensure that the constitution has not been revoked.
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 particular company has one.

Director certificates under s 223(e)

1. Check if both companies in a 2-company amalgamation have creditors or, in a multi-company amalgamation, if at least 2 have creditors. If just one or neither/none has creditors, the section will not apply to the amalgamation and no certificate can be given.
2. Disregard creditors of an amalgamating company whose future position will be improved by greater assets.
3. Consider if those other creditors whose position will be adversely affected, will be prejudiced by the amalgamation – by putting repayment to them at risk. If they will not be prejudiced, the board of the intended amalgamated company will give the certificate.

Form 13 consents

1. Check the full names and residential addresses (s 2(5)) for those named in the resolutions as being the directors of the amalgamated company.
2. Check that the Form 13 is the latest version, in the top-right corner (currently 1 July 2017).
3. Complete the form, including the 'completed by' section.

Director information page

Head a page with the name of the amalgamated company. Then record the directors' full names, birth dates, and places and countries of birth. There is no need to date or sign this page.

File this page in the 'Supporting Documents' tab, not with the certificates and resolutions.

Payment of amalgamation registration fee

The fee of \$350.00 (plus GST) will be paid at the time of filing online, and held until the amalgamation documents are registered.

Issues with filing online

If there are issues with your documentation, the application will be returned to you online for amendment.

If you're having problems uploading and filing your documents, we may be able to assist you. Please call us on 0508 266 726.

Other amalgamation resources

A video tutorial is also available to help you with your short-form amalgamation.

<https://www.youtube.com/watch?v=iTVyh6U3XzQ>

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