



The Merger Process Easy Guide

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Scope

This Guide is provided to assist community housing providers (particularly smaller Tier 3 providers) to understand what is involved in negotiating a merger to legally effect transfer of assets and liabilities to another registered community housing provider and wind up their organisation.

The flowchart overleaf introduces a five stage process from 'Decision/Preliminary Discussions' through to 'Completion'. The steps within each stage are further explained in the Chapters that follow.

The term '**relinquishing provider**' is used to describe the Community Housing Provider (CHP) that will transfer all assets and liabilities and wind up their existing organisation while '**receiving provider**' is used to describe the existing CHP that will accept ongoing legal responsibility for tenancy and property management.

If you require more information or clarification about this document and the merger process, please contact your SA Housing Authority Business Relations Specialist or email IndustryPartnershipsCHP@sa.gov.au

Acknowledgement

The SA Housing Authority wishes to acknowledge the following sources referenced in preparation of this document. While these publications are specific to other interstate jurisdictions, they may also provide some useful tips for not-for-profits considering a merger/amalgamation:

- [Mergers and Amalgamations: A guide for community housing providers considering their strategic future](#) (Qld Shelter, August 2014)
- [Partnership and merger resource kit for Office of Housing funded community organisations](#) (Victorian Government, May 2008)
- [Thinking Big – Mergers Guide](#) (Our Community, May 2015)

Relevant SA Policy

For community housing providers subject to the terms of the Master Community Housing Agreement, please refer to:

- [Community housing property transaction policy](#)

Disclaimer

This is a guide only and is not intended for direction, or as a sole basis for decision making. Community Housing Providers are encouraged to seek their own legal advice when negotiating a merger arrangement.

Introduction

A *merger* involves the transfer of assets (properties, bank balances), liabilities (debts) and tenancies from one organisation to another. (Note: Throughout this guide we use the term 'merger' acknowledging the term 'acquisition' may be legally more accurate).¹

A merger might be considered for a range of different reasons:

- *Environmental reasons* e.g. increased compliance management requirements
- *Managerial reasons* e.g. the organisation is too small to keep doing the work required; increasing problems with member participation; and/or internal management conflict
- *Financial reasons* e.g. limited development capacity and opportunity for growth, increasing administrative costs and maintenance liabilities.

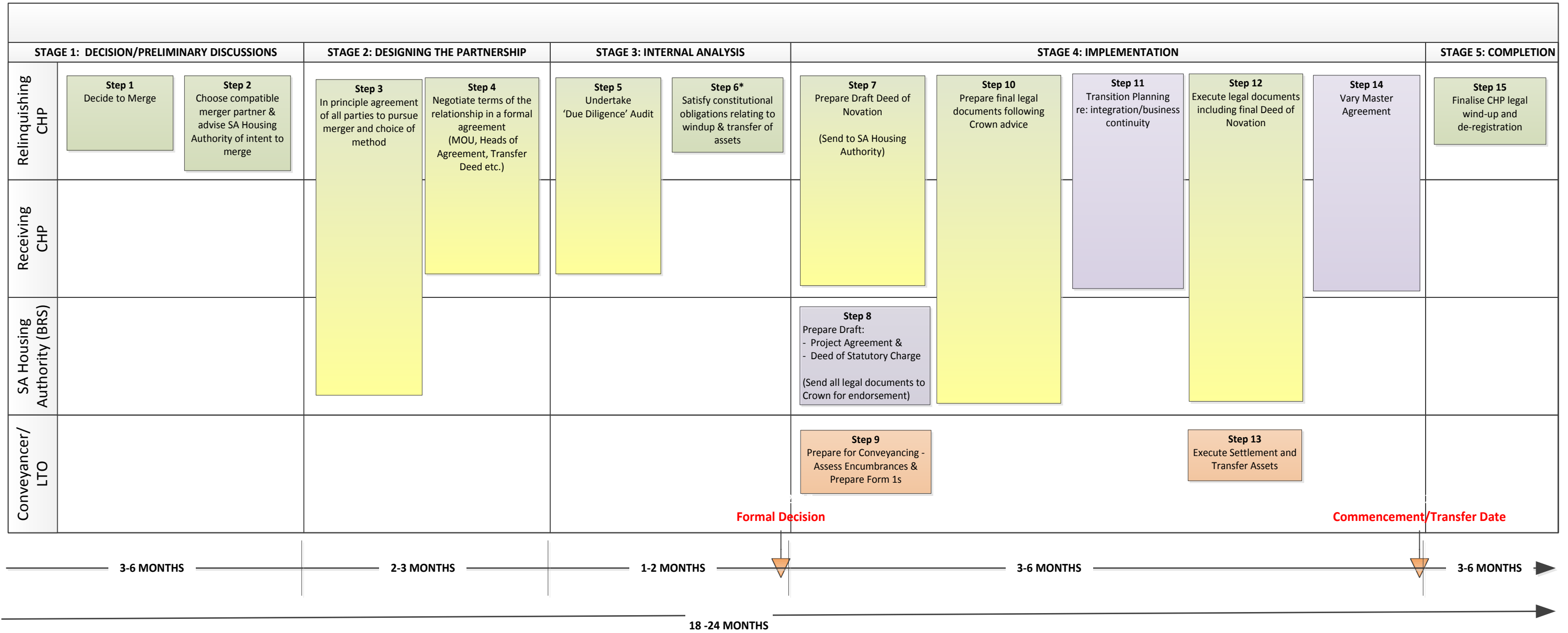
It is important to understand from the outset, that negotiating a successful merger involves a significant commitment from both organisations in terms of time and effort.

Organisations which have already followed steps 1-15 of the merger process suggest it can take between 18-24 months to finalise a merger, including winding up of the relinquishing organisation and negotiating terms.

Depending on the size of your organisation, and its legal structure, it is important to consider how your organisation will give this process focussed attention, time and energy. Some organisations are able to budget for a Project Officer to oversee the process, while others may choose to form a sub-committee which can do the leg work and report back to the management committee/Board. Either way, someone needs to take responsibility for overseeing the negotiations and keeping everything on track.

¹ A ***Merger*** generally means a coming together of two organisations to form a completely new organisation, while an ***Acquisition*** involves an existing organisation taking over the assets and liabilities of another organisation resulting in the closure of that organisation

MERGER PROCESS SUMMARY FLOWCHART



* Note: Step 6 may occur earlier or later or multiple times throughout the merger process depending upon the Constitution of the relinquishing provider

Stage 1: Decision/Preliminary Discussions

Step 1

Decide to Merge

Once you decide a Merger is the best option, you should formalise your decision at a duly convened meeting of your management committee/ Board and advise your Business Relations Specialist in the SA Housing Authority who can help guide you through this process.

Step 2

Choose a compatible merger partner

What makes an organisation acceptable for consideration as a potential merger partner? In broad terms, the receiving community housing provider should be able to demonstrate:

- Strength of financial and operational viability
- Proximity of property location – the location of properties is consistent with effective sustainable management and fits with your property portfolio location
- Similar or shared values, ideals and culture
- Expertise with specialist tenant groups, where appropriate (e.g. disability, youth)
- Compliance with the requirements of the National Regulatory System for Community Housing (contact the Office of Housing Regulation for this information).

To help you choose the 'best fit' provider, those community housing providers interested in pursuing merger arrangements have prepared a *Provider Profile* of their organisation (detailing some of the information listed above). Contact your SA Housing Authority Business Relations Specialist for a copy of these Profiles, which also includes the contact details of former tenants who have been through the merger process and are willing to be contacted to discuss their first hand experiences.

This information may help you to generate a short list of potential partners you may want to find out more about. You may wish to invite representatives from these organisations to your meetings to ask questions and clarify other mutual expectations including:

- What are their future aspirations and strategic directions?
- What opportunities are there for tenant involvement/participation?
- What services are offered to tenants?
- What are the policies and procedures of the new organisation regarding tenant conditions e.g. rent, maintenance, tenure etc.?

Before making contact with another provider, your organisation may wish to identify the key strengths you bring to the new alliance such as:

- Understanding of a particular client group/tenant needs
- Understanding of a particular geographical location or region
- Physical infrastructure (e.g. properties and other assets)
- Particular skills and capacities of members/tenants
- Clearly defined values

You could document these in a written statement about what you bring to the merger which may assist other providers to understand more about your organisation as you commence negotiations. This will also be helpful to have clarity about your 'non-negotiables' – the 'must haves' of a receiving provider.

Stage 2: Designing the Partnership

Step 3

In principle agreement of all parties

The *Community Housing Providers (National Law) (South Australia) Act 2013* (section 24) requires that a community housing provider must not sell, transfer, assign, mortgage or otherwise deal with land in which the SAHT has an interest unless the community housing provider has obtained the written consent of the SAHT. Further, the SAHT may withhold consent if it is not satisfied that there will be no significant detrimental impact on tenants as a result.

Therefore, the in-principle support of the SA Housing Authority to pursue a merger arrangement must be sought prior to proceeding more formally with the merger process.

The following information should be provided in writing by the relinquishing provider to their SA Housing Authority Business Relations Specialist:

- the legal name of both providers
- a summary of the reason for deciding to merge
- proposed date for transfer of properties
- a copy of your minutes showing a decision to merge.

As part of its obligation to protect public assets, the SA Housing Authority will only support a request for **merger** where the 'receiving' provider is a registered high performing Community Housing Provider with demonstrated capacity for growth and fully compliant with:

- the requirements of their Master Community Housing Agreement; and
- the Regulatory Code for Community Housing (as advised by the Office of Housing Regulation).

Step 4

Negotiate terms of the relationship (formal agreement)

Once the SA Housing Authority has granted 'in-principle' support to proceed with a merger, both the relinquishing provider and receiving provider should negotiate and articulate the proposed terms and conditions upon which the merger will take place.

These arrangements should be formally documented in a legal agreement which may take a variety of forms (e.g. Heads of Agreement, Transfer Deed etc.).

It is important both providers seek their own independent legal advice in order to determine the most appropriate form of agreement appropriate to their individual circumstances, organisation size and structure.

The SA Housing Authority is not a party to this agreement. The agreement will set out the agreed transfer terms and conditions negotiated by both providers. This agreement might include (but is not limited to):

- A confidentiality/exclusivity clause which ensures that the discussions that follow between the two providers and the information that will be exchanged is confidential and only to be discussed within each organisation, not more generally or publicly
- A target transfer date (recognising this may change depending on the progress of negotiations)
- A schedule of assets to be transferred (including property, major equipment, all bank account balances, non-property assets etc.)
- A schedule of tenancies to be transferred

- ❑ Any liabilities that will transfer (including any outstanding debts, loans etc.)
- ❑ Employment conditions/leave entitlements (where any staff are to transfer)
- ❑ Contracts, agreements or licences to be assigned or transferred (e.g. lease of office accommodation, office equipment or software licensing)
- ❑ Any other special conditions (including any existing rights or tenancy conditions that you may wish to preserve for existing tenants) which may include:
 - › Lease arrangements
Tenants of *volunteer member-tenant managed providers* are not required to have fixed term leases. Members of volunteer member-tenant managed providers which merge into another community housing provider may keep their existing lease arrangements where this has been agreed as part of merger negotiations².
 - › Residential Tenancies Act requirements
Section 83 of the Residential Tenancies Act 1995 allows an Association (other than a volunteer member-tenant managed provider) to terminate a tenancy (where it is not for a fixed term) without specifying a ground for termination, by giving 90 days' notice. If you negotiate to keep current members' existing lease arrangements, you may also wish to negotiate to waive the receiving Association's right to terminate without reason. Alternatively, the CHP could negotiate that its tenants on periodic leases could obtain extended fixed term leases.

Stage 3: Internal Analysis

Step 5 Undertake 'Due Diligence' Audit

Due Diligence refers to the process of thoroughly investigating the operations of a potential business partner prior to the signing of a legally binding contract. While preliminary discussions have been held around merger conditions, both providers should be satisfied that they have undertaken a thorough investigation of the other provider's operations.

A merger for the 'relinquishing provider' often sees members experiencing feelings of loss: a loss of autonomy, loss of accumulated funds and/or a loss of identity and loss of sense of community. Due diligence for the relinquishing provider is therefore largely to ensure a compatible merger partner is chosen (refer step 2) and you are familiar with their tenancy related policies and practices.

The 'receiving provider' should also exercise due diligence in ensuring any identified potential or actual risks are studied and strategies are in place for effectively dealing with them. This should include seeking information and establishing a complete understanding of:

- ❑ **Financials**
 - Assets
 - Liabilities (e.g. outstanding debts)
 - Bank balances and revenue streams
 - Strength of balance sheet
 - Impact on charitable status/GST

² Community Housing Core Operating Policy: [Tenant Allocation and Tenure](#) (s3.2.2)

- **Assets and Liabilities**
 - In land, contract and other instruments
- **Maintenance**
 - Assessment of properties to gauge the level of maintenance required
 - How will any maintenance shortfall be covered?
- **Tenancies**
 - Existing rights and conditions
 - Outstanding rent arrears
 - Any current matters involving the RTT
 - Any equity shares held by tenants
 - Appeals, conflicts, special circumstances
 - Existing service plans
 - Records management
- **Employee/Management issues (if applicable)**
 - Employment contracts, conditions and history
 - Leave entitlements
 - Superannuation entitlements
 - Technical competence
- **Legalities**
 - Understand any constitutional or legal obligations in respect of winding up
 - Pending, probable or possible litigation
 - Terms and conditions of any contracts, agreements or licences to be assigned or transferred (loans, credit arrangements, service arrangements, software licenses etc.)
- **Strategic fit/Social purpose**
 - Organisational Mission, Values
 - Constitutional purpose

Step 6

Satisfy Constitutional obligations relating to windup/transfer assets (formal decision)

Depending upon the legislation under which your organisation was incorporated, there may be different requirements for formally winding up the legal entity.

It is important to ensure that appropriate authority and delegation is obtained for decisions to wind up and execute legal documents including the formal *Deed of Novation or Transfer* (refer step 10).

Each organisation should seek legal advice based on its Constitution and individual circumstances to determine at which point decisions can be made by the Board/Management Committee and when a *special resolution* of members is required.

A ***special resolution*** of an incorporated association under the *Associations Incorporations Act 1985* means—

- (a) Where the rules of the association provide for the membership of the association—a resolution passed at a duly convened meeting of the members of the association if—
 - (i) at least 21 days written notice specifying the intention to propose the resolution as a special resolution has been given to all members of the association; and
 - (ii) it is passed at a meeting referred to in this paragraph by a majority of not less than three-quarters of such members of the association as, being entitled to do so, vote in person or, where proxies are allowed, by proxy, at that meeting

In the case of registered Associations, the *Associations Incorporations Act 1985* requires that the relinquishing provider decide by *Special Resolution* to voluntarily wind up (s41(6)) and nominate a person who will apply on behalf of the Association for deregistration (refer to step 15).

Stage 4: Implementation

Step 7

Prepare Draft Deed of Novation/Transfer

The SA Housing Authority has a legal obligation under the *Community Housing Providers (National Law) (South Australia) Act 2013* (section 24) to provide written consent for a community housing provider to transfer land in which the SAHT has an interest. We use a tri-partite agreement in the form of a *Deed of Novation* or *Deed of Transfer* between the three interested parties (the SA Housing Trust, relinquishing provider and receiving provider) to achieve this.

This easy guide is aimed at small organisations which are likely to fully wind up their organisation and transfer all activities, assets and liabilities in their entirety to the receiving provider. Given this, the SA Housing Authority has, in consultation with Crown Solicitors Office, developed a template *Deed of Novation* and *Deed of Transfer*. The appropriate document will be dependent on whether contracts are being novated, or if only assets are being transferred. The SA Housing Authority can provide a copy of the appropriate documents on request.

Providers are still strongly encouraged to seek independent legal advice and if your circumstances are different or complex, the template Deeds may act as a guide for the development of an alternative legal agreement. Depending on complexity, SAHT will negotiate with the CHPs whether the SAHT templates are suitable or whether legal advice is required to develop specific clauses.

The template Deed (or its alternative replacement in the case of a more complex organisation) addresses the following elements:

- SAHT consent for the transfer of assets as required by section 24 of the *Community Housing Providers (National Law) (SA) Act, 2013*
- Relinquishing provider agrees to transfer the title in properties to the receiving provider (a Schedule of properties must be attached to the Agreement)
- SAHT agrees to remove its interest on the condition that the receiving provider issues SAHT with a *Deed of Statutory Charge* to the same value and over the same properties
- The Master Agreement between the relinquishing provider and the SAHT is null and void on the date of the last transfer
- An Indemnity clause providing that the relinquishing provider retains liability up until the agreed transfer date with the receiving provider to assume responsibility for liabilities beyond that date
- An agreed transfer/commencement date that property titles legally transfer

The amendments to the template Deed (or preparation of a specific Deed in complex situations) are usually led by one party which will engage legal advisors to support its development. The relinquishing provider may prefer to assume the lead role, in order to maintain “control” of the document. Legal costs may be negotiated to be shared, but are most likely to be borne by the relinquishing provider where they take the lead role.

Important

Once you have prepared a final draft of the *Deed of Novation* or *Deed of Transfer* send a copy to the SA Housing Authority. Where the draft varies from the template, Crown endorsement is required. At least 2-3 weeks turn around should be allowed.

Step 8

Prepare Draft Project Agreement & Deed of Statutory Charge

The *Deed of Novation* or *Deed of Transfer* provides for the SA Housing Authority to enter into a Project Agreement with the receiving provider to ensure the transferring properties can be subject to and included under the terms of their Master Community Housing Agreement, including *Deeds of Statutory Charge*. The SA Housing Authority will prepare these documents and liaise with the receiving provider.

Step 9

Preparation for Conveyancing

The SA Housing Authority will bear the costs and undertake all aspects of conveyancing in the case of:

- Consolidating the sector where small Tier 3 CHPs are merging with a larger SA based organisation with demonstrated capacity for growth (see Step 3).
- Properties being returned to the Authority
- Properties to be released to other CHPs via an EOI process

Unless otherwise negotiated with the SA Housing Authority, CHPs will manage all aspects of and bear the costs of conveyancing properties where:

- The merger is primarily a change in company structure
- The merger is not consolidating small organisations with a larger SA based organisation.

Where CHPs use their own Conveyancer they will then be responsible for the payment of all associated fees and will be required to keep the SA Housing Authority notified of progress (ie settlement date, confirmation of settlement).

In the case where a provider chooses to use SA Housing Authority Conveyancing, the Lands Titles Office requires that providers have a completed a *Client Authorisation Form* giving authority for the SA Housing Authority to act on their behalf in this regard. The only persons authorised to complete this form are those who have undertaken a Verification of Identity check. This can be arranged through the SA Housing Authority if required.

As part of the transfer process the Conveyancer will prepare Form 1s enabling them to determine whether there are any encumbrances or liabilities that need to transfer with title at the time the asset is transferred. In these circumstances (listed in Part B), this may be done by the SA Housing Authority at no cost to providers.

Step 10

Prepare Final Legal Documents

The relinquishing provider must prepare the final Deed of Novation (or Deed of Transfer) incorporating any feedback received on the draft from the SA Housing Authority or the Crown Solicitor's Office (where applicable) and proceed to execute (refer step 12).

The SA Housing Authority will finalise the Project Agreement and Deed of Statutory Charge documents and distribute all relevant documents for execution.

Step 11

Develop Project Plan for Integration and Business Continuity

To support the transfer of assets and tenancies, both parties should work together to plan the transition from one organisation to the other, including:

- Transfer of tenancy and property records

- Adding the transferring tenants and property information to new systems
- Obtaining necessary consents from tenants e.g. for Centrelink information
- Changing Centrelink deduction arrangements to ensure tenants redirect their payments to the receiving provider
- Making any changes to policies, procedures or Constitution that were negotiated as part of the merger (some of which would normally have been prepared well in advance so that they can immediately come into effect upon completion date)

Step 12

Execute Legal Documents

The legal documents need to be signed by the relevant parties as follows:

Document	Relinquishing Provider	Receiving Provider	SA Housing Authority
Deed of Novation or Transfer	✓	✓	✓
Project Agreement	✗	✓	✓
Deed of Statutory Charge	✗	✓	✓
LTO Client Authority Form	✓	✓	✗

Step 13

Execute Settlement and Transfer Assets

The SA Housing Authority Conveyancer will attend the Lands Titles Office to transfer the property assets from the relinquishing provider to the receiving provider on the Merger date stipulated in the *Deed of Novation (or Transfer)*. As of this date, the receiving provider becomes legally responsible for all aspects of property and tenancy management according to the terms of their Master Community Housing Agreement with the SAHT.

Step 14

Vary Master Agreement

Once the Project Agreement has been executed and the assets legally transferred, depending on the circumstances, the SA Housing Authority may issue the receiving provider a variation to their Master Community Housing Agreement, updating Annexure A (Property Listing and Portfolio Outcomes) to show the transferred properties. However, in most cases, the Project Agreement itself varies the Master Agreement.

Stage 5: Completion

Step 15

Finalise CHP wind up and deregistration

Once all assets and liabilities have been transferred, the relinquishing provider will need to:

- Advise suppliers e.g. power, telephone, internet services
- Cancel ABN
- Transfer relevant records (e.g. property and tenancy records and information held in IT systems)
- Arrange for a final audit to finalise all bills and close bank accounts. This is particularly important, as the providers' business is not complete until all these processes are finalised, and reported at the end of the financial year.

This is paid from funds of the relinquishing provider or from monies transferred to the receiving provider.

- Apply to Consumer and Business Services to legally deregister their Association (see summary of this process below).
- The relinquishing CHP will need to inform the Office of Housing Regulation of its closure so it can be de-registered under the NRSCH.

The SA Housing Authority will provide to the receiving CHP a list of registrants on CHCR with the relinquishing CHP as their Primary Contact Organisation (PCO). The receiving CHP should contact registrants to confirm the new PCO and update provider preferences. This information can then be passed back to the SA Housing Authority (Business Systems Specialist) for a bulk update on CHCR.

Note: It is usual for a small amount of funds to be retained by the relinquishing provider for the purposes of winding up the organisation and paying any outstanding items. Any funds not used are then returned to the receiving provider. This is generally articulated and agreed in the legal document at step 4.

To legally deregister an Incorporated Association

Consumer and Business Services (CBS) undertake the administration of the *Associations Incorporation Act 1985* on behalf of the Corporate Affairs Commission. It is recommended that you visit their website at www.cbs.sa.gov.au for the latest forms and up to date information relating to winding up an Incorporated Association.

In summary, **section 43(A)** of the *Associations Incorporation Act* enables an Incorporated Association with surplus assets of \$5000 or less to apply for deregistration.

Following transfer of all assets and liabilities to the acquiring provider, the relinquishing provider is required to take the following steps to finalise the closure of the organisation under section 43(A):

1. Complete an *Application for Deregistration of an Incorporated Association* (CBS **Form 9C**). This application may be made by:
 - a person authorised by special resolution to make the application; or
 - not less than 2 people where it is impracticable to authorise a person because the association no longer has an active membership.
2. Attach the following support documentation to your application:
 - Surplus assets, details and manner of distribution (this should be able to be copied from your *Deed of Novation or Transfer* completed at step 7)
 - Copy of your Constitution showing how the distribution of assets will be made upon winding up (**Note:** it is not lawful to distribute any surplus assets among members, former members or associates of members or former members of an Incorporated Association)
 - Copy of the resolution and minutes of a meeting authorising the person making the application
 - List of committee members and their addresses
3. Lodge the application with Consumer and Business Services

Within a month after a complete application is lodged, Consumer and Business Services will publish a notice in the Advertiser advising that an application has been made to the Corporate Affairs Commission to deregister your association and inviting submissions from members of the public.

After a minimum of one month from the date of publication of the advertisement, and provided that it has no reason not to do so, Consumer and Business Services will approve the application for deregistration.

Within a further month, Consumer and Business Services will publish a notice in the Government Gazette, which will have the effect of deregistering and dissolving the association. The provider will be advised of this in writing following publication of the notice.

Please contact the Registration Unit at Consumer and Business Services on ph: (08) 8204 8514 for further information about this process.

Important

Persons who were members of the committee of the association immediately before deregistration are required to keep the association's books for 3 years after deregistration (refer section 601AD of the Corporations Law as modified by regulation under the *Associations Incorporations Act 1985*).

Variations to the Above

A merger process is quite complex, and this guide presents it in its most simple form. There are a number of different variations that can be employed to suit specific circumstances. Two key variations to the above process are outlined below.

Expression of Interest process

Where a CHP demonstrates that they have no capacity to manage their affairs in relation to a merger or wind up, assistance from the SA Housing Authority may be negotiated in some circumstances. For instance, the SA Housing Authority might manage an **Expression of Interest** process on your behalf, to find a suitable high performing Community Housing Provider to accept the ongoing management responsibility of tenancies and properties.

The key difference between this arrangement and a merger process described above is that the relinquishing provider is not able to choose their preferred merger partner organisation, and may have limited opportunity to negotiate any specific terms.

It will still require a significant commitment by your organisation to work with the SA Housing Authority and for you to legally wind up your organisation at the end of the process.

Contact your SA Housing Authority, Business Relations Specialist if you wish to discuss this option further.

Associations Incorporation Act 1985 Section 42 determination

Some CHPs may choose to use an *Associations Incorporation Act 1985 section 42* determination. The CHP can apply to the Corporate Affairs Commission to close its operations by transferring all assets, liabilities and agreements to another body (certain conditions apply) upon Gazettal. The receiving CHP must be a company limited under the Corporations Act in order for Section 42 to be viable.

It is strongly recommended that legal advice is sought prior to taking this option which might influence many of the steps described above, especially those relating to legal documents and wind-up processes.