Understanding JWAs and sub-contracts

Legal issues to consider when working with other organisations

Client : Homelessness peak bodies (Industry Partnership Sector Development Project)

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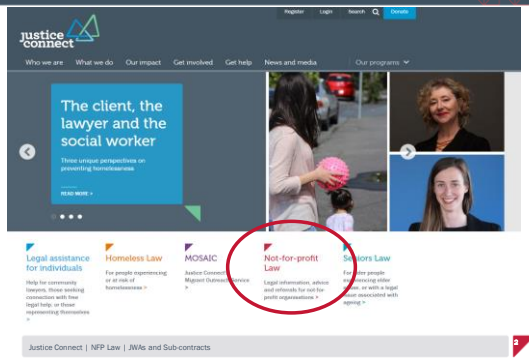

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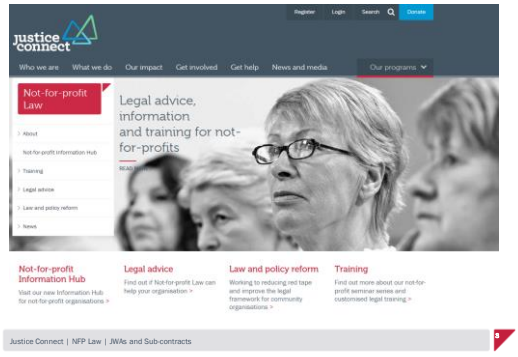

Introduction

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Introduction

What we will cover

Introduction

1. JWAs - Options for NFP organisations to work together
2. Working well with other organisations
3. Sub-contracts (key terms and legal issues to consider)

Close Summary, questions and evaluation

Introduction

About the training

- Legal information not legal advice
- Focus today is on the law as it applies in **NSW** – the law in other states may differ
- Questions any time
- Timing and breaks

Introduction

Acronyms:

Acronym:	Term:
FACS	NSW Family & Community Services
GIPA	*Government Information (Public Access) Act 2009* (NSW)
IP	intellectual property
NFP	not-for-profit organisation
org	organisation
PLA	Program Level Agreement
SHS	Specialist Homelessness Service(s)
WWCC	Working with children check

Part 1: Options for working with other organisations

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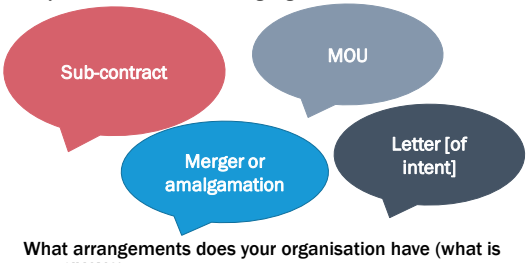
Options for working together

Ways SHS have been working together…



What arrangements does your organisation have (what is your 'JWA'?)…

Options for working together

Activity 1: Match the term

	Term		Meaning
1.	Collaboration		A broad, loose concept which can be formed using a number of structures
2.	Consortia		An arrangement where one organisation provides support, sponsorship or guidance to another organisation so that the second (sometimes smaller/newer) group can access funding, grants or insurance
3.	Joint Working Arrangement		An informal type of agreement – sometimes referred to as an 'agreement to agree'. Usually not legally binding
4.	Joint Working Agreement		A contract-based arrangement usually established for a specific project. Can be incorporated or unincorporated
5.	Partnership		A broad, loose concept which can be formed using a number of structures
6.	Subsidiary		A complex legal arrangement where two or more organisations integrate permanently and one or more original organisations ceases to exist
7.	Alliance		A broad, loose concept which can be formed using a number of structures
8.	Network		A process, which can be used by two or more organisations to combine and integrate permanently into a new organisation and the original organisation(s) cease to exist
9.	Joint venture		A document which clearly roles and responsibilities of parties in a variety of arrangements
10.	Amalgamation		A voluntary legal arrangement where parties are independent and separately liable for the expenses of others
11.	Merger		An agreement where a lead contractor contracts another entity to perform all or part of the obligations under the principal contract
12.	Sub-contract		A broad, loose concept which can be formed using a number of structures
13.	Memorandum of Understanding		A broad, loose concept which can be formed using a number of structures

Options for working together

Options we will discuss

1. Memoranda of understanding
2. Sub-contract
3. Auspicing
4. Joint Venture
5. Partnership
6. Amalgamation
7. Merger

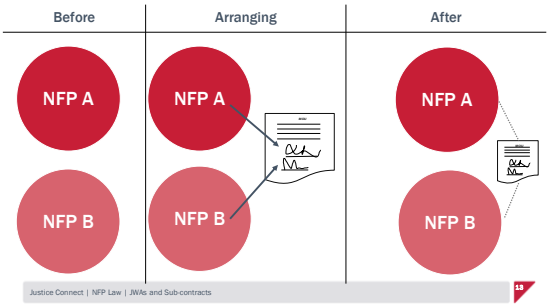
Options for working together

JWA, consortia, collaboration, alliance and network

- These terms do not have particular legal meaning
- They are broad, loose concepts, which can be formed using a number of legal structures
- Allow 2 or more organisations to combine capabilities
- Usually formed in response to a government tender (but not always)

Options for working together

Memoranda of understanding



Options for working together

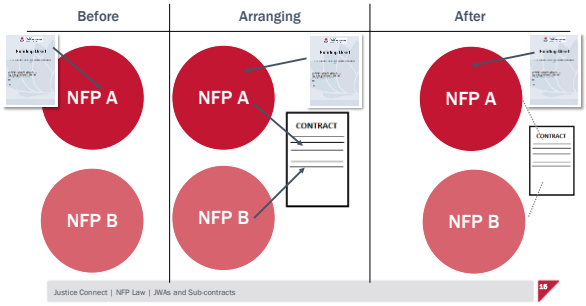
Memoranda of understanding

- Informal, written agreement
- Generally not legally binding, least formal arrangement
- Usually used when 2 organisations want to enter into a more formal contract at a later stage
- Signing an MOU does not result in organisations merging together

NFP Law Factsheet: Memoranda of Understanding

Options for working together

Sub-contracting arrangement



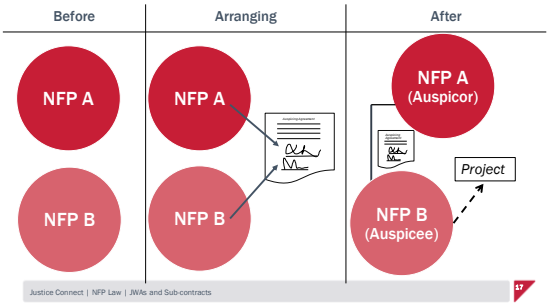
Options for working together

Sub-contracting

- Usually set out in a legally binding agreement
- Enables organisations to sub-contract activities (eg delivery of some or all services) to another organisation
- Important to check conditions around sub-contracting in funding agreements (eg Clause 21 of FACS Funding Deed)
- A sub-contracting agreement does not result in organisations merging together

Options for working together

Auspicing



Options for working together

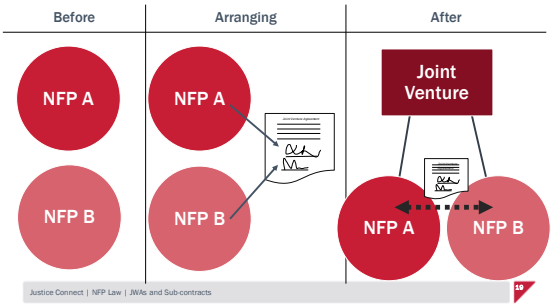
Auspicing

- Commonly used when a group finds it difficult to obtain funding, or where a group / individual wants to run a once-off or short term project, and requires the support, incorporated status or tax status of another organisation (the auspicor).
- The 'auspicee' will often carry out a project or activity 'under the auspices of' another organisation, referred to as the 'auspicor'.
- The auspicor takes legal and financial responsibility for the project – important to have a written agreement.

NFP Law Fact Sheet: Auspicing

Options for working together

Joint venture



Options for working together

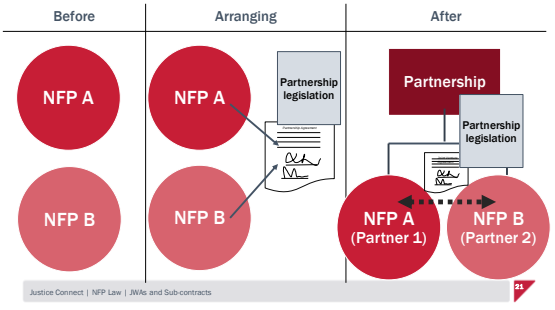
Joint venture

- Sign a legally binding joint venture contract
- Usually for a specific project or common goal
- Incorporated or unincorporated
- Signing a joint venture contract does not mean the organisations merge together – they remain separate joint venture partners

NFP Law Factsheet: Joint Ventures

Options for working together

Partnership



Options for working together

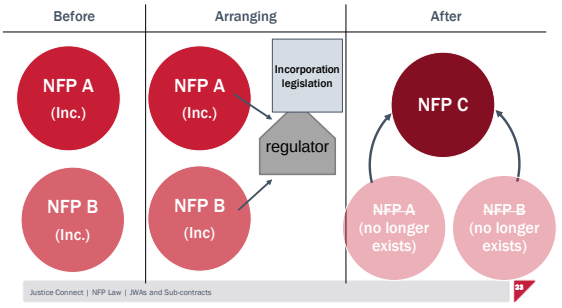
Partnership

- Has a specific legal meaning
- Sign a legally binding partnership contract
- Partners owe obligations to each other (jointly and separately liable)
- A partnership agreement does not mean the organisations merge together. They remain separate "partners"

NFP Law Factsheet: Partnerships

Options for working together

Amalgamation



Options for working together

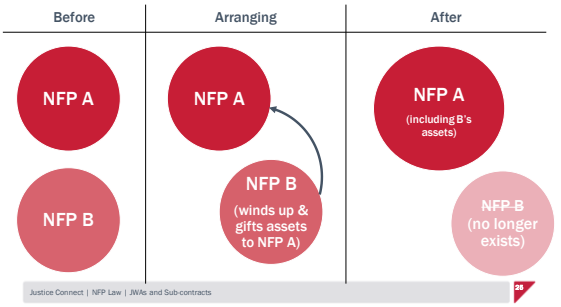
Amalgamation

- Process used by incorporated associations under the NSW *Associations Incorporation Act 2009*
- 2 or more organisations combine or amalgamate to create a new incorporated association
- Existing associations cease to exist

NFP Law Factsheet: Amalgamation

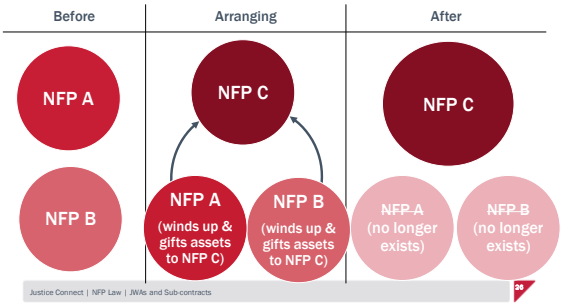
Options for working together

Merger 1 example



Options for working together

Merger 2 example



Options for working together

Merger

- Complex process
- Process is not set out in law, can be tailored to the organisations involved
- Organisations involved will sign a merger contract
- Requires a lot of planning - each organisation needs legal advice

NFP Law Factsheet: Merger

Options for working together

Activity 2: Terms with legal meaning

	Term	Meaning
1.	Collaboration	A broad, loose concept of a/ch can be formed using a number of structures
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3.	Joint Working Arrangement	An informal type of agreement – sometimes referred to as an 'agreement to agree'. Usually not legally binding
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5.	Partnership	A broad, loose concept of a/ch can be formed using a number of structures
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Options for working together

Top tips on working together options

1. Think about the **level of formality and certainty** your organisation needs
2. **Planning and preparation is key** – there are many things to consider for any of the arrangements – do your due diligence!
3. **Get legal advice** to make sure your organisation chooses the best structuring option for working together

Options for working together - video

Part 2: Working well with other organisations

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Working well with other organisations

Due diligence and 'health checks'

- Think carefully about whether the orgs. need to participate in due diligence investigations or a health check
- This process is important – you need to know about the other organisation(s) you are working with
- If any problems arise in due diligence or a health check, you can address them in an informed way

NFP Law Checklist: Working with other organisations

Working well with other organisations

Due diligence key items

- Financials – solvency, key liabilities, tax
- Corporate structure, rules or constitution
- Contracts
- List of assets
- Employment contracts, arrangements and policies
- Intellectual property

Working well with other organisations

What about 'cultural' due diligence / health check?

- Are the organisations' purposes aligned? If not, how are they different?
- How will the people in the organisations work together? Will there be a clash of cultures which may be disruptive?
- What does your constitution say about working with other organisations? Think about board or member approval.

NFP Law Checklist: Working with other organisations

Working well with other organisations

Activity 3: Discussion on working together

Activity 3: Working [well] together

The aim of this activity is to think about and share ideas of what has been working well with your JWA or sub-contract and what can be improved.

1. Write down on a sticky note one thing your organisation has been doing that is working well. It would be great if this can be in the form of a 'tip' for other organisations to take away.

   Put your tip into one 'bucket'.

2. Write down on a sticky note one thing that has not been working so well with your JWA or sub-contract and if possible, any suggestions for improvement.

   Put your issue and suggestion into the other 'bucket'.

We will then collate the tips and issues in a list to reflect on.

Working well with other organisations

Top tips on working well with other organisations:

1. **Governance:** think about the requirements in your own constitution for working with other organisations
2. **Culture and communication:** do the organisations fit well together and do their purposes align?
3. **Legal compliance:** understand your legal obligations under head contracts and sub-contracts

Part 3: Sub-contracts (key terms and legal issues)

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Sub-contracts

Issues we will discuss

1. Before you enter or re-negotiate a sub-contract
2. Important terms
3. Understanding the Funding Deed (head contract) and importance of 'flowing through' terms

NFP Law Checklist: Issues to cover in a sub-contract agreement (and template sub-contract)

Sub-contracts

1. Before you start drafting or decide to enter into a sub-contract

- Seek consent (from FACS, board, members)
- Ensure organisations can work well together (culture and communication)
- Remember you can negotiate contracts
- Make sure sub-contractors have access to all 'head' agreements
- Seek legal advice

Sub-contracts

2. Important issues to cover in sub-contract:

Why do you think each of these issues are important?	
what constitutes a breach	termination
conflicts of interest	confidentiality
dispute resolution	privacy and information sharing
insurance and indemnity	intellectual property
warranties	notification requirements

Sub-contracts

Activity 4: Case scenario on sub-contracting

The North Centre Ltd.

East Shelter Inc.

Sub-contracts

3. The Funding Deed and flow-through terms

Why is it important to flow through these terms to sub-contractors?
accessibility of services
when to provide notification in writing
requirements for personnel
access to records and audits
performance measures
Reporting requirement
asset managements and ownership

Sub-contracts

Activity 5: Make your own checklist for re-contracting

Checklist: Issues to cover in a Sub-contract Agreement

This checklist covers:

Sub-contracts

Top tips:

1. **Type of JWA:** think about how your organisations can best work together, and choose the right option
2. **Due diligence and health check:** to enter a new arrangement or improve and existing one, think about conducting due diligence or a 'health check'
3. **Understand your sub-contract or other JWA** as well as the Funding Deed and other documents. If anything not clear, seek legal advice

Close: Questions and evaluations

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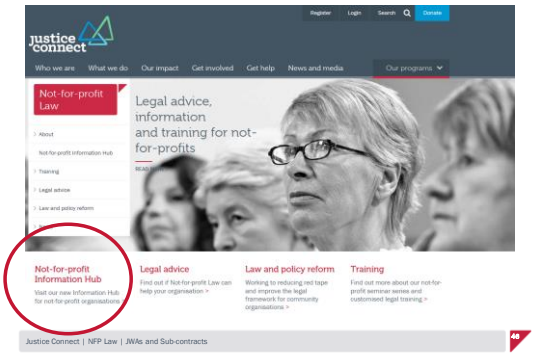

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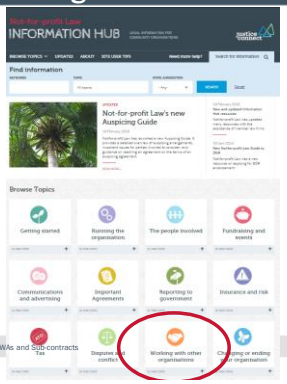

Summary and questions

Evaluation and thanks!

- We would be grateful if you could please complete the evaluation form
- If you would like to receive our monthly legal update – please include email address and we will subscribe you
- Thank you for your participation!

Summary and questions

About Not-for-profit Law (NFP Law)

- **Website:** www.justiceconnect.org.au/nfplaw
- **Phone:** **1800 NFP LAW**
- **Our services:**
  - Legal information factsheets on common legal issues www.nfplaw.org.au
  - Legal training for community groups
  - Law reform work aimed at reducing unnecessary NFP regulation
  - Phone advice to answer quick legal questions**
  - Referral to a lawyer to assist with complex legal issue**

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