



Restructuring to a company limited by guarantee

A manual for community housing consolidations

one
social housing
system

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Part A - Introduction

1. Overview

This Manual outlines the processes for various types of registered providers of community housing to change their current structure to that of a public company limited by guarantee (PCLG) either on an individual basis or by amalgamating with one or more other registered providers and some issues relevant to those processes.

This Manual was prepared by Allens Arthur Robinson in May 2007 for the benefit of the department only as a general guide to the issues that are likely to arise and factors that are likely to be relevant in a restructure of the registered provider to a target PCLG. It does not claim to be a complete and definitive guide to all the potential issues and factors.

It has been prepared without reference to the particular structure, constitution, assets, liabilities, facts and circumstances of any registered provider.

Important disclaimer:

No statement in this Manual is to be taken as legal advice to, or relied on by any registered provider or any other person in respect of a particular transaction. The department recommends that each registered proprietor seek independent legal advice in considering and undertaking a restructure and independently verify all statements in this Manual. Neither the State of Queensland acting through the Department of Housing or Allens Arthur Robinson gives any warranty that any statement in this document is complete, accurate, not misleading and/or up to date.

2. Glossary

In this Manual, the following definitions apply unless the context requires otherwise. References to Acts include the regulations issued under that Act.

ABN	means	Australian Business Number
ABN Lookup	means	www.abr.business.gov.au
ABR	means	Australian Business Register
ACN	means	Australian Company Number
AGM	means	annual general meeting
amalgamated Cooperative	means	see part B, section 4.1
GST Act	means	the <i>A New Tax System (Good and Services Tax) Act</i> (Cth)
ASIC	means	the Australian Securities and Investment Commission
Association	means	an incorporated association under the Associations Act
Associations Act	means	the <i>Associations Incorporation Act 1981</i> (Qld)
Associations Regulations	means	the <i>Associations Incorporation Regulation 1999</i> (Qld)
ATO	means	the Australian Taxation Office
BAS	means	a business activity statement for GST purposes
CGT	means	capital gains tax
Company	means	a Company incorporated or taken to be incorporated under the Corporations Act
Constitution	means	the constitution, rules and other governing documents of the registered provider, whatever called
Cooperative	means	a cooperative under the Cooperatives Act
Cooperatives Act	means	the <i>Cooperatives Act 1997</i> (Qld)
Corporations Act	means	the <i>Corporations Act 2001</i> (Cth)
Corporations Regulations	means	the <i>Corporations Regulations 2001</i> (Cth)
Department	means	the Department of Housing of the State
DGR	means	a deductible gift recipient
Duties Act	means	the <i>Duties Act 2001</i> (Qld)
Exempt Institution	means	an exempt institution under the Duties Act

FBT	means	the tax imposed by the <i>Fringe Benefits Tax Act 1986</i> (Cth) on the fringe benefits taxable amounts of an employer as determined under the FBTA Act
the FBTA Act	means	the <i>Fringe Benefits Tax Assessment Act 1986</i> (Cth)
GST	means	GST as defined in the GST Act
GST Act	means	the <i>A New Tax System (Good and Services Tax) Act</i> (Cth)
Housing Act	means	the <i>Housing Act 2003</i> (Qld)
Housing Regulations	means	the <i>Housing Regulations 2003</i> (Qld)
Land Tax Act	means	the <i>Land Tax Act 1915</i> (Qld)
Local Government Act	means	the <i>Local Government Act 1993</i> (Qld)
management committee	means	the management committee of an Association as defined in the Associations Act
new Cooperative	means	see part B, section 4.1
OFT	means	the Office of Fair Trading (Qld)
ordinary resolution	means	<ul style="list-style-type: none"> • for an Association: a resolution passed at a general meeting of the Association in the manner provided by the Constitution • for a Company: a resolution passed at a general meeting of the Company in the manner provided by the Constitution • for a Cooperative: a resolution of a Cooperative that is passed by a simple majority at a general meeting of the Cooperative or in a postal ballot of members
OSR	means	the Office of State Revenue (Qld)
PBI	means	public benevolent institution
PCLG	means	public Company limited by guarantee under the Corporations Act
Proprietary Company	means	proprietary Company limited by shares under the Corporations Act
Public Company	means	public Company limited by shares under the Corporations Act
registered provider	means	an entity registered under part 4 of the Housing Act
State	means	the State of Queensland

special resolution	means	<ul style="list-style-type: none"> • for an Association: a resolution passed at a general meeting of the Association by the votes of $\frac{3}{4}$ of the members who are present and entitled to vote on the resolution • for a Company: a resolution: <ul style="list-style-type: none"> • of which notice as set out in s249L(c) Corporations Act has been given; and • that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution • for a Cooperative: a resolution of a Cooperative that is passed: <ul style="list-style-type: none"> • by a two-thirds majority at a general meeting of members; or • by a two-thirds majority in a postal ballot (other than a special postal ballot) of members; or • by a three-quarters majority in a special postal ballot of members (s186 Cooperatives Act)
target Cooperative	means	see part B, section 4.1
target PCLG	means	the public company limited by guarantee, whether new or existing, that is to be the single registered provider as a result of a restructure of one or more registered providers
TAA	means	the <i>Tax Administration Act 1953</i> (Cth)
Tax Acts	means	the <i>Income Tax Assessment Act 1936</i> (Cth) and the <i>Income Tax Assessment Act 1997</i> (Cth)
TCC	means	tax concession charity

3. Assumptions

This Manual is based on the assumptions set out below:

- (a) The structure to which all registered providers will be changed as the end result of the restructure process is that of a public company limited by guarantee.
- (b) Registered providers that are (or are intended to be) exempt from income tax and eligible for other GST and FBT concessions are eligible on the basis that they are a charitable institution and are (or will be) endorsed by the ATO as a TCC. (There are other bases for exemption which are by self-assessment and are not endorsed by the ATO. As well, some TCCs are specifically listed in the Tax Acts.)
- (c) Registered providers that are (or are intended to be) a DGR, are eligible on the basis that they are a PBI and are (or will be) endorsed by the ATO as a DGR. (There are other bases for ATO endorsement that could apply, and some DGRs are specifically listed in the Tax Acts.)
- (d) People dealing with Associations, Cooperatives and Companies are entitled by law to make certain assumptions as to the validity of the internal management of the organisation in the absence of any actual or constructive knowledge of invalidity, including assumptions:
 - (i) that all meetings have been duly convened and held and all resolutions validly passed;
 - (ii) that all officers purporting to act on behalf of that entity have been duly appointed;
 - (iii) that all members have been duly admitted to membership;
 - (iv) that all minutes have been properly recorded; and
 - (v) that all registers are up to date and correct.

This Manual assumes that each registered provider is entirely responsible for the internal management of the processes necessary to implement a restructure, and the department and all other registered providers and third parties with whom it is amalgamating or otherwise dealing will rely on the assumption of validity.

Part B – Processes and Checklists

1. Getting started: Identifying the current status of a registered provider

1.1 Overview

Before starting any restructuring process it is important to undertake checks to identify the legal and tax status of the relevant registered providers, because a restructure may potentially have significant consequences, including:

- liability to stamp duty on asset transfers;
- loss of income tax exempt status as a TCC;
- triggering a liability to pay CGT;
- loss of GST and FBT concessions as a TCC;
- loss of DGR status;
- loss of FBT exemption as a PBI;
- loss of special purpose company status;
- loss of section 150 company status;
- loss of rates exemption; and
- loss of land tax exemption.

It is also important to identify the current Constitution of the registered provider. (This can often be unclear).

These checks may also identify registered providers which are not taking advantage of all the exemptions and concessions currently available to them or of which they could take advantage if changes to their Constitutions and/or operations were made (assuming those changes were acceptable to them).

Some non-profit organisations may have assumed that they are exempt from income tax as a 'charity' and/or that as a charity they are automatically an organisation to which donations are tax deductible. However, without the necessary formal ATO endorsements, they would generally not be eligible to be either of these.

1.2 Checklist for identifying the current status of a registered provider

This process sets out initial questions to be considered by each registered provider that proposes to restructure.

No.	Question	Evidence	Refer to Part B:
1.	Is the registered provider a Proprietary Company?	Certificate of Incorporation under the Corporations Act	If yes, see section 2
2.	Is the registered provider a Public Company?	Certificate of Incorporation under the Corporations Act	If yes, see section 2

3.	Is the registered provider a PCLG?	Certificate of Incorporation under the Corporations Act	If yes, see section 5 and Questions 6 to 18 below
4.	Is the registered provider an Association?	Certificate of Incorporation under the Associations Act	If yes, see section 3 and Questions 6 to 18 below
5.	Is the registered provider a Cooperative?	Certificate of Incorporation under the Cooperatives Act	If yes, see section 4 and Questions 6 to 18 below
6.	Is the registered provider a TCC?	<ul style="list-style-type: none"> ATO Notification of endorsement as a TCC or income tax exempt charity ABN Lookup 	See section 7.2
7.	Is the registered provider a DGR?	<ul style="list-style-type: none"> ATO Notification of endorsement as a DGR ABN Lookup 	See section 7.3
8.	Is the registered provider a PBI?	<ul style="list-style-type: none"> ATO Notification of endorsement as a DGR ABN Lookup 	See section 7.3
9.	Is the registered provider registered for GST?	ABN Lookup	See section 7.4
10.	Is the registered provider registered for FBT?	ABN Lookup	See section 7.5
11.	Is the registered provider an Exempt Institution?	OSR Exempt Institution Notice of Registration	See section 7.6
12.	If a PCLG, is the registered provider a section 150 company?	ASIC Company search	See section 7.7
13.	If a Company, is the registered provider a special purpose company?	Latest annual Company review statement	See section 7.8
14.	Is the registered provider exempt from rates?	Letter from relevant local council	See section 7.9
15.	Is the registered provider exempt from land tax?	OSR letter	See section 7.10
16.	Does the registered provider own or lease any assets?	e.g. Land Titles Registry search, lease documents, bank account records, motor vehicle registration certificate	See section 9

17.	Has the registered provider entered into any contract/s with the department or any third parties?	Contracts and agreements	See section 9
18.	What insurance cover does the registered provider have?	Insurance policies	See section 9
19.	What is the financial position of the registered provider?	Directors/management committee to determine from latest audited financial statements and subsequent events and refer to accountants and auditors	See Housing Regulations regs 11 and 40
20.	Is the registered provider insolvent?	Directors/management committee to determine from latest audited financial statements and subsequent events and refer to accountants and auditors	The registered provider cannot be wound up by the members voluntarily if insolvent.
21.	Is the registered provider a party to any current legal proceedings?	Directors/management committee to determine and check with legal advisers and insurers as to any implications for the restructure process	
22.	Are the register of members and other statutory registers and records in good order, and up to date?	Secretary to review	
23.	Are the OFT or ASIC registration details of the registered provider accurate and up to date?	OFT or ASIC search	
24.	Are all returns and lodgements up to date?	Tax returns, OFT/ASIC annual return, BAS	
25.	What is the Constitution?	OFT or ASIC search and statutory records	See section 1.3 below

1.3 Identifying the current Constitution

The registered provider must ensure that it is working from a complete, up-to-date and valid copy of its Constitution. The original Constitution of Associations and Cooperatives, and any subsequent amendments to them, should have been lodged with the OFT and the original Constitution of PCLGs, and any subsequent amendments to them, should have been lodged with the ASIC.

Amendments to Constitutions of Associations and Cooperatives are not effective until registered by the OFT so a copy of the Constitution obtained from the OFT can be relied on as the valid Constitution. For Companies, it can be more difficult to identify the valid Constitution. Amendments to the Constitutions of Companies take effect when passed or on the later date stated in the amending resolution. The Constitutions of Proprietary Companies are not lodged with ASIC and, while the Constitutions of Public Companies and PCLGs are required to be lodged with ASIC, ASIC's register may not necessarily record all amendments that have been made and therefore, the minutes of members' meetings should also be reviewed to identify any unregistered amendments.

2. Change of Public Company or Proprietary Company to Public Company Limited by Guarantee

A Company limited by shares under the Corporations Act, whether proprietary or public, cannot change its type to a PCLG. It would have to wind up and transfer its assets to the target PCLG established as a new entity. Refer to section 9 regarding the process for establishment of the target PCLG and section 10 regarding the processes and issues for transferring assets to the target PCLG.

The obligations imposed by the Corporations Act on a Public Company in relation to preparation of audited financial statements and public reporting are the same as for a PCLG and otherwise there are no significant differences between those two Company types relevant to the registered providers.

A Proprietary Company could change type to a Public Company which would impose those same reporting obligations. This is a straightforward process. As there is no known registered provider that is a Proprietary Company, the process for changing Company type is not set out in this document.

As there is currently only one known registered provider that is a Public Company, the process for winding up and transferring the assets of a Public Company to a PCLG is not set out in this document. However, it is not materially different from the process for winding up and transferring the assets of a PCLG set out in section 5.6.

3. Change of Association to Public Company Limited by Guarantee

3.1 Overview

There is no provision in the Associations Act for an Association to change to a PCLG and remain intact as the same legal entity. The Association must be wound up and resolve to transfer its surplus assets to the target PCLG (s89 Associations Act). Such of the former members of the Association who wish to reassociate must become members of the target PCLG as permitted by the membership admission provisions of the target PCLG.

Generally, when a registered provider that is an Association is to be wound up and intends to transfer its assets and undertaking to a target PCLG, there are likely to be third parties with interests in the assets being transferred to, and in the liabilities that are to be assumed by, the target PCLG. These third parties may include the department, mortgagees, chargees, landlords and lessors and their prior consent is likely to be needed in order for the transfer to take place. The change may also be a breach of various contracts entered into between the Association and third parties (such as funding agreements with the department and management agreements) unless the consent of the third party is obtained. The circumstances in which consent is required from these third parties and the requirements for seeking consent will be set out in the relevant agreements, which will need to be carefully reviewed before starting the winding up process.

The winding up is a members' voluntary winding up which is governed by the provisions of parts 5.5 and 5.6 of the Corporations Act, which means that the Association is wound up as if it is a Company under the Corporations Act (s91 Associations Act). Some, but not all, of these provisions are set out below. If the Association is insolvent, it cannot be wound up except with the leave of the Supreme Court.

An alternative approach to transferring the assets during the winding up process is for the surplus assets to be transferred to the target PCLG while the Association is still active and then the members passing a special resolution to wind up the remaining "empty shell" of the Association. (Voluntary deregistration, as opposed to voluntary winding up, by application of the Association is not available to Associations (as it is for Cooperatives and Companies) but the Registrar may cancel the incorporation of an Association if, relevantly, it has less than seven members or has ceased to exist (s93 Associations Act)). Informal discussions with the OFT indicate that this is an approach acceptable to them, and in that case (despite s91 of the Associations Act) other than the passing of the special resolution to wind up in accordance with s89 of the Associations Act, the OFT does not require the appointment of a liquidator or any of the other formal processes for the conduct of the winding up required under the Corporations Act. The method of transferring the assets would be as provided by the Constitution but, for the protection of the management committee, it may be preferable for the transfer to be approved by a special resolution of the members if the level of approval required by the Constitution is not that high. Under this approach, the interests of the department and other third parties will still need to be dealt with, as discussed above, before the transfer takes place.

Further, despite s91 of the Associations Act, if an Association that has few assets (so that the cost of appointing a liquidator and otherwise winding up in accordance with the Corporations Act would exceed or be disproportionate to those assets) passes a special resolution to wind up when it still has those assets, the OFT would not expect a liquidator

to be appointed or any of the other formal processes (such as a solvency declaration) followed. As these approaches are not strictly in accordance with the Associations Act, Associations considering winding up but not appointing a liquidator or otherwise not following the full formal process required by s91, should first verify this approach with the OFT.

Note also that this approach refers to the transfer of surplus assets, that is, the assets of the Association remaining after all liabilities have been discharged. If the Association has any liabilities, including contingent or future liabilities that cannot be discharged out of the assets or otherwise appropriately dealt with, the assets cannot be transferred to the extent that this would leave the Association insolvent. If the liabilities are very narrow in scope, it may be possible for the Association to transfer all of its assets to the target PCLG and, with the consent of all creditors, have the target PCLG contractually assume all such liabilities, as a prelude to the winding up of the shell. This would get round the need for the liquidator undertaking the winding up doing much the same things as part of the winding up process. However, it would require complete cooperation from the department and creditors.

Before or during winding up, the Association's surplus assets can only be transferred as permitted by the Constitution. The Constitution may first need to be amended to permit the transfer of the Association's assets to the target PCLG.

If the Association is a TCC, a transfer of the assets to another entity that is not a TCC could lead to the TCC status of the Association being revoked by the ATO (including retrospectively so that tax may become payable for the current or prior years).

If the Association is a DGR, a transfer of the assets to another entity that is not a DGR could lead to the DGR status of the Association being revoked by the ATO (including retrospectively so that tax deductions and FBT exemptions for the current or prior years may be disallowed).

Any such transfer may not be exempt from stamp duty unless the PCLG was an Exempt Institution (see section 7.6).

3.2 Checklist for change of single Association to PCLG

This process applies to a registered provider that is an Association which is to be voluntarily wound up by the members and its assets transferred during that process to a target PCLG that is either an existing registered provider which is a PCLG or to a new PCLG formed specifically for that purpose.

The winding up process requires the appointment of an approved liquidator who takes over the role of the directors, identifies the assets and liabilities of the Association, pays its debts, finalises the tax affairs, prepares final accounts and transfers any surplus assets in accordance with the Constitution.

For an Association that has relatively few assets at the time of winding up, only steps 1 to 14 and 19 to 21 apply as formal steps but the management committee itself would then have to attend to many of the liquidator's tasks identified in subsequent steps to deal with the Association's assets and liabilities (but need not prepare accounts).

See section 7 as to the concessions, exemptions and benefits that may be relevant to the Association and/or the target PCLG and section 9 as to the process for establishing a new target PCLG.

No	Item	Action	Comments
1.	Is the Association insolvent?	If yes, the Association cannot proceed to wind up without leave of the Supreme Court. Seek legal advice.	See item 17 below.
2.	Is the Association a TCC?	If yes, the target PCLG must be a TCC when the transfer occurs. If the target PCLG cannot be a TCC, seek advice from the ATO as to whether it would approve the transfer of assets to the target PCLG without loss of TCC status.	See section 7.2. Retrospective loss of TCC exemption may not be a significant issue if the Association has no taxable income and has not taken advantage of the GST and FBT concessions (but presumably the Association is likely to have applied the GST concessions).
3.	Is the Association a DGR?	If yes, the target PCLG must be a DGR when the transfer occurs. If the target PCLG cannot be a DGR, seek advice from the ATO as to whether it would approve the transfer of assets to the target PCLG without loss of DGR status.	See section 7.3. Retrospective loss of DGR status may not be a significant issue if the Association has not received tax deductible gifts, claimed the FBT exemption for PBIs, or taken advantage of GST concessions on the basis that it is a DGR.
4.	Does the Constitution of the Association permit the transfer of the assets of the Association to the target PCLG (either specifically or to organisations of that kind)?	If no, amend the Constitution. See next item.	
5.	Amend the Constitution of the Association to permit the transfer of the assets of the Association to the target PCLG.	By special resolution passed at a members' meeting in accordance with s3 Associations Act and the Constitution. See next item.	
6.	Register the amendment of the Constitution with the OFT in accordance with s48 Associations Act.	By application in the approved form (OFT Form 8) made within three months of the passing of the resolution.	The amendment does not take effect until registered.
7.	Does the Association have any dutiable property under the Duties Act?	See section 10.2. If yes, see next item.	

No	Item	Action	Comments
8.	Is the target PCLG an Exempt Institution or eligible to be an Exempt Institution?	See section 7.6. If yes, confirm registration of the target PCLG as an Exempt Institution. If no, the transfer of dutiable property to the target PCLG may be liable to stamp duty.	
9.	Is the Association up to date in preparing and lodging its annual audited financial statements in accordance with s59 Associations Act?	If no, bring statements and lodgements up to date.	
10.	If the Association is required to lodge income tax returns or a BAS (not a TCC), is it up to date in lodging those returns?	If no, bring lodgements up to date.	
11.	Does the Association own any real estate subject to a mortgage or charge, does it have any other liabilities that are not to be discharged, or has it entered into any contracts with the department or third parties in relation to assets that are to be transferred to the PCLG?	If yes, seek consent of all mortgagees, chargees and other relevant parties to the transfer of the assets to, and assumption of liability by, the target PCLG in accordance with the terms of the relevant mortgage or contract.	Contracts can be transferred by assignment or novation. The latter is preferable.
12.	Has the Association entered into any other contracts or agreements that are not required by the target PCLG?	If yes, cancel all agreements in accordance with their terms.	
13.	Staffing	Review staffing requirements and renegotiate staff arrangements as required.	
14.	Does the target PCLG have appropriate insurance policies in place to cover the Association's assets and potential liabilities when transferred to it?	If no, arrange appropriate insurance.	
15.	Choice of liquidator.	Identify an appropriate liquidator and obtain approval for consent to act.	
16.	Statement of affairs in	The management committee	

No	Item	Action	Comments
	accordance with s494(2) Corporations Act.	causes the preparation of a statement of the affairs of the Association showing the property, the total amount expected to be realised from the property, the liabilities and the estimated expenses of winding up, made up to the latest practicable date before the making of the declaration of solvency.	
17.	After completion of all above items as required, declaration of solvency by the management committee in accordance with s494(1) Corporations Act.	<p>Convene a meeting of the members of the management committee to be held before notice of the general meeting of members at which it is proposed to pass a resolution to wind up the Association is sent out, at which meeting the management committee resolve that they have formed the opinion that the Association will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.</p> <p>After the meeting, a majority of the members of the management committee must make a written declaration to the effect that they have made an inquiry into the affairs of the Association and that at a meeting of the management committee they have formed the opinion as stated above. The statement of affairs must be attached to the declaration of solvency.</p>	The management committee members making the declaration of solvency must have reasonable grounds to form that opinion.
18.	Lodgement of the solvency declaration with the OFT in accordance with s494(3) Corporations Act.	The declaration must be lodged before the notice of the general meeting of members at which it is proposed to pass a resolution	The declaration of solvency has no effect unless lodged with the OFT.

No	Item	Action	Comments
		to wind up the Association is sent out. Use ASIC Form 520 with all necessary changes.	
19.	After completion of all above items, a general meeting of the members must be convened.	By notice in accordance with the Associations Act and the Constitution.	The notice must contain sufficient details of the proposed resolution and intention to transfer the assets.
20.	<p>Within five weeks after the making of the declaration of solvency, a general meeting of members must be held at which the members resolve to:</p> <ul style="list-style-type: none"> • (special resolution) wind up the Association in accordance with s89 Associations Act; • (special resolution) transfer all surplus assets to the target PCLG in accordance with s92 Associations Act; • (ordinary resolution) appoint an approved liquidator in accordance with s495(1) Corporations Act; • (ordinary resolution) fix the remuneration of the liquidator, if any. 	By resolutions passed at a members' meeting in accordance with s3 Associations Act and the Constitution.	<p>The winding up begins on the date of the resolution (s513B Corporations Act).</p> <p>The powers of the management committee cease upon appointment of the liquidator except to the extent the liquidator approves otherwise (s495(2) Corporations Act).</p>
21.	Lodgement of a copy of the special resolution to wind up the Association with the OFT in accordance with s89 Associations Act.	By application in the approved form (OFT Form 9a) made within one month of the passing of the resolution, together with a final audited statement of assets and liabilities.	
22.	Lodgement with the OFT of a notice of appointment of liquidator and of liquidator's office address.	Within 14 days after the appointment. Use ASIC Form 505 with all necessary changes.	
23.	Books and records.	Deliver all books and records	

No	Item	Action	Comments
		of the Association to the liquidator.	
24.	Liquidator's investigation.	Liquidator investigates the property and liabilities of the Association and admits to proof against the Association all debts and claims.	
25.	Confirmation of solvency.	When satisfied as to all liabilities, liquidator reviews and confirms the solvency of the Association.	
26.	Payment of liabilities.	Liquidator pays all liabilities of the Association that are not to be assumed by the target PCLG in accordance with the Corporations Act.	
27.	Transfer of assets.	Liquidator transfers the surplus assets of the Association to the target PCLG as required by the type of asset.	
28.	Stamping of transfers.	Target PCLG attends to stamping by OSR of any transfers of surplus assets that are dutiable property (transfers must be lodged for stamping even if the target PCLG is an Exempt Institution and no duty is payable).	
29.	Insurance policies.	Liquidator cancels the Association's insurance policies.	
30.	Bank accounts.	Liquidator closes the Association's bank accounts.	
31.	Final tax return.	If the Association is required to lodge income tax returns, liquidator lodges the final return.	
32.	Notice to the ATO of cessation of entitlement to endorsement as a TCC and DGR effective on winding up (s426-45 TAA Act).	By written notice to the ATO.	

No	Item	Action	Comments
33.	Cancellation of ABN.	ATO Form NAT2955.	
34.	Liquidator's accounts.	ASIC Form 524 with all necessary changes. Accounts are lodged within one month after the end of each period of six months after the liquidator is appointed.	
35.	Final account.	Liquidator makes a final account showing how the winding up has been conducted and the property disposed of. ASIC Form 523 with all necessary changes.	
36.	Final meeting.	Liquidator convenes a general meeting for the purpose of providing and explaining the final account (s509 Corporations Act). The meeting is convened in the usual way and by advertising in the Queensland Government Gazette, at least one month before the meeting is due to be held.	
37.	Lodgement of final statement.	Liquidator lodges with the OFT a return of the holding of the meeting, together with the final account. Lodge ASIC Form 523 with all necessary changes within seven days after the meeting.	
38.	Rights of interested persons.		Interested persons may apply to the Court to postpone the winding up within three months of the date of lodgement of the OFT return.
39.	Dissolution of Association.		The Association is dissolved within three months after lodgement of the OFT return unless a successful application to Court has been made (s509 Corporations Act).

See section 10 as to the steps that may need to be taken by the target PCLG to deal with the assets transferred to it and by the Association to notify various authorities and third parties of the winding up to the extent that they have not already been dealt with before the winding up commenced or during the winding up process outlined above.

3.3 Change of two or more Associations to PCLG

The amalgamation of two or more Associations does not preserve the same legal entity and the issues for amalgamating Associations are the generally same as for changing an Association to a PCLG. Therefore, where the restructure involves a number of Associations changing to a target PCLG, there is no advantage from amalgamating the Associations into a single Association before transferring the assets of the single Association to the target PCLG and this would only add an additional and unnecessary layer of complexity and potentially a double exposure to stamp duty.

The amalgamation of the Associations is best achieved by establishing a new PCLG to be the target PCLG (see section 9) and for each Association to individually wind up and transfer its assets to the target PCLG following the process outlined in section 3.2.

4. Change of Cooperative to Public Company Limited by Guarantee

4.1 Overview of options

A single Cooperative can transfer its incorporation to become a target PCLG and retain its legal identity.

If two or more Cooperatives are to be amalgamated into a single Cooperative, there are two options:

- (a) **Option (a):** a full merger into a Cooperative that is a new legal entity (***new Cooperative***); or
- (b) **Option (b):** a transfer of engagements, where one of the amalgamating Cooperatives is selected to remain as the standing legal entity and take the assets and assume the liabilities of the other Cooperatives (***target Cooperative***).

The amalgamated Cooperative arising out of Options (a) or (b) (***amalgamated Cooperative***) could then transfer its incorporation to become the target PCLG.

Alternatively, as there may be potential stamp duty issues on amalgamation of Cooperatives under both Options (a) and (b) and more complexity in the amalgamation process (as outlined in section 4.6), it may be simpler to either:

- (c) **Option (c):** select one of the amalgamating Cooperatives as the entity that will transfer its incorporation to become the target PCLG, wind up each of the other Cooperatives under a members' voluntary winding up and transfer their assets to the target PCLG; or
- (d) **Option (d):** form a new target PCLG or select another existing PCLG as the target PCLG, wind up each of the Cooperatives under a members' voluntary winding up and transfer their surplus assets to the target PCLG.

4.2 Choice of options

(a) Target PCLG is a charity

If:

- (i) the amalgamating Cooperatives and the target PCLG are all TCCs;
- (ii) the target PCLG is a DGR, if any amalgamating Cooperative is a DGR; and
- (iii) the target PCLG is an Exempt Institution,

then:

- (iv) there is no advantage from amalgamating the Cooperatives into an amalgamated Cooperative under Options (a) or (b) before transferring the incorporation of the amalgamated Cooperative to become the target PCLG and such amalgamation would only add an additional and unnecessary layer of complexity;

- (v) the amalgamation of the Cooperatives is best achieved by Options (c) or (d); and
- (vi) the choice of Option (c) or (d) is a matter of preference for the amalgamating registered providers and their particular circumstances. If one Cooperative is much more substantial than the others, it may be easier to transfer the incorporation of that Cooperative to become the target PCLG in order to avoid having to process transfers of large numbers of assets and contracts and avoid terminating and transferring the employment of a large number of employees. However, the registered providers may prefer to start afresh with a 'clean' new target PCLG.

See section 7 as to the concessions, exemptions and benefits that may be relevant to the amalgamating Cooperatives and/or the target PCLG.

(b) Target PCLG is not a charity

If paragraph (a) does not apply and a significant amount of stamp duty could potentially be payable:

- (i) as between Options (a) and (b), option (b) would be preferable, and the target Cooperative should be the amalgamating Cooperative with the dutiable property that would attract the highest amount of duty if transferred; and
- (ii) as between Options (c) and (d), option (c) would be preferable, and the target PCLG should be the amalgamating Cooperative with the dutiable property that would attract the highest amount of duty if transferred.

4.3 Interests of third parties

Generally, when a registered provider that is a Cooperative is to be wound up or merged and/or intends to transfer its assets and undertaking to a target PCLG, there are likely to be third parties with interests in the assets being transferred to, and in the liabilities that are to be assumed by, the amalgamated Cooperative or the target PCLG. These third parties may include the department, mortgagees, chargees, landlords and lessors and their prior consent is likely to be needed in order for the transfer to take place. The change may also be a breach of various contracts entered into between the Cooperative and third parties (such as funding agreements with the department and management agreements) unless the consent of the third party is obtained. The circumstances in which consent is required from these third parties and the requirements for seeking consent will be set out in the relevant agreements, which will need to be carefully reviewed before starting the winding up, merger or transfer process.

4.4 Explore truncated process

All of these processes are complex and potentially costly. Before embarking on a restructure under any of these options, the Cooperative concerned would be well-advised to hold informal discussions with the OFT as to whether there are any other possible approaches (such as, under Options (c) and (d), transferring the assets while the

Cooperative is still active before applying to deregister the "empty shell" under s307A of the Cooperatives Act and/or whether the OFT would expect the full formal process to be followed, particularly in cases where the Cooperative has few assets so that the cost of appointing a liquidator and otherwise winding up in accordance with the Corporations Act would be exceeded or be disproportionate to those assets. See section 4.5 as to voluntary deregistration.

The disposal of the entire assets of the Cooperative (with the effect that it cannot carry on its primary activity) requires a special resolution by a special postal ballot (s268 Cooperatives Act) so there is still some complexity and cost to this truncated process.

Note also that this approach refers to the transfer of surplus assets, that is, the assets of the Cooperative remaining after all liabilities have been discharged. If the Cooperative has any liabilities, including contingent or future liabilities, which cannot be discharged out of the assets or otherwise appropriately dealt with, the assets cannot be transferred to the extent that this would leave the Cooperative insolvent. If the liabilities are very narrow in scope, it may be possible for the Cooperative to transfer all of its assets to the target PCLG and, with the consent of all creditors, have the target PCLG contractually assume all such liabilities, as a prelude to voluntary deregistration. This would obviate the need for the liquidator undertaking the winding up doing much the same things as part of the winding up process. However, it would require complete cooperation from the department and creditors.

Under any truncated approach, the interests of the department and other third parties will still need to be dealt with, as discussed in section 4.3, before the transfer takes place.

4.5 Voluntary deregistration

As an alternative to a members' voluntary winding up, under s601AA of the Corporations Act, as applicable to a Cooperative, any of the Cooperative, a director, a member or a liquidator can apply to the OFT for voluntary deregistration. The application can only be made in the following circumstances:

- (a) all members agree to the deregistration;
- (b) the Cooperative is not carrying on business;
- (c) the Cooperative's assets are worth less than \$1000;
- (d) the Cooperative has paid all fees and penalties payable under the Cooperatives Act;
- (e) the Cooperative has no outstanding liabilities; and
- (f) the Cooperative is not a party to any legal proceedings.

Each member must sign a form of consent and then the application is made in OFT Form 34 signed by the applicant.

Unless the OFT is aware of any failure to comply with the requirements for deregistration, it must give notice of the proposed deregistration on its database and in the Queensland

Government Gazette. When 2 months have passed since the Gazette notice, the OFT may deregister the Cooperative and must give notice of the deregistration to the applicant.

4.6 Checklist for mergers and transfers of engagements

This process applies to a merger or transfer of engagements of two or more amalgamating Cooperatives under Options (a) and (b). Any two or more Cooperatives may consolidate all or any of their assets, liabilities and undertakings by way of an approved merger or transfer of engagements (s292 Cooperatives Act). The members must approve the merger or transfer of engagements by passing a special resolution by a special postal ballot (s195 Cooperatives Act).

This process applies:

- (a) for a merger, each Cooperative that proposes to merge; and
- (b) for a transfer of engagements, each Cooperative that is proposing to transfer to the target Cooperative and the target Cooperative.

For the reasons mentioned in paragraph 4.2(a), this process assumes that a merger or transfer of engagements will only occur where the amalgamated Cooperative or the target PCLG is not a charity.

No	Item	Action	Comments
1.	Is the merging or transferring Cooperative a TCC?	If yes, and the amalgamated Cooperative or the target PCLG (as the case may be) is not a TCC when the transfer occurs, seek advice from the ATO as to whether it would approve the transfer of assets to the amalgamated Cooperative or the target PCLG without loss of TCC status.	See section 7.2. Retrospective loss of TCC exemption may not be a significant issue if the merging or transferring Cooperative has no taxable income and has not taken advantage of the GST and FBT concessions (but presumably the Cooperative is likely to have applied the GST concessions).
2.	Is the merging or transferring Cooperative a DGR?	If yes, and the amalgamated Cooperative or the target PCLG (as the case may be) is not a DGR when the transfer occurs, seek advice from the ATO as to whether it would approve the transfer of assets to the amalgamated Cooperative or the target PCLG without loss of DGR	See section 7.3. Retrospective loss of DGR status may not be a significant issue if the merging or transferring Cooperative has not received tax deductible gifts, claimed the FBT exemption for PBIs, or taken advantage of GST concessions on the basis that

No	Item	Action	Comments
		status.	it is a DGR.
3.	Does the Constitution of the merging or transferring Cooperative permit the transfer of the assets of the Cooperative to the amalgamated Cooperative or the target PCLG (as the case may be) (either specifically or to organisations of that kind)?	If no, amend the Constitution. See next item.	
4.	Application for approval of the OFT to alter the Constitution in accordance with s106 Cooperatives Act.	Submit a draft of the proposed alteration in a form that may reasonably be approved (OFT Form 5A), together with a statement of reasons for the alteration, to the Registrar at least 28 days (or a shorter period the Registrar may allow) before the notice of the special resolution altering the Constitution is given to members. See next item.	See s101 Cooperatives Act as to the required content of the Constitution.
5.	Approval of alteration of Constitution.	The Registrar may: (a) approve the alteration as submitted; (b) approve a different alteration to that submitted; or (c) refuse to approve the alteration, (s106(4) Cooperatives Act). The Registrar approves the alteration or gives notice of refusal to approve by written notice to the person who submitted the application. See next item.	
6.	After approval by the Registrar, either:	Convene the meeting or conduct the postal ballot in	

No	Item	Action	Comments
	<p>(a) a general meeting of members; or</p> <p>(b) if permitted by the Constitution, a postal ballot of members,</p> <p>must be held to pass a special resolution to alter the Constitution of the merging or transferring Cooperative to permit the transfer of the assets of the merging or transferring Cooperative to the amalgamated Cooperative or the target PCLG (as the case may be).</p>	<p>accordance with the Cooperatives Act and the Constitution. Not less than 21 days notice must be given to the members of:</p> <p>(a) the intention to propose the special resolution;</p> <p>(b) the reasons for proposing the special resolution; and</p> <p>(c) the effect of the special resolution being passed, (s186 Cooperatives Act). See next item.</p>	
7.	After the special resolution is passed, application to OFT to register the alteration of the Constitution in accordance with s109 Cooperatives Act.	By application in the approved form (OFT Form 6) made within 28 days after the alteration is made.	The alteration does not take effect unless and until it is registered (s109 Cooperatives Act).
8.	Does the merging or transferring Cooperative have any dutiable property under the Duties Act?	See section 10.2. If yes, see next item.	
9.	Is the amalgamated Cooperative or the target PCLG (as the case may be) an Exempt Institution or eligible to be an Exempt Institution?	<p>See section 7.6. If yes, confirm registration of the amalgamated Cooperative or the target PCLG (as the case may be) as an Exempt Institution.</p> <p>If no, the transfer of dutiable property to the amalgamated Cooperative or the target PCLG (as the case may be) may be liable to stamp duty.</p>	
10.	Is the merging or transferring Cooperative up to date in preparing and lodging its annual report including audited financial statements in	If no, bring statements and lodgements up to date.	

No	Item	Action	Comments
	accordance with ss232 and 242 Cooperatives Act?		
11.	If the merging or transferring Cooperative is required to lodge income tax returns or a BAS (not a TCC), is it up to date in lodging those returns?	If no, bring lodgements up to date.	
12.	Does the merging or transferring Cooperative own any real estate subject to a mortgage or charge, does it have any other liabilities that are not to be discharged, or has it entered into any contracts with the department or third parties in relation to assets that are to be transferred to the amalgamated Cooperative or the target PCLG (as the case may be)?	If yes, seek consent of all mortgagees, chargees and other relevant parties to the transfer of the assets to, and assumption of liability by, the amalgamated Cooperative or the target PCLG (as the case may be), in accordance with the terms of the relevant mortgage or contract.	Contracts can be transferred by assignment or novation. The latter is preferable.
13.	Has the merging or transferring Cooperative entered into any other contracts or agreements that are not required by the amalgamated Cooperative or the target PCLG (as the case may be)?	If yes, cancel all agreements in accordance with their terms.	
14.	Staffing.	Review staffing requirements and renegotiate staff arrangements as required.	
15.	Does the amalgamated Cooperative or the target PCLG have appropriate insurance policies in place to cover the merging or transferring Cooperative's assets and potential liabilities when transferred to it?	If no, arrange appropriate insurance.	

No	Item	Action	Comments
16.	Draft disclosure statement.	<p>Directors cause the preparation of a disclosure statement stating:</p> <ul style="list-style-type: none"> (a) the financial position of each Cooperative concerned in the proposed merger or transfer prepared as at a date not more than six months before the date of the statement; (b) any interest any officer of each Cooperative concerned has in the proposed merger or transfer of engagements; (c) compensation or other consideration proposed to be given to any officer or member of each Cooperative concerned in relation to the proposed merger or transfer of engagements; (d) whether the proposal is for a merger or a transfer of engagement; (e) the reason for the merger or transfer of engagements; (f) for a transfer of engagements, whether it is a total or partial transfer of engagements, <p>(s294 Cooperatives Act).</p>	<p>The Registrar may exempt a Cooperative from complying with s294 by notice in the Queensland Government Gazette.</p> <p>As to paragraph (c), as the Cooperatives are non-profit, no compensation should be payable.</p> <p>As to paragraph (f), the restructure will be a total transfer of engagements.</p>
17.	Submission of draft disclosure statement to the OFT for approval by the Registrar (s294 Cooperatives Act).	OFT Form 16 must be submitted at least 28 days (or the shorter period the Registrar may allow) before	

No	Item	Action	Comments
		the notice of the special postal ballot is sent (ss194(5) and 17(1) Cooperatives Act).	
18.	Consideration of disclosure statement by the OFT.	<p>The Registrar may:</p> <ul style="list-style-type: none"> • approve the draft statement as submitted; • amend the draft, or require a stated amendment of the draft, and then approve the amended statement; • approve a different statement to that submitted; • refuse to approve the statement; or • require the person submitting the draft statement to give additional information the Registrar reasonably requires, (s17(4) Cooperatives Act). 	<p>The Registrar may direct other information be included in the disclosure statement and approve the disclosure statement on any conditions or without conditions (ss 294(6) and 17(5A) Cooperatives Act). The Registrar may require the disclosure statement to be accompanied by a report made by an independent person approved by the Registrar about any matters the Registrar directs (s194(4) Cooperatives Act).</p> <p>A person who has submitted a draft disclosure statement may appeal against a failure of the Registrar to approve the statement (ss194(5) and 29 Cooperatives Act).</p>
19.	Approval of disclosure statement by the OFT.	<p>Approval may be given at any time before the notice of the special postal ballot is sent. The Registrar approves of a disclosure statement by giving written notice of approval to the person who submitted the draft to the Registrar but the Registrar is taken to have approved the disclosure statement as submitted to the Registrar unless at least 5 days before the notice of the special postal ballot is due to be sent (ss195(5) and 17 Cooperatives Act).</p>	

No	Item	Action	Comments
20.	Notice to the OFT of proposed special resolution (s186(4) Cooperatives Act).	No prescribed form. The notice must be given at least 28 days before giving notice to the members of the proposed resolution.	Failure to give notice does not affect the validity of the resolution 9S186(5) Cooperatives Act).
21.	Notice to members of a special postal ballot of the members to pass a special resolution to approve the merger or transfer of engagements.	Notice of the ballot and the approved disclosure statement must be sent to the members of each Cooperative concerned so that it will, in the ordinary course of the post, reach each member entitled to vote on the special resolution no later than 21 days before the day on which the ballot papers must be returned (s192(2) Cooperatives Act).	
22.	Special postal ballot in accordance with s194 Cooperatives Act.	The ballot must not be held less than 21 days after notice of the ballot is given to members so as to enable enough time for a meeting to discuss the proposal to be called and held, whether by the board or on requisition of members.	The board of a Cooperative must call a general meeting of the Cooperative on the written requisition of the number of members who together are able to cast at least 20% (or a lower percentage specified in the Constitution) of the total number of votes able to be cast at a meeting of the Cooperative. A requisitioning member must be an active member (s203 Cooperatives Act) and a special general meeting of a Cooperative may be called at any time by the board of directors (s199 Cooperatives Act).
23.	After the special resolution is passed, application to the OFT to register the special resolution and approve the	For the special resolution, lodge OFT Forms 11 and 11A and file two copies (signed by a director or secretary) of the	A special resolution requiring a special postal ballot takes effect when it is passed but has no effect until it is

No	Item	Action	Comments
	merger or transfer of engagements.	special resolution, within 28 days. For approval of the transfer of engagements, lodge OFT Form 28 and for a merger, OFT Form 29 and two copies of the proposed Constitution of the new Cooperative.	registered (s190 Cooperatives Act). If the Registrar is satisfied that the Cooperative has complied with the Cooperatives Act and the special resolution is not contrary to the Cooperatives Act, the Registrar must register the special resolution (s192 Cooperatives Act).
24.	Approval of a merger by the OFT.	The Registrar must approve a merger if satisfied: (a) the provisions of the Cooperatives Act have been complied with; (b) the proposed Constitution of the new Cooperative is consistent with the Cooperatives Act and may reasonably be approved; (c) the certificates of registration of the merging Cooperatives have been surrendered; and (d) there is no good reason why the new Cooperative and its Constitution should not be registered, (s296(1) Cooperatives Act).	
25.	Approval of a transfer of engagements by the OFT.	The Registrar must approve a transfer of engagements if satisfied: (a) the relevant provisions of the Cooperatives Act have been complied with; (b) the Constitution of the target Cooperative is adequate; (c) for a total transfer of	A transfer of engagements takes effect on the day stated in the approval (s297(2) Cooperatives Act).

No	Item	Action	Comments
		<p>engagements, the certificate of registration of each transferring Cooperative is surrendered; and</p> <p>(d) there is no good reason why the transfer of engagements should not take effect,</p> <p>(s297(1) Cooperatives Act).</p>	
26.	Amendments to Register of Cooperatives on approval of a merger.	The registrations of the merged Cooperatives are cancelled and the new Cooperative and its Constitution are registered (s296(2) Cooperatives Act).	The merger takes effect on issue of the certificate of registration of the new Cooperative (s296(3) Cooperatives Act).

The effect of a merger or transfer of engagements is that on the date the merger or transfer takes effect (see items 25 and 26 above):

- (a) the assets of the merging or transferring Cooperatives vest in the amalgamated Cooperative without the need for a conveyance, transfer, assignment or assurance;
- (b) the rights and liabilities of the merging or transferring Cooperatives become the rights and liabilities of the amalgamated Cooperative;
- (c) all proceedings by or against the merging or transferring Cooperatives pending immediately before the effective date are taken to be proceedings pending by or against the amalgamated Cooperative;
- (d) an act, matter or thing done or omitted to be done by, to or in relation to, the merging or transferring Cooperatives before the effective date is (to the extent to which the act, matter or thing has any force or effect) taken to have been done or omitted by, to or in relation to, the amalgamated Cooperative;
- (e) a reference in an instrument or in a document of any kind to the merging or transferring Cooperatives is to be read as, or as including, a reference to the amalgamated Cooperative,

and the merger or transfer of engagements must not be regarded:

- (f) as a breach of contract or confidence or otherwise as a civil wrong;
- (g) as a breach of a contractual provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities; or

- (h) as giving rise to a remedy by a party to an instrument, or as causing or permitting the termination of an instrument, because of a change in the beneficial or legal ownership of an asset, right or liability,

(s327 Cooperatives Act)

See section 10 as to the steps that may need to be taken by a new Cooperative, a target Cooperative and a target PCLG to deal with the assets transferred to it and by the merging or transferring Cooperatives which will cease to exist, to notify various authorities and third parties of the merger or transfer of engagements.

4.7 Checklist for transfer of incorporation to a PCLG

This process applies to:

- (a) the transfer of incorporation of a single Cooperative to become the target PCLG;
- (b) the transfer of incorporation of the amalgamated Cooperative to become the target PCLG after either Option (a) or (b) has been implemented; and
- (c) the transfer of incorporation of the selected Cooperative to the target PCLG under Option (c).

Under a transfer of incorporation, the target PCLG is taken to be the same entity as the Cooperative (s305(1) Cooperatives Act) and registration as a PCLG does not create a new legal entity (s601BM(1) Corporations Act).

The members must approve the transfer of incorporation by passing a special resolution by a special postal ballot (s195 Cooperatives Act). The transfer must result in all persons who were members of the Cooperative at the date of transfer becoming members of the target PCLG (s303(2) Cooperatives Act).

See section 8 as to the steps that may need to be taken by the target PCLG after the transfer of incorporation.

No	Item	Action	Comments
1.	Draft disclosure statement.	<p>Directors cause the preparation of a disclosure statement stating:</p> <ul style="list-style-type: none"> (a) the financial position of the Cooperative; (b) the interests of the directors of the Cooperative in the proposal with which the ballot is concerned, including any interests of the directors in another 	As to paragraph (c), as the Cooperatives are non-profit, no compensation should be payable.

No	Item	Action	Comments
		<p>organisation concerned in the proposal; and</p> <p>(c) any compensation or consideration to be paid to officers or members of the Cooperative in connection with the proposal,</p> <p>(s194 Cooperatives Act).</p>	
2.	Submission of draft disclosure statement to the OFT for approval by the Registrar (s194 Cooperatives Act).	OFT Form 16 must be submitted at least 28 days (or the shorter period the Registrar may allow) before the notice of the special postal ballot is sent (ss194(5) and 17(1) Cooperatives Act).	Use OFT Form 15 to request a shorter time.
3.	Consideration of disclosure statement by the OFT.	<p>The Registrar may:</p> <ul style="list-style-type: none"> • approve the draft statement as submitted; • amend the draft, or require a stated amendment of the draft, and then approve the amended statement; • approve a different statement to that submitted; • refuse to approve the statement; or • require the person submitting the draft statement to give additional information the Registrar reasonably requires, <p>(s17(4) Cooperatives Act).</p>	<p>The Registrar may direct other information be included in the disclosure statement (s194(3)(d) Cooperatives Act) and approve the disclosure statement with or without conditions (s17(5A) Cooperatives Act). The Registrar may require the disclosure statement to be accompanied by a report made by an independent person approved by the Registrar about any matters the Registrar directs (s194(4) Cooperatives Act).</p> <p>A person who has submitted a draft disclosure statement may appeal against a failure of the Registrar to approve the statement (ss194(5) and 29 Cooperatives Act).</p>
4.	Approval of disclosure statement by the OFT.	Approval may be given at any time before the notice of the	

No	Item	Action	Comments
		special postal ballot is sent. The Registrar approves of a disclosure statement by giving written notice of approval to the person who submitted the draft to the Registrar but the Registrar is taken to have approved the disclosure statement as submitted to the Registrar unless at least five days before the notice of the special postal ballot is due to be sent (ss195(5) and 17 Cooperatives Act).	
5.	New Constitution.	Draft proposed Constitution for target PCLG.	The Constitution must not impose on the members of the target PCLG who were members of the Cooperative at the date of transfer any greater or different liability to contribute to the assets of the target PCLG than the liability to which they were subject as members of the Cooperative (s303(1) Cooperatives Act).
6.	Notice to OFT of proposed special resolution (s186(4) Cooperatives Act).	No prescribed form. The notice must be given at least 28 days before giving notice to the members of the proposed resolution.	Failure to give notice does not affect the validity of the resolution 9S186(5) Cooperatives Act.)
7.	Notice to the members of a special postal ballot of the members to pass a special resolution to: (a) approve the proposed application to become incorporated as a PCLG; (b) decide the name of the target PCLG; and	The notice, the approved disclosure statement and the proposed Constitution must be sent to the members of the Cooperative so that it will, in the ordinary course of the post, reach each member entitled to vote on the special resolution no later than 21 days before the day on which	As to paragraph (c), the name must not include the word "Cooperative" or similar (s302(2) Cooperatives Act).

No	Item	Action	Comments
	(c) adopt the proposed Constitution, (s301(1) Cooperatives Act).	the ballot papers must be returned (s194(2) Cooperatives Act).	
8.	Special postal ballot in accordance with s194 of the Cooperatives Act.	The ballot must not be held less than 21 days after notice of the ballot is given to members so as to enable enough time for a meeting to discuss the proposal to be called and held, whether by the board or on requisition of members.	The board of a Cooperative must call a general meeting of the Cooperative on the written requisition of the number of members who together are able to cast at least 20% (or a lower percentage specified in the Constitution) of the total number of votes able to be cast at a meeting of the Cooperative. A requisitioning member must be an active member (s203 Cooperatives Act) and a special general meeting of a Cooperative may be called at any time by the board of directors (s199 Cooperatives Act).
9.	After the special resolution is passed, application to the OFT for registration of the special resolution.	Lodge OFT Forms 11 and 11A and file two copies (signed by a director or secretary) within 28 days.	A special resolution requiring a special postal ballot takes effect from the date it is passed but has no effect until it is registered (s190 Cooperatives Act). If the Registrar is satisfied that the Cooperative has complied with the Cooperatives Act and the special resolution is not contrary to the Cooperatives Act, the Registrar must register the special resolution (s192 Cooperatives Act).
10.	After the special resolution is passed, consents of	Obtain written consents and personal details of the	

No	Item	Action	Comments
	proposed initial officers of the target PCLG.	<p>directors and secretaries of the target PCLG (ss201D, 204C, 205B and 601BC(5) Corporations Act).</p> <p>There is no prescribed form for the consents.</p>	
11.	After the special resolution is passed, application for incorporation of the target PCLG.	<p>Apply to ASIC to become a PCLG under s601BC Corporations Act. Lodge ASIC Form 202 together with:</p> <ul style="list-style-type: none"> (a) a certified copy of the current certificate of incorporation as a Cooperative issued by the OFT not more than three months before the application (reg 5B.2.01 Corporations Regulations); (b) a certified printed copy of the new Constitution (s601BG(1) Corporations Act); (c) if the Cooperative has any registered charges, ASIC Forms 309 and 911 and a copy of each instrument of charge (in accordance with s263(3) and (4) Corporations Act); (d) evidence satisfactory to ASIC (a document certified by the OFT) that: <ul style="list-style-type: none"> (i) the Cooperative is not externally administered; (ii) no application to wind up has been made; and 	<p>Director's consent forms typically also include disclosures of interests in accordance with division 2, part 2D.1 Corporations Act.</p> <p>The copy of the new Constitution can be certified by a director or secretary by a statement in writing and by other means using ASIC Form 911 (reg 5B.2.02 Corporations Regulations).</p>

No	Item	Action	Comments
		<p>(iii) no application for a compromise or arrangement has been made;</p> <p>(e) evidence satisfactory to ASIC that:</p> <p>(i) the Cooperative's type is substantially the same as a PCLG;</p> <p>(ii) the new Constitution defines the limits on members' liability;</p> <p>(iii) the transfer of incorporation is authorised (provide a written statement by a director or secretary); and</p> <p>(iv) the Cooperative has complied with the Cooperatives Act requirements for transfer of incorporation (provide a written statement by a director or secretary as to the details of the Cooperatives Act and attach this as an annexure a copy of the relevant provisions),</p> <p>(s601BC(6) and (7) Corporations Act).</p>	
12.	Section 150 company.	If applicable, apply to ASIC to be a section 150 company at the same time as item 11. ASIC Form 432.	See section 7.7.
13.	Registration by ASIC upon application.	<p>ASIC may:</p> <p>(a) give the target PCLG an ACN;</p>	

No	Item	Action	Comments
		(b) register the target PCLG as a PCLG; and (c) issue a certificate of registration, (s601BD Corporations Act).	
14.	Cancellation of Cooperative registration.	Give the OFT a copy of the ASIC certificate of registration immediately (s304A Cooperatives Act).	The transfer takes effect and the Cooperative ceases to be a cooperative upon registration by ASIC and the ASIC certificate of registration is conclusive evidence that all transfer requirements of the Cooperatives Act have been met (ss302 and 304 Corporations Act).
15.	Statutory registers.	Within 14 days of registration as a PCLG: (a) set up and make appropriate entries in the register of members and register of charges and other statutory registers; (b) set up the minute books, (s601BK Corporations Act).	
16.	First AGM.	The target PCLG must hold, after registration, an AGM in the calendar year of registration (s601BR(1) Corporations Act).	This is a strict liability offence so timing of the transfer process to allow an AGM to be held in the same calendar year will be important.

The effect of a transfer of incorporation is that on the date the transfer takes effect (see item 14 above):

- (a) the assets of the Cooperative vest in the target PCLG without the need for a conveyance, transfer, assignment or assurance;
- (b) the rights and liabilities of the Cooperative become the rights and liabilities of the target PCLG;
- (c) all proceedings by or against the Cooperative pending immediately before the effective date are taken to be proceedings pending by or against the target PCLG;

- (d) an act, matter or thing done or omitted to be done by, to or in relation to, the Cooperative before the effective date is (to the extent to which the act, matter or thing has any force or effect) taken to have been done or omitted by, to or in relation to, the target PCLG;
- (e) a reference in an instrument or in a document of any kind to the Cooperative is to be read as, or as including, a reference to the target PCLG,

and the merger or transfer of engagements must not be regarded:

- (f) as a breach of contract or confidence or otherwise as a civil wrong;
- (g) as a breach of a contractual provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities; or
- (h) as giving rise to a remedy by a party to an instrument, or as causing or permitting the termination of an instrument, because of a change in the beneficial or legal ownership of an asset, right or liability,

(s327 Cooperatives Act) and registration as a PCLG does not:

- (i) affect the existing property, rights or obligations (except as against members in that capacity); or
- (j) render defective any legal proceedings by or against the target PCLG or its members,

(s601BM Corporations Act).

4.8 Checklist for winding up and transfer of assets to a PCLG

This process applies to a registered provider that is a Cooperative which is to be wound up under Options (c) and (d) under a members' voluntary winding up and its assets transferred to a target PCLG that is either an existing registered provider which is a PCLG or to a new PCLG formed specifically for that purpose.

A Cooperative may be wound up voluntarily in the same way and in the same circumstances as a Company under the Corporations Act may be wound up (s306 Cooperatives Act). For a members' voluntary winding up, the members must approve the winding up by passing a special resolution by a special postal ballot (s309(1) Cooperatives Act).

The winding up process requires the appointment of an approved liquidator who takes over the role of the directors, identifies the assets and liabilities of the Cooperative, pays its debts, finalises the tax affairs, prepares final accounts and transfers any surplus assets in accordance with the Constitution.

See section 7 as to the process for preparing an existing registered provider that is a PCLG to be a target PCLG and section 9 as to the process for establishing a new target PCLG.

No	Item	Action	Comments
1.	Is the Cooperative insolvent?	If yes, the Cooperative cannot proceed with a members' voluntary winding up. Seek legal advice.	See item 22 below.
2.	Is the Cooperative a TCC?	If yes, and the target PCLG is not a TCC when the transfer occurs, seek advice from the ATO as to whether it would approve the transfer of assets to the target PCLG without loss of TCC status.	See section 7.2. Retrospective loss of TCC exemption may not be a significant issue if the Cooperative has no taxable income and has not taken advantage of the GST and FBT concessions (but presumably the Cooperative is likely to have applied the GST concessions).
3.	Is the Cooperative a DGR?	If yes, and the target PCLG is not a DGR when the transfer occurs, seek advice from the ATO as to whether it would approve the transfer of assets to the target PCLG without loss of DGR status.	See section 7.3. Retrospective loss of DGR status may not be a significant issue if the Cooperative has not received tax deductible gifts, claimed the FBT exemption for PBIs, or taken advantage of GST concessions on the basis that it is a DGR.
4.	Does the Constitution of the Cooperative permit the transfer of the assets of the Cooperative to the target PCLG (either specifically or to organisations of that kind)?	If no, amend the Constitution. See next item.	
5.	Application for approval of the OFT to alter the Constitution in accordance with s106 Cooperatives Act.	Submit a draft of the proposed alteration in a form that may reasonably be approved (OFT Form 5A), together with a statement of reasons for the alteration, to the Registrar at least 28 days	See s101 Cooperatives Act as to the required content of the Constitution. Use OFT Form 15 to apply for a shorter period.

No	Item	Action	Comments
		(or a shorter period the Registrar may allow) before the notice of the special resolution altering the Constitution is given to members. See next item.	
6.	Approval of alteration of Constitution.	<p>The Registrar may:</p> <ul style="list-style-type: none"> (a) approve the alteration as submitted; (b) approve a different alteration to that submitted; or (c) refuse to approve the alteration, <p>(s106(4) Cooperatives Act.</p> <p>The Registrar approves the alteration or gives notice of refusal to approve by written notice to the person who submitted the application. See next item.</p>	
7.	<p>After approval by the Registrar, either:</p> <ul style="list-style-type: none"> (a) a general meeting of members; or (b) if permitted by the Constitution, a postal ballot of members, <p>must be held to pass a special resolution to alter the Constitution of the Cooperative to permit the transfer of the assets of the Cooperative to the target PCLG.</p>	<p>Convene the meeting or conduct the postal ballot in accordance with the Cooperatives Act and the Constitution. Not less than 21 days notice must be given to the members of the intention to:</p> <ul style="list-style-type: none"> (a) propose the special resolution; (b) the reasons for proposing the special resolution; and (c) the effect of the special resolution being passed, <p>(s186 Cooperatives Act). See next item.</p>	

No	Item	Action	Comments
8.	After the special resolution is passed, application to the OFT to register the alteration of the Constitution with the OFT in accordance with s109 Cooperatives Act.	By application in the approved form (OFT Form 6) made within 28 days after the alteration is made.	The alteration does not take effect unless and until registered (s109 Cooperatives Act).
9.	Does the Cooperative have any dutiable property under the Duties Act?	See section 10.2. If yes, see next item.	
10.	Is the target PCLG an Exempt Institution or eligible to be an Exempt Institution?	See section 7.6. If yes, confirm registration of the target PCLG as an Exempt Institution. If no, the transfer of dutiable property to the target PCLG may be liable to stamp duty.	
11.	Is the Cooperative up to date in preparing and lodging its annual report including audited financial statements in accordance with ss232 and 242 Cooperatives Act?	If no, bring statements and lodgements up to date.	
12.	If the Cooperative is required to lodge income tax returns or a BAS (not a TCC), is it up to date in lodging those returns?	If no, bring lodgements up to date.	
13.	Does the Cooperative own any real estate subject to a mortgage or charge, does it have any other liabilities that are not to be discharged, or has it entered into any contracts with the department or third parties in relation to assets that are to be transferred to the target PCLG?	If yes, seek consent of all mortgagees, chargees and other relevant parties to the transfer of the assets to, and assumption of liability by, the target PCLG, in accordance with the terms of the relevant mortgage or contract.	Contracts can be transferred by assignment or novation. The latter is preferable.

No	Item	Action	Comments
14.	Has the Cooperative entered into any other contracts or agreements that are not required by the target PCLG?	If yes, cancel all agreements in accordance with their terms.	
15.	Staffing	Review staffing requirements and renegotiate staff arrangements as required.	
16.	Does the target PCLG have appropriate insurance policies in place to cover the Cooperative's assets and potential liabilities when transferred to it?	If no, arrange appropriate insurance.	
17.	Choice of liquidator.	Identify an appropriate liquidator and obtain approval for consent to act.	
18.	Draft disclosure statement.	<p>Directors cause the preparation of a disclosure statement stating:</p> <ul style="list-style-type: none"> (a) the financial position of the Cooperative; (b) the interests of the directors of the Cooperative in the proposal with which the ballot is concerned, including any interests of the directors in another organisation concerned in the proposal (in this case, the target PCLG); and (c) any compensation or consideration to be paid to officers or members of the Cooperative in connection with the proposal, <p>(s194 Cooperatives Act).</p>	<p>As to paragraph (c), as the Cooperatives are non-profit, no compensation should be payable.</p> <p>While the Cooperatives Act does not specifically require it, it would be expected that a statement of the financial position of the target PCLG would also be a condition imposed by the Registrar.</p>

No	Item	Action	Comments
19.	Submission of proposed disclosure statement to the OFT for approval by the Registrar (s194 Cooperatives Act).	OFT Form 16 must be submitted at least 28 days (or the shorter period the Registrar may allow) before the notice of the special postal ballot is sent (ss194(5) and 17(1) Cooperatives Act).	Application for a shorter period may be made in OFT Form 15.
20.	Consideration of disclosure statement by the OFT.	<p>The Registrar may:</p> <ul style="list-style-type: none"> • approve the draft statement as submitted; • amend the draft, or require a stated amendment of the draft, and then approve the amended statement; • approve a different statement to that submitted; • refuse to approve the statement; or • require the person submitting the draft statement to give additional information the Registrar reasonably requires, <p>(s17(4) Cooperatives Act).</p>	<p>The Registrar may direct other information be included in the disclosure statement (s194(3)(d) Cooperatives Act) and approve the disclosure statement with or without conditions (s17(5A) Cooperatives Act). The Registrar may require the disclosure statement to be accompanied by a report made by an independent person approved by the Registrar about any matters the Registrar directs (s194(4) Cooperatives Act).</p> <p>A person who has submitted a draft disclosure statement may appeal against a failure of the Registrar to approve the statement (ss194(5) and 29 Cooperatives Act).</p>
21.	Approval of disclosure statement by the OFT.	Approval may be given at any time before the notice of the special postal ballot is sent. The Registrar approves of a disclosure statement by giving written notice of approval to the person who submitted the draft to the Registrar but the Registrar is taken to have approved the disclosure statement as submitted to the Registrar	

No	Item	Action	Comments
		unless at least five days before the notice of the special postal ballot is due to be sent (ss195(5) and 17 (5), (6), (7) and (8) Cooperatives Act).	
22.	After completion of all above items as required, declaration of solvency by the directors in accordance with s494(1) Corporations Act.	<p>Convene a meeting of the directors to be held before notice of the general meeting of members at which it is proposed to pass a resolution to wind up the Cooperative is sent out, at which meeting the directors resolve that they have formed the opinion that the Cooperative will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.</p> <p>After the meeting, a majority of the directors must make a written declaration to the effect that they have made an inquiry into the affairs of the Cooperative and that at a meeting of the directors they have formed the opinion as stated above. The statement of affairs must be attached to the declaration of solvency.</p>	The directors making the declaration of solvency must have reasonable grounds to form that opinion.
23.	Lodgement of the solvency declaration with the OFT in accordance with s494(3) Corporations Act.	OFT Form 520. The declaration must be lodged before the notice of the general meeting of members at which it is proposed to pass a resolution to wind up the Cooperative is sent out.	<p>The declaration of solvency has no effect unless lodged with the OFT.</p> <p>Application for a longer period between the passing of the declaration of solvency and the notices being sent out may be made in OFT</p>

No	Item	Action	Comments
			Form 15.
24.	Notice to OFT of proposed special resolution (s186(4) Cooperatives Act).	No prescribed form. The notice must be given at least 28 days before giving notice to the members of the proposed resolution.	Failure to give notice does not affect the validity of the resolution 9S186(5) Cooperatives Act).
25.	<p>After completion of all above items, notice to members of a special postal ballot of the members to pass resolutions:</p> <ul style="list-style-type: none"> • (special resolution) wind up the Cooperative in accordance with s491 Corporations Act as applied by s308 Cooperatives Act; • (resolution as required by the Constitution) transfer all surplus assets to the target PCLG in accordance with the Constitution; • (ordinary resolution) appoint an approved liquidator in accordance with s309(3) Cooperatives Act; • (ordinary resolution) fix the remuneration of the liquidator, if any (s309(3) Cooperatives Act). 	Notice of the ballot and the approved disclosure statement must be sent to the members of each Cooperative concerned so that it will, in the ordinary course of the post, reach each member entitled to vote on the special resolution no later than 21 days before the day on which the ballot papers must be returned (s192(2) Cooperatives Act).	
26.	Within 5 weeks after the making of the declaration of solvency, a special postal ballot must be conducted in accordance with s194 Cooperatives Act.	The ballot must not be held less than 21 days after notice of the ballot is given to members so as to enable enough time for a meeting to discuss the proposal to be called and held, whether by the board or on requisition of members.	The board of a Cooperative must call a general meeting of the Cooperative on the written requisition of the number of members who together are able to cast at least 20% (or a lower percentage specified in the Constitution) of the total

No	Item	Action	Comments
			<p>number of votes able to be cast at a meeting of the Cooperative. A requisitioning member must be an active member (s203 Cooperatives Act) and a special general meeting of a Cooperative may be called at any time by the board of directors (s199 Cooperatives Act).</p> <p>The powers of the directors cease upon appointment of the liquidator except to the extent the liquidator approves otherwise (s495(2) Corporations Act). In this case the liquidator should approve the appointment taking effect upon registration by the OFT of the special resolution to wind up.</p>
27.	After the special resolution is passed, application to OFT to register the special resolution to wind up (and any other special resolution) to the OFT.	Lodge OFT Forms 11 and 11A and file two copies (signed by a director or secretary) of the special resolution within 28 days.	<p>A special resolution requiring a special postal ballot takes effect from when it is passed but has no effect until it is registered (s190 Cooperatives Act).</p> <p>If the Registrar is satisfied that the Cooperative has complied with the Cooperatives Act and the special resolution is not contrary to the Cooperatives Act, the Registrar must register the special resolution (s192 Cooperatives Act).</p>
28.	Publication of notice of the resolution (s491 Corporations Act).	In the Queensland Government Gazette within 21 days.	
29.	Notice to OFT of appointment of liquidator and	Lodge OFT Form 505 within 14 days after the	

No	Item	Action	Comments
	of liquidator's office address.	appointment.	
30.	Books and records.	Deliver all books and records of the Cooperative to the liquidator.	
31.	Liquidator's investigation.	Liquidator investigates the property and liabilities of the Cooperative and admits to proof against the Cooperative all debts and claims.	
32.	Confirmation of solvency.	When satisfied as to all liabilities, liquidator reviews and confirms the solvency of the Cooperative.	
33.	Payment of liabilities.	Liquidator pays all liabilities of the Cooperative that are not to be assumed by the target PCLG in accordance with the Corporations Act.	
34.	Transfer of assets.	Liquidator transfers the surplus assets of the Cooperative to the target PCLG as required by the type of asset.	
35.	Stamping of transfers.	Target PCLG attends to stamping by OSR of any transfers of surplus assets that are dutiable property (transfers must be lodged for stamping even if the target PCLG is an Exempt Institution and no duty is payable).	
36.	Insurance policies.	Liquidator cancels the Cooperative's insurance policies.	
37.	Bank accounts.	Liquidator closes the Cooperative's bank accounts.	

No	Item	Action	Comments
38.	Final tax return.	If the Cooperative is required to lodge income tax returns, liquidator lodges the final return.	
39.	Notice to the ATO of cessation of entitlement to endorsement as a TCC and DGR effective on winding up (s426-45 TAA Act).	By written notice to the ATO.	
40.	Cancellation of ABN.	ATO Form NAT2955.	
41.	Liquidator's accounts.	OFT Form 524. Accounts are lodged within one month after the end of each period of 6 months after the liquidator is appointed.	
42.	Final account.	Liquidator makes a final account showing how the winding up has been conducted and the property disposed of. OFT Form 524.	
43.	Final meeting.	Liquidator convenes a general meeting for the purpose of providing and explaining the final account (s509 Corporations Act). The meeting is convened in the usual way and by advertising in the Queensland Government Gazette, at least one month before the meeting is due to be held.	
44.	Lodgement of final statement.	Liquidator lodges with the OFT a return of the holding of the meeting, together with the final account. Lodge OFT Form 523 within seven days after the meeting.	
45.	Rights of interested persons.		Interested persons may apply to the Court to postpone the winding up

No	Item	Action	Comments
			within 3 months of the date of lodgement of the OFT return.
46.	Dissolution of Cooperative.		The Cooperative is dissolved within 3 months after the OFT Form 523 is lodged unless a successful application to Court has been made (s509 Corporations Act).
47.	Registration of cessation and cancellation of registration.	By the OFT.	

A person who stopped being a member of the target PCLG before it was registered as a PCLG is treated as a past member in respect of a winding up, as provided in s601BN Corporations Act.

See section 10 as to the steps that may need to be taken by a new Cooperative, a target Cooperative and a target PCLG, to deal with the assets transferred to them and by the Cooperative to notify various authorities and third parties of the winding up to the extent they have not already been dealt with before the winding up commenced or during the winding up process outlined above.

5. Amalgamation of existing Public Companies Limited by Guarantee

5.1 Overview

It is assumed that any restructuring of registered providers is to take place as a voluntary process. On that basis, and as schemes of arrangement are complex, lengthy and costly, processes and checklists for a scheme of arrangement has not been developed. If a scheme proves necessary because of dissenting members or creditors, the relevant registered providers will require legal advice.

If a number of registered providers that are PCLGs are to be amalgamated under a voluntary process there are two options:

- (a) select one of the amalgamating PCLGs as the entity that will be the target PCLG, wind up each of the other PCLGs under a members' voluntary winding up and transfer their assets to the target PCLG; or
- (b) form a new target PCLG, wind up all the PCLGs under a members' voluntary winding up and transfer their assets to the target PCLG.

5.2 Choice of options

(a) Target PCLG is a charity

If:

- (i) the amalgamating PCLGs and the target PCLG are all TCCs;
- (ii) the target PCLG is a DGR if any amalgamating PCLG is a DGR; and
- (iii) the target PCLG is an Exempt Institution,

then the choice of option (a) or (b) is a matter of preference for the amalgamating PCLGs. They may prefer to start afresh with a "clean" new target PCLG.

(b) Target PCLG is not a charity

If (a) does not apply and a significant amount of stamp duty could be payable, as between options (a) and (b), option (a) would be preferable, and the target PCLG should be the amalgamating PCLG with the dutiable property that would attract the highest amount of duty if transferred.

5.3 Interests of third parties

Generally, when a registered provider that is a PCLG is to be wound up and intends to transfer its assets and undertaking to a target PCLG, there are likely to be third parties with interests in the assets being transferred to, and in the liabilities that are to be assumed by, the target PCLG. These third parties may include the department, mortgagees, chargees, landlords and lessors and their prior consent is likely to be needed in order for the transfer to take place. The change may also be a breach of various contracts entered into between the amalgamating PCLG and third parties (such as funding agreements with the department and management agreements) unless the consent of the third party is

obtained. The circumstances in which consent is required from these third parties and the requirements for seeking consent will be set out in the relevant agreements, which will need to be carefully reviewed before starting the winding up, merger or transfer process.

5.4 Explore truncated process

The winding up process is complex and potentially costly. Another option may be to transfer the assets while the Company is still active before applying to deregister the 'empty shell' of the Company under s601AA of the Corporations Act. See section 5.5 as to voluntary deregistration.

The method of transferring the assets would be as provided by the Constitution but, for the protection of the directors, it may be preferable for the transfer to be approved by a special resolution of the members if the level of approval required by the Constitution is not that high. Note also that this approach refers to the transfer of surplus assets, that is, the assets of the Company remaining after all liabilities have been discharged. If the Company has any liabilities, including contingent or future liabilities, that cannot be discharged out of the assets or otherwise appropriately dealt with, the assets cannot be transferred to the extent that this would leave the Company insolvent. If the liabilities are very narrow in scope, it may be possible for the Company to transfer all of its assets to the target PCLG and, with the consent of all creditors, have the target PCLG contractually assume all such liabilities, as a prelude to voluntary deregistration. This would obviate the need for the liquidator undertaking the winding up doing much the same things as part of the winding up process. However, it would require complete cooperation from the department and creditors.

Under any truncated approach, the interests of the department and other third parties will still need to be dealt with, as discussed in section 5.3, before the transfer takes place.

5.5 Voluntary deregistration

As an alternative to a members' voluntary winding up, under s601AA of the Corporations Act, any of the Company, a director, a member or a liquidator can apply to the OFT for voluntary deregistration. The application can only be made in the following circumstances:

- (a) all members agree to the deregistration;
- (b) the Company is not carrying on business;
- (c) the Company's assets are worth less than \$1,000;
- (d) the Company has paid all fees and penalties payable under the Companies Act;
- (e) the Company has no outstanding liabilities; and
- (f) the Company is not a party to any legal proceedings.

Each member must sign a form of consent and then the application is made in ASIC Form 6010 signed by the applicant.

Unless ASIC is aware of any failure to comply with the requirements for deregistration, it must give notice of the proposed deregistration on its database and in the ASIC Gazette. When two months have passed since the Gazette notice, ASIC may deregister the Company and must give notice of the deregistration to the applicant.

5.6 Checklist for transfer of one PCLG to another PCLG

This checklist applies to a registered provider that is a PCLG which is to be wound up under a members' voluntary winding up and its assets transferred to a target PCLG which is either an existing registered provider or a new PCLG formed specifically for that purpose.

The winding up process requires the appointment of an approved liquidator who takes over the role of the directors, identifies the assets and liabilities of the PCLG, pays its debts, finalises the tax affairs, prepares final accounts and transfers any surplus assets in accordance with the Constitution.

No	Item	Action	Comments
1.	Is the PCLG insolvent?	If yes, the PCLG cannot proceed with a members' voluntary winding up. Seek legal advice.	See item 17 below.
2.	Is the PCLG a TCC?	If yes, the target PCLG must be a TCC when the transfer occurs. If the target PCLG cannot be a TCC, seek advice from the ATO as to whether it would approve the transfer of assets to the target PCLG without loss of TCC status.	See section 7.2. Retrospective loss of TCC exemption may not be a significant issue if the registered provider has no taxable income and has not taken advantage of the GST and FBT concessions (but the registered provider is likely to have applied the GST concessions).
3.	Is the PCLG a DGR?	If yes, the target PCLG must be a DGR when the transfer occurs. If the target PCLG cannot be a DGR, seek advice from the ATO as to whether it would approve the transfer of assets to the target PCLG without loss of DGR status.	See section 7.3. Retrospective loss of DGR status may not be a significant issue if the registered provider has not received tax deductible gifts, claimed the FBT exemption for PBIs, or taken advantage of GST concessions on the basis that it is a DGR.
4.	Does the Constitution of the PCLG permit the transfer of the assets of the PCLG to the target PCLG (either specifically or to organisations	If no, amend the Constitution. See next item.	

No	Item	Action	Comments
	of that kind)?		
5.	Amendment of Constitution of the PCLG to permit the transfer of the assets of the PCLG to the target PCLG.	By special resolution passed at a member's meeting in accordance with part 2G.2 Corporations Act and the Constitution. See next item.	
6.	Registration of amendment of the Constitution with ASIC.	ASIC Form 205 must be lodged within 14 days after the resolution is passed.	The amendment takes effect when the resolution is passed or a later date stated in the resolution.
7.	Does the PCLG have any dutiable property under the Duties Act?	See section 10.2. If yes, see next item.	
8.	Is the target PCLG an Exempt Institution or eligible to be an Exempt Institution?	See section 7.6. If yes, confirm registration of the PCLG as an Exempt Institution. If no, the transfer of dutiable property to the target PCLG may be liable to stamp duty.	
9.	Is the PCLG up to date in preparing and lodging its annual audited financial statements in accordance with part 2M.3 Corporations Act?	If no, bring statements and lodgements up to date.	
10.	If the PCLG is required to lodge income tax returns or a BAS (not a TCC), is it up to date in lodging those returns?	If no, bring lodgements up to date.	
11.	Does the PCLG own any real estate subject to a mortgage or charge, does it have any other liabilities that are not to be discharged, or has it entered into any contracts with the department or third parties in relation to assets	If yes, seek consent of all mortgagees, chargees and other relevant parties to the transfer of the assets to, and assumption of liability by, the target PCLG in accordance with the terms of the relevant mortgage or contract.	Contracts can be transferred by assignment or novation. The latter is preferable.

No	Item	Action	Comments
	that are to be transferred to the PCLG?		
12.	Has the PCLG entered into any other contracts or agreements that are not required by the target PCLG?	If yes, cancel all agreements in accordance with their terms.	
13.	Staffing	Review staffing requirements and renegotiate staff arrangements as required.	
14.	Does the target PCLG have appropriate insurance policies in place to cover the PCLG's assets and potential liabilities when transferred to it?	If no, arrange appropriate insurance.	
15.	Choice of liquidator.	Identify an appropriate liquidator and obtain approval for consent to act.	
16.	Statement of affairs in accordance with s494(2) Corporations Act.	Directors cause the preparation of a statement of the affairs of the PCLG showing the property, the total amount expected to be realised from the property, the liabilities and the estimated expenses of winding up, made up to the latest practicable date before the making of the declaration of solvency.	
17.	After completion of all above items as required, declaration of solvency by the directors in accordance with s494(1) Corporations Act.	Convene a meeting of the directors to be held before notice of the general meeting of members at which it is proposed to pass a resolution to wind up the PCLG is sent out, at which meeting the directors resolve that they have formed the opinion that the PCLG will be able to pay its debts in full within a period	The directors making the declaration of solvency must have reasonable grounds to form that opinion.

No	Item	Action	Comments
		<p>not exceeding 12 months after the commencement of the winding up.</p> <p>After the meeting, a majority of the directors must make a written declaration to the effect that they have made an inquiry into the affairs of the PCLG and that at a meeting of the directors they have formed the opinion as stated above. The statement of affairs must be attached to the declaration of solvency.</p>	
18.	Lodgement of the solvency declaration with ASIC in accordance with s494(3) Corporations Act.	The declaration must be lodged before the notice of the general meeting of members at which it is proposed to pass a resolution to wind up the PCLG is sent out. ASIC Form 520.	The declaration of solvency has no effect unless lodged with ASIC.
19.	After completion of all above items, general meeting of the members must be convened.	By notice in accordance with part 2G.2 Corporations Act and the Constitution.	The notice must contain sufficient details of the proposed resolution and intention to transfer the assets.
20.	<p>Within five weeks after the making of the declaration of solvency, a general meeting of members must be held at which the members resolve to:</p> <ul style="list-style-type: none"> • (special resolution) wind up the PCLG in accordance with s491 Corporations Act; • (resolution as required by the Constitution) transfer all surplus assets to the target PCLG in 	By special resolution passed at a members' meeting in accordance with part 2G.2 Corporations Act and the Constitution.	<p>The winding up begins on the date of the resolution (s513B Corporations Act).</p> <p>The powers of the directors cease upon appointment of the liquidator except to the extent the liquidator approves otherwise (s495(2) Corporations Act).</p>

No	Item	Action	Comments
	<p>accordance s501 Corporations Act;</p> <ul style="list-style-type: none"> (ordinary resolution) appoint an approved liquidator in accordance with s495(1) Corporations Act; (ordinary resolution) fix the remuneration of the liquidator, if any. 		
21.	Lodgement of a copy of the special resolution to wind up the PCLG with ASIC in accordance with s491(2)(a) Corporations Act.	By ASIC Form 205 made within seven days after the passing of the resolution.	
22.	Publication of notice of the resolution in the ASIC Gazette in accordance with s491(2)(b) Corporations Act.	Published within 21 days after the passing of the resolution.	
23.	Lodgement with ASIC of a notice of appointment of liquidator and of liquidator's office address.	By ASIC Form 505 lodged within 14 days after the appointment.	
24.	Books and records.	Deliver all books and records of the PCLG to the liquidator.	
25.	Liquidator's investigation.	Liquidator investigates the property and liabilities of the PCLG and admits to proof against the PCLG all debts and claims.	
26.	Confirmation of solvency.	When satisfied as to all liabilities, liquidator reviews and confirms the solvency of the PCLG.	
27.	Payment of liabilities.	Liquidator pays all liabilities of the PCLG that are not to be assumed by the target PCLG in accordance with the Corporations Act.	

No	Item	Action	Comments
28.	Transfer of assets.	Liquidator transfers the surplus assets of the PCLG to the target PCLG as required by the type of asset.	
29.	Stamping of transfers.	Target PCLG attends to stamping by OSR of any transfers of surplus assets that are dutiable property (transfers must be lodged for stamping even if the target PCLG is an Exempt Institution and no duty is payable).	
30.	Insurance policies.	Liquidator cancels the PCLG's insurance policies.	
31.	Bank accounts.	Liquidator closes the PCLG's bank accounts.	
32.	Final tax return.	If the PCLG is required to lodge income tax returns, liquidator lodges the final return.	
33.	Notice to the ATO of cessation of entitlement to endorsement as a TCC and DGR effective on winding up (s426-45 TAA Act).	By written notice to the ATO.	
34.	Cancellation of ABN.	Form NAT2955.	
35.	Liquidator's accounts.	ASIC Form 524. Accounts are lodged within one month after the end of each period of six months after the liquidator is appointed.	
36.	Final account.	Liquidator makes a final account showing how the winding up has been conducted and the property disposed of. ASIC Form 524.	
37.	Final meeting.	Liquidator convenes a	

No	Item	Action	Comments
		general meeting for the purpose of providing and explaining the account (s509 Corporations Act). The meeting is convened in the usual way and by advertising in the ASIC Gazette, at least one month before the meeting is due to be held.	
38.	Lodgement of final statement.	Liquidator lodges with ASIC a return of the holding of the meeting, together with the account. Lodge ASIC Form 523 within seven days after the meeting.	
39.	Rights of interested persons.		Interested persons may apply to the Court to postpone the winding up within three months of the date of lodgement of the ASIC return.
40.	Dissolution of PCLG.		The PCLG is dissolved within three months after lodgement of the ASIC return unless a successful application to Court has been made (s509 Corporations Act).

See section 10 as to the steps that may need to be taken by the target PCLG to deal with the assets transferred to it and by the PCLGs that have been wound up to notify various authorities and third parties to the extent they have not already been dealt with before the winding up commenced or during the winding up process outlined above.

6. Amalgamations of different entity types to Public Company Limited by Guarantee

6.1 Process for one or more Associations and one or more PCLGs to amalgamate to a target PCLG

The issues are the same as for:

- (a) amalgamations of multiple Associations as set out in section 3.3; and
- (b) amalgamations of multiple PCLGs as set out in section 5.1.

The relevant checklists will be those in sections 3.2 and 5.6.

6.2 Process for multiple registered providers (being Associations and/or PCLGs and including one or more Cooperatives) to amalgamate to a target PCLG

The issues are the same as for:

- (a) amalgamations of multiple Associations as set out in section 3.3;
- (b) amalgamations of Cooperatives as set out in section 4; and
- (c) amalgamations of multiple PCLGs as set out in section 5.1.

The relevant checklists will be those in sections 3.2, 4.6 and 5.6.

7. Concessions, exemptions and benefits

7.1 Overview

This section sets out the various concessions, exemptions and benefits that may apply to an entity. All references in this section to the Tax Acts are to the 1997 Act.

7.2 Tax Concession Charity

This Manual only deals with registered providers that are, or may be, eligible for exemption from income tax (including CGT) or for other tax exemptions and concessions on the basis that they are a charitable institution. The term 'TCC' also applies to charitable institutions that are eligible for various GST and FBT concessions (see sections 7.4 and 7.5).

(a) Exemption category

Charitable institutions are exempt from income tax under item 1.1 of the table in s50-5 of the Tax Acts. The term 'charitable institution' is not defined in this legislation. To be a charitable institution an entity must be non-profit and its sole or dominant purpose must be charitable.

The charitable purposes have to be evident in the governing documents of the institution and, for continuing eligibility for exemption from income tax, these purposes have to be observed in practice, as well as being stated in the constitution.

PCLGs and other types of companies, Associations and Cooperatives can be institutions but the concept of 'institution' relates to the permanence and degree of the entity's activities rather than its structure.

The constitution of a TCC must provide how any surplus remaining should be dealt with on winding up and would usually provide that the surplus property should be transferred to another fund, authority or institution with substantially similar objects and which is a TCC. If there is no other fund, authority or institution with substantially similar objects, the surplus could be transferred to any other TCC.

(b) Conditions for exemption

There are two special conditions for exemption applicable to a charitable institution:

- (i) it must meet any one of the conditions in s50-50 Tax Acts, the most relevant of which to registered providers are either that the charitable institution:
 - (A) has a physical presence in Australia and to that extent pursues its objectives and incurs its expenditure principally (i.e. more than 50%) in Australia; or
 - (B) is a DGR; and

- (ii) it is endorsed as exempt from income tax under subdivision 50-B of the Tax Acts (ss50-50 and 50-105). (See section 7.11 as to the application for endorsement and section 7.12 as to obtaining pre-endorsement advice.)

(c) ATO ruling

For further explanation of TCCs, see ATO Taxation Ruling TR 2005/21 *Income tax and fringe benefits tax: charities*.

7.3 PBI and DGR

This Manual only deals with registered providers that are, or may be, eligible for DGR status on the basis that they are a PBI.

(a) Exemption category

A PBI is a particular type of charitable institution which is eligible, under item 1 of the table in s30-15 and item 4.1.1 of the table in s30-45 of the Tax Acts, to be a DGR. Donations are only tax deductible if made to a DGR.

The term 'public benevolent institution' is not defined in this legislation. A PBI is an institution which promotes the relief of poverty, sickness, destitution or helplessness directed towards the public or a section of the public. The relief must be provided in a direct way to persons suffering from those conditions where the plight of such persons is sufficiently serious to arouse pity or compassion, stimulating the need for benevolent relief.

The institution can still be a PBI if it engages in some incidental non-benevolent activities, but it must be predominantly for the benevolent purposes.

The requirement for the institution to be 'public' mainly refers to the extensiveness of the class of beneficiaries of the services. It does not refer to participation in the operation of the institution itself such as membership of the institution being open to the public. The relief provided by the PBI must be available without discrimination to every member of that section of the public which the organisation aims to benefit. Because the relief need only be made available to a section of the public, this means that the institution can confine its activities to a region or community.

The constitution of a PBI must provide how any surplus remaining should be dealt with on winding up and would usually provide that the surplus property should be transferred to another fund, authority or institution with substantially similar objects and which is a DGR. If there is no other fund, authority or institution with substantially similar objects, the surplus could be transferred to any other DGR.

(b) Conditions for exemption

There are two special conditions applicable to a PBI (see item 1 of the table in s30-15):

- (i) it is 'in Australia', which means it must:
 - (A) be established in and operating in Australia; and

- (B) have its beneficiaries and purposes in Australia ; and
- (ii) it is endorsed as a DGR under subdivision 30-BA of the Tax Acts (ss30-17 and 30-120). (See section 7.11 as to the application for endorsement and section 7.12 as to obtaining pre-endorsement advice.)

(c) ATO ruling

For further explanation of PBIs, see ATO Taxation Ruling TR 2003/5 *Income tax and fringe benefits tax: public benevolent institutions*.

7.4 GST

This Manual only deals with registered providers that are, or may be, eligible for GST exemptions and concessions on the basis that they are a charitable institution or PBI. GST is very complex. The following is only a very brief introduction to some matters that may be relevant to registered providers.

(a) 'Non-commercial activity' rules

A supply will be 'GST-free' (i.e. not taxable or input taxed) if the supplier is a charitable institution or a gift-deductible entity (i.e. a DGR and endorsed as such) and the supply is made in the following circumstances:

(i) Supply of accommodation

The supply of accommodation (not defined—but likely to be rental of premises to tenants) is GST-free where the supply is less than:

- (A) 75% of the GST inclusive market value of the supply; or
- (B) 75% of the cost to the supplier (i.e. the registered provider) of providing the accommodation,

(s38-250 GST Act).

(ii) Other supplies

Other supplies are GST-free where the supply is less than

- (A) 50% of the GST-free inclusive market value of the supply; or
- (B) 75% of the consideration the supplier (i.e. the registered provider) provided or was liable to provide to acquire the thing supplied,

(s38-250 GST Act).

'Charitable institution' is not defined, but has the same meaning as discussed in section 7.2.

These provisions mean that non-commercial (i.e. concessional) supplies of community housing are treated as GST-free, so the providers can claim input tax credits on acquisitions relating to the supplies (thereby recovering all they GST they pay out). 'Cost' and 'market value' are not defined. Where there is no identifiable market or comparable commercial equivalent, the charitable institution can calculate its own market value. See the guidelines on the ATO website. GST is applicable in respect of the commercial activities of a charitable institution.

(b) Other GST matters

Charitable institutions can choose to account for GST on a cash basis regardless of annual turnover and can claim a GST credit when reimbursing volunteers for expenses incurred in connection with their activities for the charitable institution.

GST returns of charitable institutions only need to be lodged quarterly or even only yearly if annual turnover is below \$2 million (but with quarterly instalments of GST being payable).

(c) Conditions

To be eligible for these GST concessions a charitable institution must be endorsed as such for GST purposes (s176-1(1) GST Act). See section 7.11 as to the application for endorsement and section 7.12 as to obtaining pre-endorsement advice.

7.5 FBT

This Manual only deals with registered providers that are, or may be, eligible for FBT exemptions and concessions on the basis that they are a charitable institution or PBI. FBT is very complex. The following is only a very brief introduction to some matters that may be relevant to registered providers.

(a) Exemption for PBI

PBIs (except hospitals) receive an exemption from paying FBT, subject to a cap of \$30,000 (currently) per employee (s123C(3) FBTA Act). Benefits provided to employees are FBT-free where the total grossed up value of certain fringe benefits to an individual employee during the FBT year is \$30,000 (currently) or less.

If the total grossed-up value of the fringe benefits provided to an individual employee is more than \$30,000 (currently), the PBI employer will be liable for the FBT on the excess amount.

To be eligible for these FBT concessions a PBI must be endorsed as such for FBT purposes (s123C(1) FBTA Act). See section 7.11 as to the application for endorsement and section 7.12 as to obtaining pre-endorsement advice.

(b) Concessions for charitable institutions

Charitable institutions qualify for an FBT rebate (s65J(1)(baa) FBT Act). Qualifying employers are entitled to have their FBT liability reduced by a rebate equal to 48% of the gross FBT payable. The maximum grossed-up value of benefits that can be provided to anyone employed by a rebatable employer (without losing the concession) is \$30,000. If the total grossed-up value of the fringe benefits provided to an individual employee is more than \$30,000, a rebate cannot be claimed for the FBT liability on the excess amount.

These concessions mean that with appropriate salary packing, staff can receive a greater benefit from their salary package than they would for an equivalent package from a normal employer.

To be eligible for these FBT concessions a charitable institution must be endorsed as such for FBT purposes (s123E(1) FBT Act). See section 7.11 as to the application for endorsement and section 7.12 as to obtaining pre-endorsement advice.

7.6 Exempt Institution

(a) Overview

When a Cooperative transfers its incorporation to a PCLG or a Company changes its type to a PCLG it preserves its legal identity and there are no stamp duty implications. However where Associations, PCLGs or Cooperatives transfer dutiable property (see section 10.2) to a separate entity on a merger, transfer of engagements or winding up, these transfers may attract stamp duty unless the transfer falls under a particular exemption category or the transferee is registered as an Exempt Institution under s460 of the Duties Act before the transfer takes place. There are no specific exemptions in the Duties Act for transfers effected in these circumstances.

If the amalgamated Cooperative or target PCLG is not an Exempt Institution, it should seek specific legal advice as to its potential liability for stamp duty or other possible grounds of exemption from stamp duty before accepting a transfer of any dutiable property.

(b) Categories of Exempt Institution

Relevant to registered providers, each of the following may be registered an Exempt Institution:

- (i) a PBI;
- (ii) an institution whose principal object or pursuit is the care of the sick, aged, infirm, afflicted or incorrigible persons;
- (iii) an institution whose principal object or pursuit is the relief of poverty;
- (iv) an institution whose principal object or pursuit is the care of children by being responsible for them on a full time basis, providing them with all necessary food, clothing and shelter and providing for their general wellbeing and protection;
- (v) an institution that has a principal object or pursuit, fulfilling a charitable object or promotion of the public good and does not have an object or pursuit involving a leisure, recreational, social or sporting activity,

(s459 Duties Act).

(c) Conditions for Exempt Institutions

The Exempt Institution must have a Constitution that provides that:

- (i) its income and property is used solely for promoting its objects;
- (ii) no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members; and

- (iii) on its dissolution, the assets remaining after satisfying all debts and liabilities must be transferred to an institution that may be registered as an Exempt Institution or that the Commissioner is satisfied is charitable or for the promotion of the public good.

(d) 'Use requirement'

In addition to the transferee being an Exempt Institution, the dutiable property transferred must be used solely or almost solely by the Exempt Institution for one or more of the qualifying exempt purposes including, relevantly to registered providers:

- (i) public benevolent purposes;
- (ii) the care of the sick, aged, infirm, afflicted or incorrigible persons;
- (iii) the relief of poverty; and
- (iv) another charitable purpose or promotion of the public good.

Transferred property will meet the use requirement if it will start to be used for the Exempt Institution by a qualifying exempt purposes within six months and will continue to be so used for at least one year or a later date fixed by the Commissioner of Stamp Duties.

A refund of stamp duty can be obtained if an Exempt Institution was refused exemption on a transfer because the use requirement would not be complied with, if it later turns out that in fact the use requirement was complied with.

(e) Application for registration as Exempt Institution

The application is made in OSR Form 12.5 accompanied by:

- (i) a copy of the Constitution;
- (ii) the certificate of incorporation;
- (iii) details of the institution's current or proposed activities;
- (iv) details of the fees charged for its activities; and
- (v) any other supporting background information.

(f) Seek advice in principle

Before incurring the expense of establishing the target PCLG or going through the formal process of amending the Constitution of a registered provider that is to become the target PCLG or amalgamated Cooperative (as the case may be), it may be appropriate to apply to the OSR for advice in principle as to whether it institution will be eligible for registration as an Exempt Institution if established as proposed.

7.7 Section 150 company

A PCLG that meets the requirements stated below may apply to ASIC for approval not to use the word 'Limited' in its name (s150 Corporations Act). Use ASIC Form 432 which is lodged together with a copy of the Constitution.

The constitution of the PCLG must:

- (a) provide that the PCLG must pursue only charitable purposes and apply its income to those purposes;
- (b) prohibit the PCLG from making distributions to its members (i.e. be non-profit);
- (c) prohibit the PCLG paying fees to its directors (directors can be paid for work done as employees, or for professional services or for supplies made or services rendered on a commercial basis, but see paragraph (d)); and
- (d) require the directors to approve other payments to directors.

Section 150 companies are exempt from the related party transaction requirements in Chapter 2E of the Corporations Act.

7.8 Special purpose company

A special purpose company is a Company that meets the requirements stated below. This entitles the Company to considerably lower annual Company review fees (under the *Corporations (Review Fees) Regulations 2003* (Cth)). Use ASIC Form 484B to notify ASIC of a Company commencing or ceasing to be a special purpose company. For a commencing this status, ASIC will send a declaration to be completed and lodged.

- (a) a section 150 company; and
- (b) a Company the constitution of which:
 - (i) requires the Company to pursue charitable purposes only and to apply its income in promoting those purposes; and
 - (ii) prohibit the PCLG from making distributions to its members (i.e. be non-profit);
 - (iii) prohibit the PCLG paying fees to its directors (directors can be paid for work done as employees, or for professional services or for supplies made or services rendered on a commercial basis, but see paragraph (d)); and
 - (iv) requires its directors to approve all other payments the Company makes to them.

7.9 Rates exemption

(a) Overview

Under the Local Government Act a local government may grant a rates exemption to a land owner if, relevantly to registered providers, the local government is satisfied the exemption is justified by certain circumstances or factors, the only one of which that is relevant to registered providers is that the land owner is an entity whose objects do not include the making of profit. As this is a discretion, the local government may chose to impose additional conditions for granting the exemption.

(b) Brisbane City Council

Brisbane City Council has resolved that property that meets the following requirements will be exempt from general and special rates:

- (i) it is used for public, religious, charitable or educational purposes;
- (ii) an application has been received from the owner; and
- (iii) the application is approved by the Council as eligible for exemption.

Relevantly to registered providers, 'charitable purposes' means property that is owned by a public charity and the predominant use of the land is the giving of food, drink, clothing, temporary emergency accommodation or money to the destitute and/or the homeless.

(c) Seek advice in principle

While the continuing availability of a rates exemption may not be a critical issue in the restructuring decision, it may have funding implications. Before embarking on the restructure, it may be appropriate to apply to the relevant local council for advice in principle as to whether the target PCLG will be eligible for a rates exemption if established as proposed.

7.10 Land tax exemption

Under the Land Tax Act, land owned by or in trust for an exempt charitable institution and used predominantly for a qualifying exempt purpose is exempt from land tax.

(a) Exemption charitable institution

Relevantly an 'exempt charitable institution' includes:

- (i) a PBI; or
- (ii) an institution whose principal object is one or more of:
 - (A) various educational purposes;
 - (B) the relief of poverty;
 - (C) the provision of care which relates to and is necessary for persons who are sick, aged, infirm, afflicted or incorrigible; and
 - (D) the provision of full time care for the wellbeing and protection of children, including the provision of all necessary food, clothing and shelter; or
- (iii) an institution declared by the Minister in the Minister's discretion to be an exempt charitable institution whose principal object is of a charitable nature, promotes the public good and is not related to a sporting, recreational, leisure or social matter.

(b) Qualifying exempt purpose

Relevantly 'qualifying exempt purpose' means:

- (i) a public benevolent purpose; or
- (ii) the relief of poverty; or
- (iii) the care of sick, aged, infirm, afflicted or incorrigible persons or of children; or

- (iv) any other activity that the Commissioner of Land Tax is satisfied is not primarily the carrying on of the business on a commercial basis after considering its relationship to the purpose of the exempt charitable institution and the way in which similar activities are carried on by other persons on a commercial basis.

All land owned by or in trust for any person or society and used or occupied by that person or society solely as the site of a building owned and occupied by a society, club, or association, not carried on for pecuniary profit is also exempt from land tax.

(c) Seek advice in principle

Before embarking on the restructure, it may be appropriate to apply to the OSR for advice in principle as to whether the target PCLG will be eligible for a land tax exemption if established as proposed.

7.11 Endorsement by ATO

An application for endorsement in accordance with division 426 in schedule 1 to the TAA can be used to:

- obtain endorsement as an entity exempt from income tax (see section 7.2);
- obtain endorsement as a DGR (being a PBI) (see section 7.3);
- obtain endorsement as a charitable institution for GST purposes (see section 7.4);
- obtain endorsement as a charitable institution for FBT purposes (see section 7.5);
- obtain endorsement as a PBI for FBT purposes (see section 7.5).

The ABN application form can be used to make these applications. It can be lodged electronically.

On receiving an application, the ATO will request copies of the Constitution and other evidence of eligibility. If a pre-endorsement advice has been obtained from the ATO, a copy should be provided with these documents.

The endorsement takes effect from the date specified by the endorsement. Provided the application is made promptly, new entities usually successfully apply for endorsement from the date of incorporation and existing entities may be endorsed from the date they became eligible to apply (usually the date when appropriate amendments to the Constitution took effect).

The ATO will send written notice of endorsement.

When an entity ceases to be entitled to be endorsed, it must give notice to the ATO. The form for notifying change of ABN details is used.

When an entity is endorsed, an entry is made on the ABR (s426-65 TAA) which can be viewed on ABN Lookup but an entry, or lack of entry, does not affect the concessions available to the entity.

7.12 Pre-endorsement advice

Before incurring the expense of establishing the target PCLG or going through the formal process of amending the Constitution of a registered provider that is to become the target PCLG or amalgamated Cooperative (as the case may be), it may be appropriate to apply to the ATO for pre-endorsement advice that the target PCLG or amalgamated Cooperative (as the case may be) will be or remain (as the case may be) eligible for endorsement as a TCC and PBI when incorporated or when the Constitution is amended. This is done by application in a letter with a copy of the proposed Constitution sent to:

Australian Taxation Office
Non-profit Centre
PO Box 300
Penrith NSW 2740.

8. Checklist for a target Public Company Limited by Guarantee after a transfer of incorporation

8.1 Overview

This section applies where the target PCLG converts its corporate type but remains the same legal entity. It would also apply to a Cooperative that transfers its incorporation to a PCLG, and a Proprietary Company that converts to a PCLG (if any).

It sets out steps that the target PCLG may need to take to notify relevant changes to various authorities and third parties after registration of the change of type.

8.2 Checklist

No	Item	Action	Comments
1.	Notice to ATO of the change of type and name and all other relevant changes.	Use the form for notifying change of ABN details.	Changes to be notified may include: <ul style="list-style-type: none">• TCC status• DGR/PBI status• GST registration• FBT registrations.
2.	Application to ASIC to be a section in full 150 Company.	ASIC Form 432.	See section 7.7.
3.	Notice to ASIC that the target PCLG is a special purpose company.	ASIC Form 484B.	See section 7.8.
4.	Registration of change of name on any land titles.	Land Titles Registry General Request Form 14.	This request is provided by the Land Titles Registry and constitutes notice to the OSR for land tax purposes and the relevant local council for rates registration.
5.	Registration of change of name for any registered motor vehicles.	Queensland Transport.	
6.	Registration of a new business name or notification of change of details of a registered business name.	OFT Forms 1 or 4.	

No	Item	Action	Comments
7.	Notice of the change of type and name.	<p>Notice of, or information about, the change may need to be given to some or all of the following, so far as it relates to them:</p> <ul style="list-style-type: none"> • members • employees • mortgagees, chargees and other holders of charges over the assets of the target PCLG; • landlords and lessors; • tenants, lessees and other clients • suppliers and utility providers (electricity, telephone, internet, gas etc.) • banks and other financial institutions • contractors and other service providers • creditors and debtors • accountants and auditors • insurers • the department and other government and non-government funding providers • relevant licensing authorities (work place registrations, accommodation licences, health and food service licences) • directories in which the target PCLG is listed 	

No	Item	Action	Comments
		<ul style="list-style-type: none"> • other associations of which the target PCLG is a member • the Court and other parties in any current proceedings to which the target PCLG is a party • other parties to any on-going contract to which the target PCLG is a party • potential donors and other supporters • any other relevant regulatory authorities (e.g. pay-roll tax) • superannuation funds for employees. 	
8.	Public documents and signage.	Change: <ul style="list-style-type: none"> • signage • letterhead and other stationery, invoices and receipts • website domain address name and details • contact details and other information on the website. 	

9. Checklist to establish a target Public Company Limited by Guarantee

9.1 Overview

The section sets out the steps to:

- (a) incorporate and prepare a new target PCLG (see section 9.2);
- (b) prepare an existing PCLG to become the target PCLG (see section 9.3).

A Company limited by guarantee is a Company formed on the principle of having the liability of its members limited to the respective amounts the members undertake to contribute to the property of the Company if it is wound up. Unlike a Company limited by shares, members do not pay money up-front to acquire a specific share of the Company and do not acquire a separate asset. Rather, each member agrees to contribute a specific amount (usually a nominal sum) if the Company is wound up and there is a shortfall of assets to pay creditors. This guarantee continues while the member remains a member and, if the current members cannot satisfy the shortfall, for one year after ceasing to be a member (but only for debts incurred up to the time when membership ceased). Generally, the amount of the guarantee cannot be changed.

Public companies, whether non-profit or for-profit, must meet statutory financial reporting requirements involving the preparation of an annual financial report and a directors' report, audit of the annual financial report, lodging the audited reports with ASIC and laying them before the AGM.

9.2 Checklist to establish a new target PCLG

No	Item	Action	Comments
1.	Reservation of proposed name of target PCLG (s152 Corporations Act).	ASIC Form 410.	The initial reservation is for two months. This can be extended for two further periods of two months by lodging another ASIC Form 410 before the previous reservation expires. The second extension usually requires a reason for the delay to be given.
2.	Consents of proposed initial officers of target PCLG.	Obtain written consents to act and personal details of initial directors and secretaries (ss201D, 204C and 205B Corporations Act). No prescribed form.	The consent forms typically include disclosures of interest in accordance with division 2, part 2D.1 Corporations Act. The minimum number of directors is three of whom

No	Item	Action	Comments
			one must reside in Australia (s201A Corporations Act). There must be at least one secretary resident in Australia (s204A Corporations Act).
3.	Guarantee.	Decide the amount of guarantee.	
4.	Constitution.	Draft proposed Constitution.	
5.	Members.	Identify initial member/s.	
6.	Adopt Constitution.	Initial member/s sign the Constitution.	
7.	Office addresses.	Identify address of registered office and principal place of business (ss142 - 146 Corporations Act).	
8.	Occupier's consent.	Obtain occupier's written consent if the target PCLG will not occupy the premises at the registered office (s143 Corporations Act).	
9.	TCC and DGR.	Seek pre-endorsement advice if the target PCLG is to be a TCC and/or DGR).	See section 7.
10.	Exemptions and concessions.	Seek advice in principle as to Exempt Institution, land tax and rates exemptions.	See section 7.
11.	Incorporation.	After receiving pre-endorsement approvals in principle, apply for incorporation. ASIC Form 201 lodged with copy Constitution.	
12.	Section 150 company.	If applicable, apply to ASIC for approval to be a section 150 company, at the same time as item 11. ASIC Form 432 lodged with copy Constitution.	
13.	Incorporation.	Certificate of Registration issued by ASIC.	

No	Item	Action	Comments
14.	Special purpose company.	Apply to ASIC to be a special purpose company. ASIC Form 484B.	
15.	Auditor.	Obtain written consent of auditor (s328A Corporations Act).	
16.	First directors' meeting to: <ul style="list-style-type: none"> • open bank accounts • appoint auditor • apply for ABN • accept transfer of assets, liabilities and members from other entities • decide the financial year (s323D Corporations Act). 	Convene the meeting in accordance with the Constitution.	The directors must appoint an auditor within one month after the date of registration as a Company unless the Company in general meeting has appointed an auditor. The auditor appointed by the directors holds office until the first AGM (s327A Corporations Act).
17.	ABN and tax endorsements.	Apply for ABN and other TCC and DGR endorsements. ABN application form. On receipt of relevant application forms from ATO, apply for endorsement as a TCC and DGR. Lodge form with copies of Constitution and pre-endorsement advice letter.	
18.	Exempt Institution.	Apply to OSR for registration as an Exempt Institution. OSR Form 12.5	
19.	Rates exemption.	Apply to local council for rates exemption.	
20.	Land tax exemption.	Apply to OSR for land tax exemption.	
21.	Bank accounts.	Open bank accounts as per directors' resolution.	
22.	Insurance policies.	Take out insurance policies.	

No	Item	Action	Comments
23.	Membership applications.	Proposed members from transferring entities apply to become members of the target PCLG and are admitted in accordance with its Constitution.	
24.	Register of members.	Update statutory register of members.	
25.	First AGM.	Convene and hold the first AGM in accordance with the Constitution and the Corporations Act.	The first AGM must be held within 18 months after registration and thereafter at least once in each calendar year and within five months after the end of its financial year (s250N Corporations Act).

9.3 Checklist to prepare a PCLG to become the target PCLG

No	Item	Action	Comments
1.	Reservation of proposed new name of target PCLG (s152 Corporations Act).	ASIC Form 410.	The initial reservation is for two months. This can be extended for two further periods of two months by lodging another ASIC Form 410 before the previous reservation expires. The second extension usually requires a reason for the delay to be given.
2.	Constitution.	Draft proposed new Constitution.	The amount of the guarantee cannot be changed.
3.	Former officers.	Obtain written resignations (as required by the Constitution) from, or remove, any directors or secretaries that are required to resign.	Directors who do not resign can only be removed by a general meeting, not by the directors (ss203D and 203E Corporations Act).

No	Item	Action	Comments
4.	New officers.	Obtain written consents to act and personal details of any new directors and secretaries (ss201D, 204C and 205B Corporations Act). No prescribed form.	The consent forms typically include disclosures of interest in accordance with division 2, part 2D.1 Corporations Act. The minimum number of directors is three of whom one must reside in Australia (s201A Corporations Act). There must be at least one secretary resident in Australia (s204A Corporations Act).
5.	Office addresses.	Identify any change of address of registered office or principal place of business (ss142 - 146 Corporations Act).	
6.	Occupier's consent.	Obtain occupier's written consent if the target PCLG will not occupy the premises at the registered office (s143 Corporations Act).	
7.	TCC and DGR.	Seek pre-endorsement advice if the target PCLG is to be a TCC and/or DGR).	See section 7.
8.	Exemptions and concessions.	Seek advice in principle as to Exempt Institution, land tax and rates exemptions.	See section 7.
9.	General meeting, after receiving pre-endorsement approvals in principle.	<p>Convene a general meeting of members to:</p> <ul style="list-style-type: none"> • (special resolutions) approve the change of name and adoption of new Constitution • (ordinary resolutions) appoint new directors. <p>At least 21 days notice is required.</p>	Public companies cannot pass circulating resolutions instead of holding general meetings.

No	Item	Action	Comments
10.	After the special resolutions are passed, notice to ASIC.	Lodge ASIC Form 205 together with copy of the new Constitution within 14 days.	
11.	Directors' meeting to appoint a new secretary, change any office addresses and accept transfer of assets, liabilities and members from other entities.	Convene the meeting in accordance with the Constitution.	
12.	Notice to ASIC of changes to officeholders and office addresses.	Lodge ASIC Forms 484A and 484B within 28 days.	
13.	Section 150 company.	If applicable, apply to ASIC for approval to be a section 150 company. ASIC Form 482 together with copy of the Constitution.	
14.	Special purpose company.	Apply to ASIC to be a special purpose company. ASIC Form 484B	
15.	Notice to ATO of changes to ABN details including application for TCC and DGR endorsements.	Notice of ABN change form. On receipt of relevant application forms from ATO, apply for endorsement as a TCC and DGR. Lodge the form with copies of the Constitution and pre-endorsement advice letter.	
16.	Exempt Institution.	Apply to OSR for registration as an Exempt Institution. OSR Form 12.5	
17.	Rates exemption.	Apply to local council for rates exemption.	
18.	Land tax exemption.	Apply to OSR for land tax exemption.	
19.	Insurance policies.	Take out or change insurance policies.	

No	Item	Action	Comments
20.	Membership applications.	Proposed members from transferring entities apply to become members of the target PCLG and are admitted in accordance with its Constitution.	
21.	Registers and records.	Update statutory registers and records.	

10. Transfers to a target Public Company Limited by Guarantee

10.1 Overview

This section applies where assets, liabilities and members are transferred to a target PCLG or an amalgamated Cooperative being:

- (a) a new Cooperative after a merger;
- (b) a target Cooperative after a transfer of engagements;
- (c) a target PCLG after a transfer of assets from an Association, a Cooperative or another PCLG which is wound up.

Section 10.2 discusses what assets may be subject to stamp duty on the transfer.

Section 10.3 sets out steps that the target PCLG may need to take to notify relevant changes to various authorities and third parties after assets are transferred. Section 10.4 sets out the various authorities and third parties that an entity that has been wound up may need to notify in addition to the steps set out in sections 3.2, 4.6, 4.8 and 5.6.

10.2 Dutiable property

Under the Duties Act, an entity may be liable to pay duty on certain transactions and documents. The types of duty that may be payable are:

- transfer duty;
- land rich duty;
- mortgage duty; and
- vehicle registration duty.

(a) Transfer duty

Transfer duty is payable when certain events, called 'dutiable transactions' occur including such things as:

- (i) the transfer of property;
- (ii) an agreement for the transfer of property;
- (iii) the vesting of property under an Act or by court order;
- (iv) the foreclosure of a mortgage over property;
- (v) the acquisition of a new right;
- (vi) the creation or termination of a trust of property; and
- (vii) a trust acquisition or trust surrender.

(b) Dutiable Transaction

For the purposes of determining whether a dutiable transaction has occurred, property includes:

- (i) land and certain leased or licensed space located in Queensland;

- (ii) an existing right, which includes such things as certain licences, an existing lease or licence of a business conducted in Queensland, an existing option/right to acquire property, an existing right to exploit property other than a business asset that is intellectual property, and an existing right to the income from property;
- (iii) a Queensland business asset, which includes such things as the goodwill, business name, licences, intellectual property, debts (if the debtor resides in Queensland), supply rights, and certain chattels of a business that is conducted from Queensland; and
- (iv) a chattel in Queensland (if there are also other assets transferred).

The parties to a dutiable transaction are liable for the transfer duty. However, duty is not imposed on a dutiable transaction under which an Exempt Institution acquires property.

(c) Land Rich Duty

Land rich duty is imposed when an entity acquires a majority interest (or increases their majority interest) in a land rich corporation. A land rich corporation is an unlisted corporation that has land holdings in Queensland, the unencumbered value of which are \$1 million or more and has land holdings, whether within or outside of Australia comprising 60% or more of the unencumbered value of all of its property. Land rich duty is imposed on the entity that acquires the land rich corporation.

(d) Mortgage Duty

Mortgage duty is imposed on certain instruments that are mortgages, particular caveats claiming an interest under mortgages, and particular releases of mortgage. Mortgage duty must be paid by the mortgagor. However, duty is not imposed on a mortgage given to secure an advance to an Exempt Institution.

(e) Vehicle Registration Duty

Vehicle registration duty is imposed on an application to register a vehicle and an application to transfer a vehicle. For an application to register a vehicle, the applicant is liable to pay the duty. For an application to transfer a vehicle, the transferee and the transferor are liable to pay the duty. Duty is not imposed on an application to register or transfer a vehicle in the name of an Exempt Institution.

(f) Exemptions

There are a number of specific and general exemptions from a liability to pay duty under the Duties Act. A relevant example includes transactions by Exempt Institutions and an exemption from duty on certain instruments or transactions entered into under the *Housing Act 2003*.

10.3 Checklist of steps by target PCLG after transfer

No	Item	Action	Comments
1.	Stamping.	Lodge transfers of dutiable property with the OFT for assessment of stamp duty.	
2.	Title registration.	Register transfers of land titles with Land Titles Registry.	The Land Titles Registry notifies the OSR for land tax purposes and the relevant local council for rates registration.
3.	Vehicle transfers.	Register transfers of motor vehicles with Queensland Transport.	
4.	Contracts.	Novate (or assign) any contracts from transferring entities to the target PCLG.	
5.	Business name.	Register transfer of business name with OFT. OFT Form 4.	
6.	Notice of change of details.	<p>For an existing target PCLG only, notice of, or information about the change of name and address and any other relevant changes, may need to be given to some or all of the following, so far as they relate to them:</p> <ul style="list-style-type: none"> • members • employees • mortgagees, chargees and other holders of charges over the assets of the target PCLG • landlords and lessors • tenants, lessees and other clients • suppliers and utility providers (electricity, telephone, internet, gas) 	

No	Item	Action	Comments
		<ul style="list-style-type: none"> • banks and other financial institutions • contractors and other service providers • creditors and debtors • accountants and auditors • insurers • the department and other government and non-government funding providers • relevant licensing authorities (work place registrations, accommodation licences, health and food service licences) • directories in which the target PCLG is listed • other associations of which the target PCLG is a member • the Court and other parties in any current proceedings to which the target PCLG is a party • other parties to any on-going contract to which the target PCLG is a party • potential donors and other supporters • any other relevant regulatory authorities (e.g. pay-roll tax) • superannuation funds for employees. 	

No	Item	Action	Comments
7.	Public documents and signage.	<p>For an existing target PCLG only, change:</p> <ul style="list-style-type: none"> • signage • letterhead and other stationery, invoices and receipts • website domain address name and details • contact details and other information on the website. 	

10.4 Checklist of steps by Associations, Cooperatives and PCLGs that are wound up.

No	Item	Action	Comments
1.	Cancellation of registration of business name.	OFT Form 5.	
2.	Notice of winding up.	<p>Notice of, or information about, the winding up, transfer of assets and cancellation of relevant contracts and services may need to be given to some or all of the following, so far as they relate to them (but in most cases this will be given before the winding up becomes a reality or during the winding up process):</p> <ul style="list-style-type: none"> • members • employees • mortgagees, chargees and other holders of charges over the assets of the target PCLG • landlords and lessors • tenants, lessees and other clients 	

No	Item	Action	Comments
		<ul style="list-style-type: none"> suppliers and utility providers (electricity, telephone, internet, gas) banks and other financial institutions contractors and other service providers creditors and debtors accountants and auditors insurers the department and other government and non-government funding providers relevant licensing authorities (work place registrations, accommodation licences, health and food service licences) directories in which the target PCLG is listed other associations of which the target PCLG is a member other parties to any on-going contract to which the target PCLG is a party past donors and other supporters any other relevant regulatory authorities (e.g. pay-roll tax) superannuation funds for employees. 	
3.	Website.	Remove website and cancel domain address.	