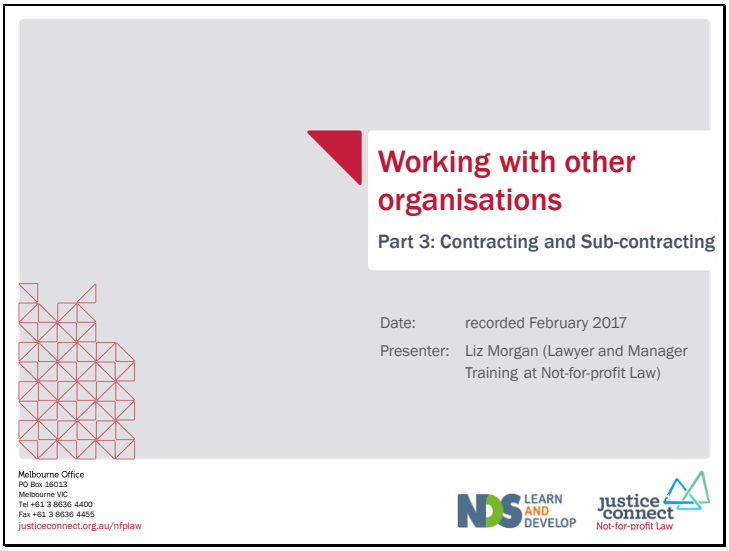
WORKING WITH OTHERS WEBINAR 3 : TRANSCRIPT

About this transcript: The material included in this document is intended to provide general information in summary form on legal topics. The contents of this document do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters or concern that you or your organisation may have.

Every effort has been made to ensure the currency and accuracy of the information contained in this document however we cannot guarantee the information is current when you access it. Also, this is not a verbatim transcript of the webinar but a close summary of the webinar contents.

Slide 1



Slide Content:
Text: Working with other organisations: Part 3: Contracting and Sub-contracting
Date: recorded February 2017
Presenter: Liz Morgan (Lawyer and Manager Training at Not-for-profit Law)

Transcript:
Welcome to this third webinar in a five part series on Working with Others – commissioned by National Disability Services and presented by Justice Connect.

My name is Liz and I'm a lawyer with Justice Connect's Not-for-profit Law service.

I would like to start by paying my respects to the traditional owners of the land I'm on today – the aboriginal people of the Kulin nations - and to pay my respects to their elders past, present and future.

So today we're going to discuss contracting and sub-contracting but before I get in to the topic – a brief overview of our two organisations: NDS and Justice Connect (see our two logos down the bottom there)

This webinar has been commissioned by the NDS - Australia's peak body representing and supporting non-government disability service organisations. You can find out more on their website at www.nds.org.au including a range of resources to support organisations as they transition to the new NDIS environment.

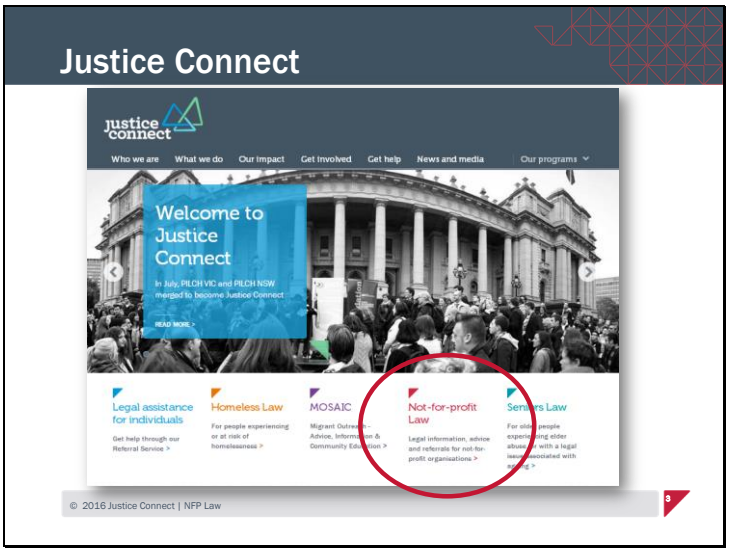
Slide 2

Slide Content:
Text: Funding acknowledgement - these resources have been made available through the Sector Transition Fund with thanks to the Victorian Government.

Transcript:
I'd also like to acknowledge that this webinar series has been made available through the sector transition fund, with thanks to the Victorian Government.

And we would like to thank NDS for getting us involved to present the series to you today.

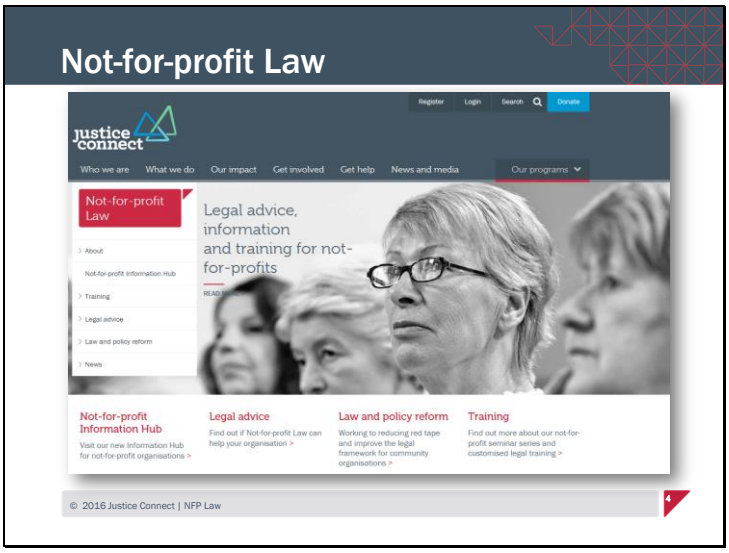
Slide 3



Slide content
Image: Screen shot of justice Connect website available at www.justiceconnect.org.au

Transcript:
So a bit about Justice Connect. We're a not-for-profit, just like many of your organisations and basically we're a community legal service and access to justice organisation. We provide a range of services but the one probably most relevant to today's webinar is the Not-for-profit Law service.

Slide 4



Slide Content:
Image: Screenshot of NFP Law homepage available at www.justiceconnect.org.au/our-programs/not-for-profit-law

Transcript:
So that service is a service for legal advice, education and training – to help community organisations with the myriad of legal issues they might experience on a day to day basis as they pursue their mission and operations. We will talk more about our services at the end of today's webinar, particularly about this topic, contracting and sub-contracting, and where to find information from our Information Hub.

Slide 5

Slide Content:
Text: Introduction
What we will cover in this webinar series

- Part 1: Overview – legal options for working with others
- Part 2: Memoranda of Understanding
- Part 3: Contracting/sub-contracting
- Part 4: Mergers #1 (including amalgamation)
- Part 5: Mergers #2

This presentation is legal information, not legal advice.

Transcript:
In this series, we're really looking at the options of working with others and we're into that aspect of the series where we're focussing down on some types of those arrangements. In part two, we looked at MOUs and now we're looking at contracting and sub-contracting.

Just a reminder this presentation is legal information and not legal advice and we do recommend getting legal advice about whether this arrangement is suitable and appropriate for your organisation.

Slide 6

Slide Content:
Text: Contracting and sub-contracting (section heading)

Transcript:
So contracting and sub-contracting is our topic today and with the previous webinars we just like to kick off with a case study.

Slide 7

Slide Content:
Text: Case Study: Central
Image: red light bulb, photo of a man

Transcript:
Central is an organisation that provides services and support for children and adults living with intellectual disabilities.

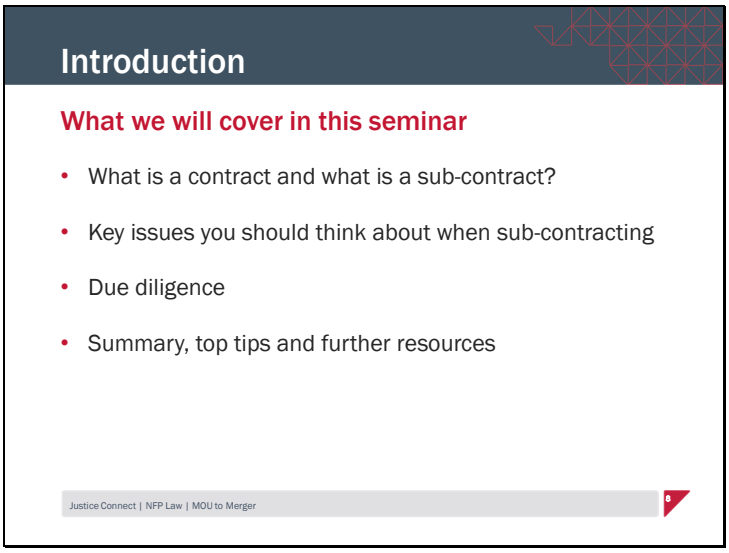
Sam is the Chief Operating Officer of a fictional organisation, Central.

In preparing for the NDIS, Sam is facing a few challenges. Central are purchasing a new client management and invoicing system and after having a look at the offerings on the market they have decided to engage a business, Flash Systems, to set up these system and provide Central with ongoing technical support. Sam is looking to put in place an arrangement for how they'll formalise working with Flash Systems.

Also Central plan subcontract to about 3 smaller niche allied health providers to deliver part of their clients' individualised support packages. Again Sam is looking to make sure the appropriate arrangements are in place with these allied health providers.

So that's the situation we'll consider as we work through contracting and sub-contracting in today's webinar.

Slide 8



Slide Content:
Text:
What we will cover in this seminar

- What is a contract and what is a sub-contract?
- Key issues you should think about when sub-contracting
- Due diligence
- Summary, top tips and further resources

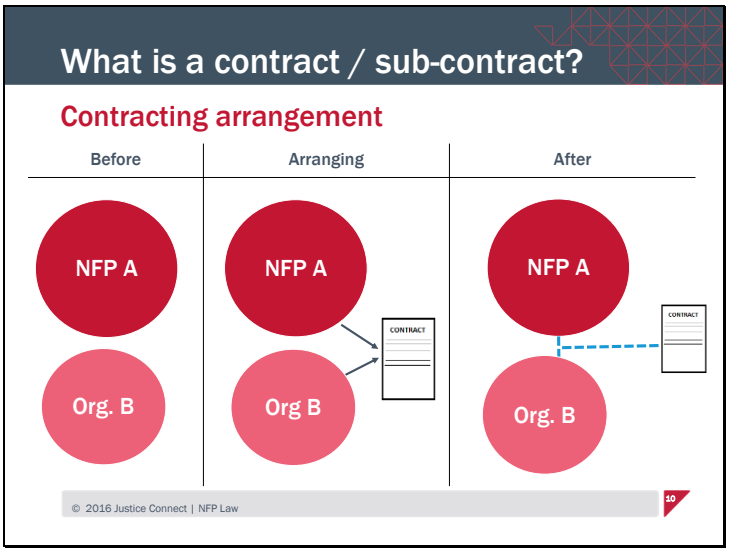
Transcript:
What we're going to cover are these four quick topics: (i) what is a contract and what is a sub-contract and some basic definitional issues around that; (ii) the key issues you should think about when either contracting or sub-contracting; (iii) due diligence and the amount of research or investigation you might need to do into the party you might be contracting or sub-contracting to, which would be appropriate in the circumstances, before signing any contract or contractually binding agreement; (iv) and we'll end with summary, top tips and further resources where you can find out more information because it's only a short webinar today.

Slide 9

Slide Content:
Text: What is a contract and what is a sub-contract?

Transcript:
A contract is a legally binding promise or agreement made between two or more parties, in its simplest form.

Slide 10



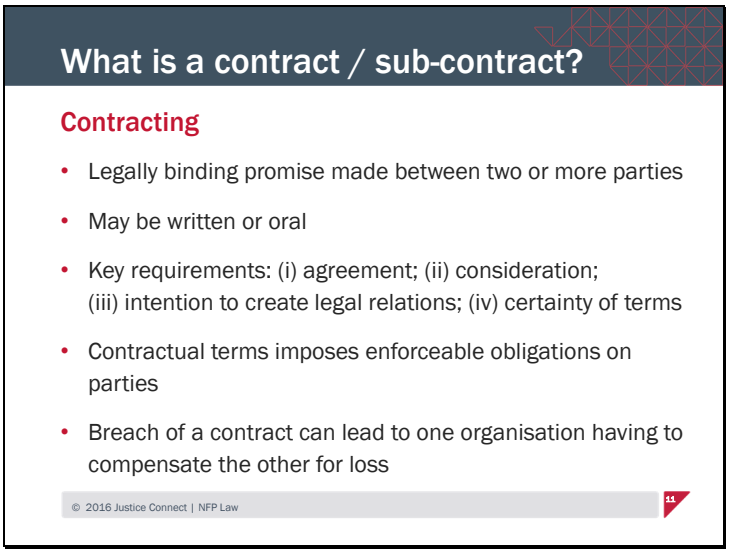
Slide Content:
Image: table representing a contracting agreement. There are three columns – before, arranging and after. In each column there are two red circles representing NFP A and Org. B. Under "Before," NFP A and Org. B are just listed. Under "Arranging," NFP A and Org. B both have separate arrows pointing to a document. In "After," NFP A and Org. B are joined by dotted lines together and with a document.
Text:
Example: Contracting arrangement

Transcript:
And just to give you a very simple diagram of what that might look like. Here we have NFP A and Org. B. NFP A decides to contract Org. B to deliver services either to or for NFP A and in the after section, you can see here, Org. B is contractually obliged to deliver services to NFP A under the terms of the contract.

That's very simply setting it out.

You'll note here that the two parties remain separate legal entities. It can be a time limited arrangement and it might be that after the contract is finished, either party can walk away to do other things, they do not stay together as a result, what we call merge, as a result of signing the contract – they remain separate legal entities.

Slide 11



Slide Content:
Text:
Contracting

- Legally binding promise made between two or more parties
- May be written or oral
- Key requirements: (i) agreement; (ii) consideration; (iii) intention to create legal relations; (iv) certainty of terms
- Contractual terms imposes enforceable obligations on parties
- Breach of a contract can lead to one organisation having to compensate the other for loss

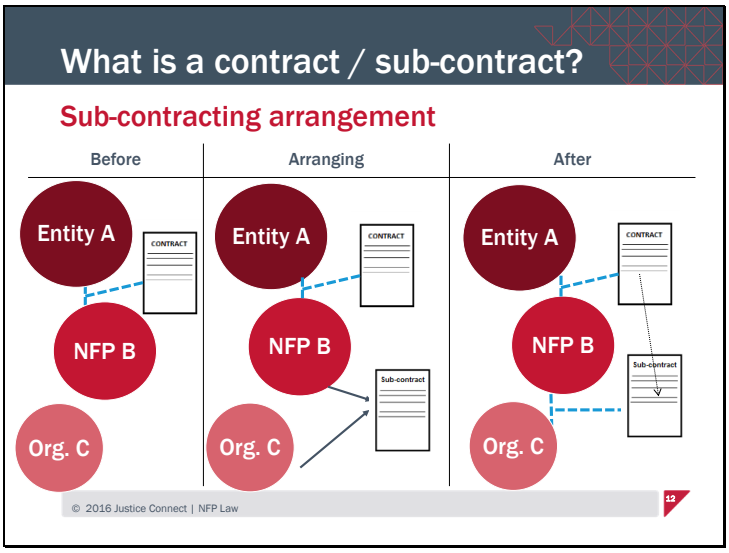
Transcript:
So to look at that in a dot point way.

A contract is a legally-binding promise or agreement made between two or more 'parties'. A contract may be oral or written, we always suggest writing contracts as oral are always very hard to evidence. In general, a contract will only be valid and enforceable if it meets four formal requirements and those are (i) that there must be an agreement, an offer must be made and the offer must be accepted; (ii) that there be consideration which is an exchange or benefit – each party gives something in return; (iii) that there is an intention to create legal relations and that it is clear from the document that the parties intended the agreement to be binding as distinct from early negotiations or discussions that are not binding and we'd refer you to our discussion on MOUs to look into that; (iv) and there must be certainty of terms - the subject matter, key terms, timing and parties are all clear and certain.

So agreements that are written up that have those four requirements can be considered a contract even if they don't have the heading 'Contract' on them. Contract is a broad term and there's a whole range of documents with different headings that meet this definition including funding agreements, lease, hire arrangement, insurance policy, for example.

Contracts impose enforceable obligations on the other party. The final point there shows that, that a breach of a contract can lead to legal action and the right to compensation for the loss they have suffered.
So they're the basics of a contract, and we'll go on now to chat about sub-contracts.

Slide 12



Slide Content:
Image: diagram representing sub-contracting arrangement. There are three columns – before, arranging and after. In each column there are three red circles representing Entity A, NFP B and Org. C. Under "Before," Entity A and NFP B are joined by dotted lines with a document in the middle, Org. C is separate. Under "Arranging," Entity A and NFP B are joined by dotted lines with a document in the middle, and NFP B and Org. C have separate arrows pointing toward a second document. In "After," Entity A and NFP B are joined by dotted lines with a document in the middle, and NFP B and Org. C are joined by dotted lines to the second document, there is a an arrow pointing from the first document to the second document.
Text: Sub-contracting arrangement.

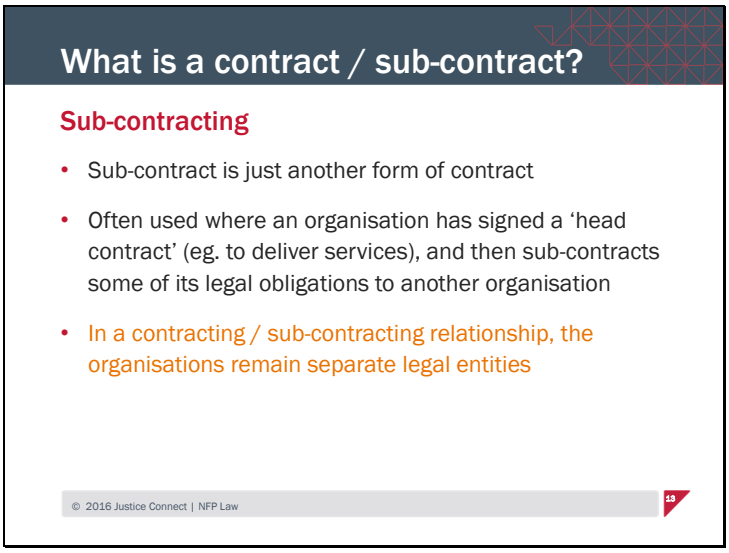
Transcript:
And here we've tried to document, or put in a diagram, how that might look, and this is one typical sub-contracting arrangement.

So in this example, in the before picture, Entity A – which could be government or a business or not for profit, has entered into a contract with NFP B to deliver services. And we'll call this contract the 'head contract'.

NFP B have then decided that they may not be able to do all of what's required by the head contract by themselves so they sub-contract some of the work to Organisation C.

So in the after picture we can see that Organisation C has been sub-contracted to deliver services for NFP B under the terms of the sub-contract, so they're helping NFP B fulfill their legal obligations under its head contract with Entity A.

Slide 13



Slide Content:
Text:
Sub-contracting

- Sub-contract is just another form of contract
- Often used where an organisation has signed a 'head contract' (eg. To deliver services), and then sub-contracts some of its legal obligations to another organisation
- In a contracting/sub-contracting relationship, the organisations remain separate legal entities

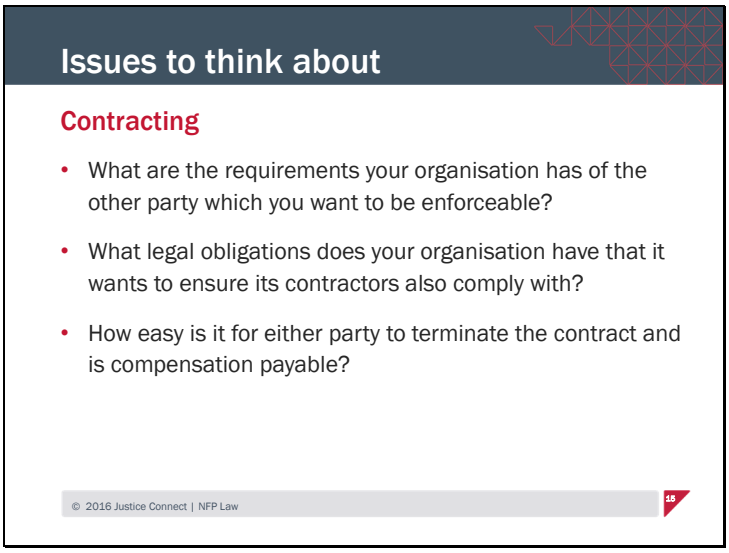
Transcript:
So a subcontract is another form of contract. It's often used where an organisation has signed a 'head contract' (eg. To deliver services), and then sub-contracts some of its legal obligations on to another organisation. As we've been noting with both types of arrangements, the organisations remain separate legal entities.

Slide 14

Slide Content:
Text: Issues to think about (section heading)

Transcript:
Some of the issues to think about if you are starting to contemplate contracting or sub-contracting; there are standard things that you'll find in most contracts and we do have a factsheet on our website, which I'll point you to at the end, that goes through some of the key terms you should be aware of.

Slide 15



Slide Content:
Contracting

- What are the requirements your organisation has of the other party which you want to be enforceable?
- What legal obligations does your organisation have that it wants to ensure its contractors also comply with?
- How easy is it for either party to terminate the contract and is compensation payable?

Transcript:
This is by no means a complete list but I've just picked three things for you to think about when you are contemplating contracting.

Point 1 is : what are the requirements your organisation has of the other party which you want to be enforceable? In the way we have been discussing, the idea of a contract is that you can enforce the other organisation to make good any promises that have been made and documented in the contract. You need to make sure that if you have any kind of requirement of your contractual partner it is listed in the contract. So, for example, don't assume they have insurance - you would want to put it, if you have any requirements, into the contract that your contractual partner have a specific kind of insurance, such as public liability insurance for a specific amount, say $2,000,000, and that you need to sight a copy of that insurance. Make sure that anything you want to be enforceable by you, that that actually makes it into the contract.

The other thing to think about is what legal obligations your organisation has that it wants to your contractors also comply with. Your not-for-profit organisation might be covered by federal privacy laws, and you might be contracting with a business who might not be covered by federal privacy laws but because they are doing business and carrying out services of your behalf you might want to make sure they are complying, and you can do that via the contract and put a clause in that they are complying to the same standard of legal obligations that you have. Privacy law is obviously one example there, you might have other obligations you want your contractors to comply with.

Just a third point, it’s always a really good idea for all parties to know how easy it is and what are the terms and conditions around the ability to terminate the contract and if compensation is payable.

They are just our three tips for contracting and just thinking about things you want to make sure are in a contract. But as I said we do have a factsheet that goes through all the common terms in a contract and you do really want to make sure you are completely across before you sign any contractual obligation on behalf of your organisation.

Slide 16

Slide Content:
Text:
Sub-contracting

- Does the head contract allow sub-contracting and what conditions does it have?
- Consider what terms of the head contract need to be included in the sub-contract?
    - Term of sub-contract
    - Requirements to provide goods or services
    - Liability, insurance and indemnities
    - Intellectual property
    - Confidentiality, information sharing, privacy
    - Dispute resolution
    - Termination of sub-contract

Transcript:
As I said, sub-contracting is just another type of contract so all the things we talked about on the last slide still apply but there are at least two additional questions that should always be asked. One is, and they kind of flow together, but does the head contract allow sub-contracting? Sometimes they will have a provision in saying you cannot sub-contract your obligations to another party or it might say you cannot without consent and sometimes the head contract might have conditions in the way in which you can go about sub-contracting – so it requires your sub-contractors to be approved or requires them to have certain licenses or qualifications.

Then also, and this cascades from the first question, consider what terms of the head contract need to be included in the sub-contract, so if you've got requirements on your organisation as a result of signing this head contract, which of those need to be included in the sub-contract? So, for example, the NDIS terms of business for registered providers contemplates that services may be contracted but it has conditions on the way sub-contractors are engaged so you'd want to be careful that they're set out in the sub-contract you have. Things like, taking the privacy example, access to records or information or levels of insurance or otherwise.

Slide 17

Slide Content:
Text: Due diligence and contracting/sub-contracting (section heading)

Transcript:
With each of these types of working with other arrangements, we're just discussing due diligence. We talked about it briefly in the first webinar if you wanted to review that but here we're talking about the level of research or investigation you might want to do into another party before you enter into some kind of arrangement with them. Which is low in terms of non-legally binding MOU as any party can walk away at any time, as it's not legally binding document but here we're talking about contracting and sub-contracting – these are enforceable arrangements so the due diligence level is medium.

You do want to know about this organisation that you are entering into this legally binding contract with, particularly if you're contracting or sub-contracting and they are delivering services on your behalf, you really want to know about their reputation, do they have what it takes to deliver on what you're requiring them to do, so you might ask for quite a lot of information via some sort of proposal or EOI or tender process. You might be looking at references and qualifications and past work. You might want to look at the kind of insurance arrangements, indemnities and warranties they have and a number of other information about the party you're thinking of entering into a contract with, depending on the circumstances.

We do think a medium level of due diligence is required and we have further information on due diligence on some of working with others resources, which I will point you to in just a moment.

Slide 18

Slide Content:
Text: Summary, top tips and further resources (section heading)

Transcript:
We've come to the end of our seminar today and we'll return to our case study.

Slide 19

Slide Content:
Text: Case Study: Central
Image: red light bulb, photo of a man

Transcript:
We'll look at Sam, the COO of Central.

Sam wants to engage Flash Systems to provide new client management and invoicing system to Central – and to provide ongoing IT support for the system. So in doing this he should be sure to sign a contract in relation to the system, he wants to bed down the arrangement.

In this situation, it's much of a muchness who provides the original contract, it could be provided to Flash Systems by Central or the other way round. In any event, Sam should definitely be looking in to all the clauses to ensure that it meets the needs of Central. For example, what is Central actually getting and how much are they liable to pay and particularly looking through the clauses for any extra hidden costs? Does Flash Systems have insurance? Will Flash, because they're providing some sort of information management system, have access to the personal information that Central hold and if so, are there sufficient protections in the contract to make sure Flash are contracted to protect personal information to the same level of protection that Central require? What happens if there is a dispute between the parties – how are this resolved? In what circumstances can Central end the contract?

So really working through to make sure all the key terms, I've mentioned some of them but definitely not all, but some of key terms are there and to the benefit of Central. There might be a fair bit of negotiation on a contract before it is got right.

In terms of Central sub-contracting some of their service agreement work to 3 smaller niche health providers, Sam should be looking to bed down many similar factors we've just talked about there in terms of the contract. Also in a sub-contracting situation, Sam might also be looking at any head contracts Central has signed and any other legislative requirements Central has when sub-contracting and these should also be built into the sub-contract. So Central is in a position to ensure the sub-contract relationship is authorized and that cascades any of those requirements from its head agreement to its sub-contract. So, for example, Central would want to ensure that any sub-contracted service providers agree to comply with the NDIS Terms of Business for Registered Providers, requisite personnel checks, agreement around access to records and a raft of other requirements.

Here, Same might want to get a lawyer who can draft a sub-contract in this way to make sure it covers off everything Central is required and that could be for both the contract with the allied health providers and also the contract with Flash.

Slide 20

Slide Content:
Text:
Top tips on contracting and sub-contracting

1. Time spent understanding the key provisions in a contract or sub-contract is time well spent (especially before you sign it)
2. When sub-contracting consider any head contracts and/or legislative requirements and ensure these are covered in the sub-contract
3. If unsure of a contractual term get legal advice: to make sure your organisation fully understands its legal obligation

Transcript:
So our top tips in this area.

Time spent understanding the key provisions in a contract or sub-contract is time well spent particularly before you sign it. Unfortunately we have worked with a number of organisation where they haven't been aware of the ability of another party to unilaterally terminate a contract with no notice, there has actually been a clause that they signed, and it's left them in financial difficulty. So really understanding those provisions up front and before you sign can save a lot of pitfalls later down the track.

As we've pointed out, when sub-contracting consider any head contracts and/or any other legislative requirements and ensure these are covered in the sub-contract and for legislative requirements, in any contract as well. This is an area for legal advice given that your organisation can have this kind of document enforced against you in a court of law, it's a good idea to understand your legal obligations.

Slide 21

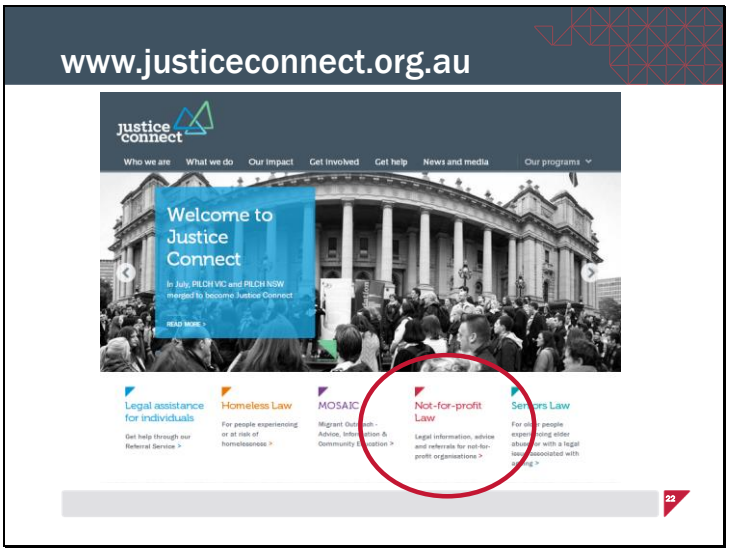
Slide Content:
Text: Introduction
What we will cover in this webinar series

- Part 1: Overview – legal options for working with others
- Part 2: Memoranda of Understanding
- Part 3: Contracting/sub-contracting
- Part 4: Mergers #1 (including amalgamation)
- Part 5: Mergers #2

This presentation is legal information, not legal advice.

Transcript:
So that's the end of our brief view of contracting and sub-contracting today.

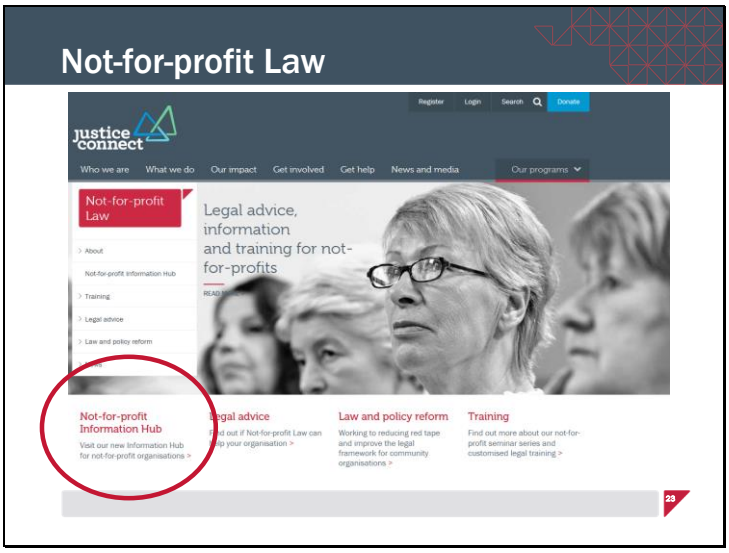
Slide 22



Slide content:
Image: Screen shot of justice Connect website available at www.justiceconnect.org.au

Transcript:
If you want to find out more please head to our website, you can either head to justiceconnect.org.au and come through our Not-for-profit law there in cherry red.

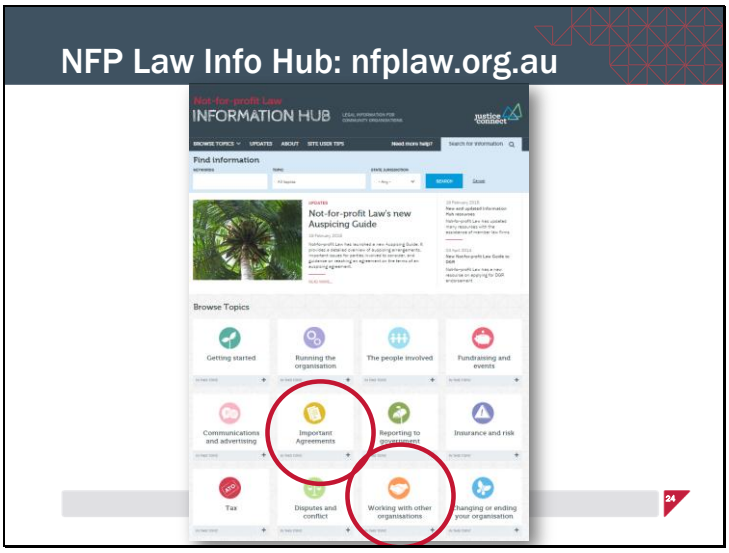
Slide 23



Slide Content:
Image: Screen shot of NFP Law homepage available at https://www.justiceconnect.org.au/our-programs/not-for-profit-law

Transcript:
And you can come here to our Information Hub.

Slide 24



Slide Content:
Image: Screenshot of NFP Law Information Hub available at nfplaw.org.au

Transcript:
Or you can come directly at nfplaw.org.au.

Here two parts of our Information Hub are particularly relevant, one on contracts generally in our “important agreements” part of the website, and particularly on sub-contracting in our “working with others” area. So we recommend both areas, we have factsheets, guides, and other information and animations and otherwise for you to work through in more detail.

Slide 25

Slide Content:

Text: About Not-for-profit Law (NFP Law)

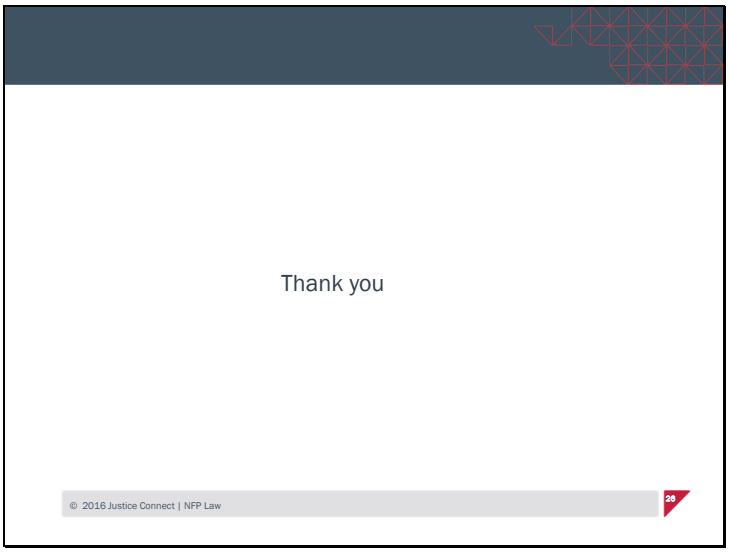
- Website: www.justiceconnect.org.au/nfplaw
- Phone: 1800 NFP LAW (1800 637 529)
- Our services:
    - The Information Hub: Legal information factsheets on common legal issues www.nfplaw.org.au
    - Legal training for community groups (online and face to face)
    - Law reform work aimed at reducing unnecessary NFP regulation
    - Phone advice to answer quick legal questions**
    - Referral to a pro bono lawyer to assist with complex legal issue**

** These are very limited services, available for eligible organisations only: see www.justiceconnect.org.au/nfpeligibility

Transcript:

Our basic details are there for more information that you might want for Justice Connect and Not-for-profit law services.

Slide 26



Slide Content:
Text: Thank you

Transcript:
And we'd like to thank you for joining us for part three of our working with others webinar. Part four and part five will be discussing mergers so we'll hope you back to listen to those sections.

For those interested, we have developed another series of webinars for NDS about Governance, if that's of interest to you please click over to NDS's website to listen to our three part series on Governance there. Thanks very much for joining us.