Title:
Social Enterprises in Australia: What are the legal and practical challenges to their operation?

Keywords (5 keywords maximum)
Social enterprise, corporate law, charity

Related Conference Theme:
Social Enterprise

Abstract (between 500 and 800 words in length, excluding bibliography):

This paper examines the way that social enterprises have structured their organisations in Australia in order to be creative and flexible in carrying out their mission and raising capital with which to ensure their sustainability. The research methodologies used are two-fold. The first is doctrinal legal research in accordance with which the author will systematically analyse the way that corporate and charity law operates in Australia, analyse the relationships between legal rules and explain areas of difficulty (Hutchinson 2012). The second is a case study approach that will be used to shed light on the operation of the Australian corporate and charity law legal system from a practical and real life perspective.

The United Kingdom (UK) and the United States of America (US) have developed legal entities that operate as social enterprises. In the UK this entity is the Community Interest Corporation (UK, Office of the Regulator of CIC) and in the US the Benefit Corporation (Forbes 2014). In Australia however, there is no specific entity that operates as a social enterprise and in fact no agreed definition of social enterprise (Barraket et al 2016).
Some Australian organisations and government institutions use the definition developed by Barraket which provides that to be a social enterprise an entity should have the following four characteristics. First it should be ‘led by an economic, social, cultural, or environmental mission consistent with public or community benefit’; second, it should ‘trade to fulfil this mission’, third, it should earn income from this trading and finally it should reinvest the majority of its profit/surplus in the fulfilment of its mission (Barraket et al 2016: 3).

Like charities and NFPs, social enterprises contribute to public service delivery. In Australia, they are typically small to medium sized enterprises and tackle complex social issues by working with government to address social concerns, for example, youth unemployment, through the provision of labour market transition programs employing at-risk youth (Mswaka and Aluko 2014). Social enterprises can also include large for-profit and NFP businesses that invest profits in projects dedicated to social goals, thus positioning them as explicitly hybrid organisations (Doherty et al 2014; Morgan 2018).

In 2016 Barraket estimated that about 70 per cent of social enterprises in Australia were structured as not-for-profits (NFPs) (Barraket et al 2016). In other words, any surpluses that the organisation makes are reinvested into the organisation for the purposes of its mission. However, the reality is that not all social enterprises exist solely for public benefit and not all organisations use most of their profits in mission fulfilment. To add to the challenges for social enterprises in Australia, the regulatory system pushes entities into either for profit structures such as the private company limited by shares which is supervised by the Australian Securities Investment Commission (ASIC) or NFP structures, usually a charity, which is then regulated by the Australian Charities and not-for-profits Commission (ACNC).

A significant issue for both for-profit and NFP entities under the Australian legal system that wish to carry on a business, is their limitations in respect of capital raising. A proprietary company limited by shares can issue shares to raise funds however it is restricted to 50 shareholders, other than employee shareholders, and cannot usually trade its shares on the stock exchange. A charity can gain funds through grants, both from private philanthropic organisations and the government, and, if eligible can receive donations that are tax deductible to the donor. However it cannot issue shares in its enterprise and, in some circumstances, may find it difficult to borrow funds.

Social enterprises often straddle both the private and the NFP sector and have expressed the need to be able to raise funds in a more flexible way. In order to overcome the limitations of either for-profit or NFP structures some social enterprises have developed alternative structures combining for-profit and NFP entities (Justice Connect 2017; Morgan 2018).

This paper will examine two of these structures in detail to demonstrate the advantages and difficulties that they offer to social enterprises.

Bibliography


