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What is a 'social enterprise' and why does it matter?

A trending term in the business world over the last year is 'social enterprise'. This represents a new interpretation on an old way of thinking – that business should be about more than profit. In September 2017, more than 1,600 delegates attended the Social Enterprise World Forum in Christchurch. What were they discussing and what are some ways this movement is seeking to have an impact today?

What is a social enterprise?

To start with we need to get the definition right. In New Zealand the Ākina Foundation works in the social enterprise sector and its definition is a good one: *Social enterprises are purpose-driven organisations that trade to deliver social and environmental impact.*

The key word there is *purpose*. Traditional business has had more of a focus on profit than purpose. In fact, that focus on profit is baked into our business model. For example, how important the shareholders of a company are and the focus on the directors returning profit to them.

Social enterprise flips that around and places the primary importance on *purpose* over *profit*. While these are businesses which are trading and they need a profit to continue, there is often some other reason for their existence beyond the money factor. In the past we might have relegated this 'do good' approach to the realm of charities and not-for-profits. Social enterprises bring purpose front and centre and, perhaps most critically, provide a self-sustaining model for achieving good in society. Think about it – how are charities and not-for-profits operated? Often they are dependent on grants or funding streams which may dry up over time and as the political climate or giving habits of donors shift. Social enterprises are longer-term solutions that often address real needs in a practical way. They seek to combine the heart of charity with the profit-making mindset of business.

Other factors making social enterprises different

This all may be intriguing, but what are some of the additional elements that set social enterprises apart?

1. **Purpose:** This should be clearly defined and set out
2. **Profit distribution:** A percentage should be reinvested into the purpose (how much is a point of debate)
3. **Asset lock:** May provide for the distribution of assets on wind-up to another similar entity acting for a comparable purpose, and

IN THIS ISSUE »

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LAWYERS

What shape might a social enterprise take?

Steve has an idea for a business that will manufacture a new product. He will employ five people. He hopes to make $40,000 profit and pay that out as a dividend to himself.

Susan also has an idea for a business but her product is biodegradable and made from sustainably-sourced raw materials. She will employ five people but will hire them from a disadvantaged group (former drug addicts). She hopes to make $40,000 profit and wants to put back half into the purpose of the business that includes education about drug abuse.

These hypothetical examples illustrate how Susan is taking into account many extra factors when designing her business and the social enterprise elements that are present – trading to deliver a social and/or environmental impact.

4. **Reporting:** Transparency and clear communication of how the purpose is being fulfilled and its tangible impact.

In New Zealand there is no bespoke form of legal entity for social enterprises. If an entity has most of the elements above then it may start calling itself a social enterprise. In other words, there is no box to be ticked on a form or a particular legal structure that signals to the world that intention. This is in contrast to countries such as the United Kingdom, Canada and the United States that have adopted legal structures better suited to social enterprises.

Legal forms of social enterprises

Often a social enterprise will end up being a limited liability company. Some may choose to become charitable entities, either as charitable trusts or companies. There is a tension here, of course, because a charitable entity cannot return profits to investors. That means they are not the best option to raise money (investors seek a market rate return). In contrast, while a company may attract investors it can be difficult explaining that the business has more than just profit in mind.

A good argument can be made that we need some new legal form that sits in the middle between a charity and a profit-making entity and embraces the best of both those structures. Such a 'social enterprise company' would certainly raise the profile of the sector and provide a means to empower those individuals who want to combine purpose and profit.

How might all this affect traditional business?

By now you will recognise that the intention behind social enterprises is not new – people have acted in ways that go beyond profit for years. Often the outlet has been through charities (think op shops) so, in some ways, 'social enterprise' is just a fresh term and new way of expressing older concepts. What is clear is that it aligns with the next generation seeking purpose in their work. Often job interviews are not ending with questions such as, "Will I get a company car", but instead, "How will my role contribute to society?"

Traditional business can learn from the approach of social enterprises and even be involved in supporting them in different ways, such as:

1. **Social Procurement:** Consider how goods and services are secured. For example, at the next board retreat have lunches from a social enterprise catering company?
2. **Purpose and vision:** Whatever your business, it can be helpful to write down your purpose and vision. Get your 'why do we do this?' right as that can also help motivate staff, and
3. **Impact:** What is the footprint of your business? Who are your suppliers? Who do you employ? Is your corporate social responsibility policy gathering dust in a drawer?

Social enterprises are a growing force but they will only have true impact if they can scale. To do that they need traditional companies to better understand what they are and support them too.

Challenges ahead for social enterprises

Some of the challenges have been hinted at already such as gaining access to funding and finding buyers for the products made, or the services offered.

At the upcoming conference at Te Papa in April, *Perspectives on Charity Law, Accounting and Regulation in New Zealand*, there will be a session about social enterprises and where they fit in the not-for-profit world. Many charities are actively exploring what it might look like for them to start a social enterprise to diversify their income streams. Increasing education and awareness about the role social enterprises can play remains a challenge for the sector.

Another more subtle challenge is when businesses adopt the term 'social enterprise' as a way to entice consumers to buy what they are offering. This could result in the entire sector being discredited and dilute the true value of what the term stands for.

Looking ahead

This is more than a passing trend. The social enterprise sector is growing and it provides an alternative way of thinking about doing business. Whether or not you choose to be involved in starting a social enterprise or working for one, the principles that sit behind them have broader application to all businesses that are looking to have a positive impact on the world. *

Economic disparity at the end of a relationship

How might this impact you?

As much as we like to think we are living in the modern day, there are still a large number of relationships that follow the more 'traditional' practice of having one party act as the 'homemaker', while the other acts as the 'breadwinner'. If the relationship breaks up, economic disparity is likely to be an issue.

With the divorce rate in New Zealand sitting at around 50%, chances are you have friends and family members who have structured their relationship in this more traditional sense and have now separated. The result is often that the 'homemaker' is left in a worse position financially because they have been out of the workforce for a long time and will struggle to get back into their career. The breadwinner, meanwhile, who could focus on their career during the relationship, is now earning at their full potential. This is economic disparity – one party is advantaged over the other.

One of the principles of the Property (Relationships) Act 1976 (PRA) is that a de facto relationship, civil union or marriage is a partnership of equals and that financial and non-financial contributions to that relationship are equal; the homemaker's contributions are equal to the breadwinner's. There is also a presumption of equal sharing of relationship property; but what about the earning potential of one party over the other? If that earning potential has increased during the relationship, should that be considered an asset of the relationship or relationship property?

Can we 'fix' disparity?

Section 15 of the PRA allows for one party to be compensated if the income and living standards of the other party are likely to be significantly higher due to the 'division of functions' within the relationship – the role of breadwinner and homemaker.

Parliament acknowledged that an equal division of relationship property doesn't always achieve fairness if one party is able to walk away with not only half the assets, but also a considerable income-earning ability, while the other has foregone theirs and supported the breadwinner in the process. While statistically the party left worse off after separation is almost always female, as the Prime Minister, Jacinda Ardern and her partner, Clarke Gayford have recently shown us, women can be breadwinners too and economic disparity can affect men.

Same-sex couples can also be vulnerable to economic disparity, which can arise in any relationship where one party has been able to progress their career while the other looks after the home.

The Law Commission recently reported that s15 has had limited success in achieving its objective. It found that sharing property equally doesn't always result in an equal outcome. Following a separation, on average, mothers who are caring for children have their household income reduced by 19% while men in employment increase their household income by 16%. Economic disparity and how to address the issues arising from the more 'traditional' relationship roles is a significant focus of the Law Commission in its current review of the PRA.

Recent boost to claims

Economic disparity claims have been given a boost by the recent Supreme Court decision of *Scott v Williams*[1]. This case involved a couple who structured their relationship in the 'traditional sense'. Ms Scott, who had accounting and law degrees, put her career on hold to look after the couple's children while Mr Williams built up a successful legal practice. When they separated after more than 25 years of marriage their incomes were vastly different.

The court ultimately found (after eight years of court battles) that in a long-term relationship, where there is the traditional split of roles between homemaker and breadwinner, and a significant disparity in income, an economic disparity claim can be presumed and compensation should be paid. The amount of compensation is determined on a case-by-case basis. There is no set method for determining the compensation, which does make it difficult for parties to agree.

Since s15 made its way into law in 2001, there have been about 100 cases go through the courts on this point, with only around 40% having been successful. Economic disparity remains a difficult, complicated and emotional topic for separating couples to discuss and on which to agree.

If you have separated and believe economic disparity is an issue, please talk with us to discuss whether this is a claim that may affect you, and how you either negotiate or defend such a claim. A contracting out agreement (colloquially known as a 'pre-nup') may assist, if prepared properly from the outset. If you wish to achieve some level of certainty, it would pay to contact us. ✱

1 *Scott v Williams* [2017] NZSC 185

Preventing money-laundering in New Zealand: a law firm's role

New changes regarding law firms are coming into force and they may affect your next visit to us. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (known as AML/CFT) applies to New Zealand law firms from 1 July of this year.

The legislation aims to ensure New Zealand is a safe place to conduct business. The government wants this country to remain at the top of the list of low risk countries with a reputation for low corruption and strong protocols to prevent money laundering activity.

What is money laundering?

Money laundering is the acquisition, possession, transfer, concealment or the conversion of property knowing it is derived from a criminal offence. There are three stages of money laundering:

1. Placement
2. Layering, and
3. Integration.

This activity can occur when funds are processed via a law firm's trust account to make them appear legal and legitimate. Moving that money into a law firm's trust account and into a legal transaction (such as buying a house) can make that money untraceable back to the illegal activity from which it came.

Similarly, this law aims to stop people in New Zealand who may finance terrorism. These people can also transfer money towards terrorism by involving a law firm to avoid being caught by law enforcement and to hide their identities.

Why are law firms a target for money laundering?

Criminals who launder money often see law firms as 'gate keepers' that can help them create funds that appear genuine.

How money laundering works

Let's use an example: Alexia has $100,000 of illegal funds she has received from drug dealing in Botswana. She makes an offer to buy a house in New Zealand and instructs a new lawyer, Jim, to establish a trust and act in this purchase. Jim, although he has only just met Alexia, doesn't ask her any questions about her identity or the source of her $100,000 deposit. Alexia gets the funds paid into Jim's law firm's trust account from her overseas Botswana account. Jim doesn't enquire as to the bank account they have come from (an unknown Botswana bank). Jim, during the property transaction, forwards the funds to the seller's lawyer for the purchase of the property. Alexia no longer has the funds and now the trust she has created owns a New Zealand property.

Alexia later sells the property on behalf of the trust and benefits from legitimate funds which have arrived in her New Zealand bank account from a New Zealand lawyer's trust account.

In this example we can see the three steps of money laundering come full circle. First, we saw *placement* when Alexia transferred the money into Jim's trust account. Second, *layering* when Alexia used it for her trust when buying New Zealand property. Lastly, we saw the criminal proceeds *integrated* into New Zealand funds when it was transferred to another lawyer's trust account when the property was transferred to Alexia's trust.

What's the issue?

If Jim the lawyer had conducted a careful inspection of the origins of the funds and into the client/trustee, Alexia, it's likely he would have seen multiple red flags.

From 1 July 2018, the AML/CFT Act 2009 requires New Zealand law firms to mitigate and eliminate the risk of being used to facilitate money laundering or terrorist financing activities. All lawyers will be required to do this by verifying identities of their clients and the legitimacy of the transactions. This is called *customer due diligence* (CDD). To comply with CDD, law firms must conduct a screening to formally identify their client, any other person related to the transaction and the actual funds for the transaction.

When we ask for identification, proof of address, source of the funds or any other questions that relate to you or your transaction, don't be alarmed; all lawyers are required to do this. Even if you have had the same lawyer for 20 years, we are still required to conduct CDD after 1 July 2018 for every new matter.

Banks, other financial institutions and casinos have been required to comply with this legislation since 2013. Accountants, real estate agents, sellers of high value goods and sports betting agencies are next in line and will all be required to be fully compliant over the next 18 months.

We all want New Zealand to be a safe place to do business, and we need your help to make this so. We have a professional obligation to comply with this legislation. If not, there are a significant range of financial sanctions and penalties that could result. ✱

Regulating stock movements during *Mycoplasma bovis* outbreak

Mycoplasma bovis (M.bovis) is a bacterial disease commonly found in cows all over the world. First detected in New Zealand in July 2017, it has affected a small number of farms in the South Island and Hawke's Bay. The Ministry of Primary Industries (MPI) is working hard with farmers to control the disease and, if possible, eradicate it from New Zealand.

M.bovis causes a range of diseases in cows including mastitis that doesn't respond to treatment, arthritis, pneumonia and late-term miscarriage. Although it affects cows, it poses no risk to food safety or human health. *M.bovis* is mainly spread through close and prolonged contact between infected animals, through the movement of stock, contaminated equipment and feeding untreated milk to calves. It's not windborne, it doesn't spread through streams or rivers and, thankfully, it is a relatively slow-moving disease.

Despite *M.bovis* not endangering the food chain, it's imperative that it is not inadvertently spread when moving stock. Having healthy cows is vital to New Zealand's economy.

Farmer and stock owner obligations when moving cows

M.bovis is an unwanted organism under the Biosecurity Act 1993. Anyone in charge of cows must comply with the National Animal Identification and Tracing (NAIT) regulations and all animal movements must be recorded and retained.

The outbreak of *M.bovis* highlights the importance of the NAIT recording system.

The NAIT scheme provides for cows to be tagged and registered in a national database which records an animal's location, movements and contact details for the person in charge of that animal. The scheme provides traceability and enhances New Zealand's ability to respond quickly to a disease outbreak such as *M.bovis*.

Moving cows between properties, and when sending cows to slaughter (with the exception of bobby calves), requires an Animal Status Declaration to be completed.

Restricted Place Notices and Notices of Direction

Under the Biosecurity Act, MPI can issue two notices to control stock movement:

1. Restricted Place Notice: These are placed on any properties that are believed to have, or are suspected to have, *M.bovis*. This effectively places them under quarantine lockdown, and stock movement is restricted.
2. Notice of Directions: Issued to farms when an inspector or authorised person considers that the movement of stock poses a risk of spreading *M.bovis*, eg: when animals from infected properties have been moved to a property but testing has not yet taken place or test results are pending.

Have a written agreement when buying cows

M.bovis can be difficult to detect, therefore having a written agreement in place when buying new cows provides protection for the purchaser and their existing herd. An agreement places obligations on the vendor, and provides the purchaser with warranties on the cows being purchased, such as information about animal health, including disease and treatment history. It can include a provision that a purchaser may reject cows, as at the purchase date, on the basis that they do not comply with the vendor warranties.

An agreement will also provide the purchaser with the protection that should the vendor breach any of the warranties contained in the agreement, they can seek to enforce remedies for any loss suffered by them against the vendor.

When buying or selling stock, we recommend having a written agreement. Do talk with us first to ensure that adequate protection and remedies are available to both purchaser and vendor. *

NZ LAW Limited is an association of independent legal practices with member firms located throughout New Zealand. There are 54 member firms practising in over 70 locations.

NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills, information and ideas whilst maintaining client confidentiality.

Postscript

Kawarau Falls case: an update

In our Autumn 2017 edition, the article 'Buying off the Plans' (page 4) noted that the Kawarau Falls case had been appealed to the Supreme Court and we were awaiting its decision.

To recap on this case: in September 2016 the Court of Appeal held that in circumstances where an 'off the plans' project could not be completed and the Agreement for Sale and Purchase had been cancelled by the developer, the developer had to pay purchasers back their deposits.

Although this result appeared to set a favourable precedent for purchasers, a purchaser's rights became uncertain when the Court of Appeal decision was appealed to the Supreme Court.

On 6 October 2017, the Supreme Court of New Zealand released its judgment[2]. The majority of the Supreme Court agreed with the lower court and found that the deposits must be refunded to the purchasers, and dismissed the appeal.

The rights of purchasers, in circumstances where they have bought off the plans and the project cannot be completed, are now clearer. *

Food Act 2014 – rolling deadlines to register your food business

The legislation has introduced a sliding scale where businesses that are at a higher risk, from a food safety viewpoint, are required to operate under stricter requirements than lower risk outlets. The Ministry of Primary Industries (MPI) points out that a corner dairy operator who reheats meat pies is treated differently from a meat pie manufacturer.

New food businesses must register when they start to trade. Existing businesses are required to register with a set of rolling deadlines.

Registration was required by **31 March 2018** for a group of businesses including cafes and clubs without an alcohol licence, bakeries, caterers, rest homes, dairies, convenience stores and some food manufacturers. For a comprehensive list, go **here**. If your business is in this group and hasn't registered, you must be in touch with MPI now.

The next group of businesses to register must do so by 30 November 2018. Go to MPI's website, (www.mpi.govt.nz) for more details. *

Minimum wage increased on 1 April

We remind you that the minimum wage rates were raised on 1 April 2018. They are now:

- $16.50/hour for adults
- Starting-out and training rates are $13.20/hour. These are 80% of the adult minimum wage. *

2 *Kawarau Village Holdings Ltd v Sun* [2017] NZSC 150

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