Employee mutuals: the legal issues

David Alcock

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Anthony Collins
solicitors

Who's he?

- Anthony Collins Solicitors – based in Birmingham, working all over the country
- Leaders in the "space" between the public, private and third sectors
- Specialising in social enterprise
  - Procurement and social enterprise
  - Community Asset transfer
  - Mutuals Information Service – working with Co-operatives UK

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solicitors

What are the legal issues?

- Public sector powers
- Structure and governance
- Procurement
- Staffing issues
- Transfer of assets
- State aid
- Contract / relationship management

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Public sector powers

- Central govt depts – the Crown limited only by prohibitions
- Local authorities – well being power? NB LAML case
- Need to demonstrate well being impact
- General power of competence to come
- Other public sector – need to review powers to set up companies

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Structure and governance

- What is a “mutual”?
- What is a “social enterprise”?

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Structure and governance

A social enterprise is “a business which is:

- “being carried on primarily for a purpose that ***promotes or improves the social or environmental well-being*** of the United Kingdom, whether the purpose is pursued in relation to all or any part of the United Kingdom or all or any of the persons resident or present in it; and
- ***the greater part of any profits for distribution is applied for such a purpose***.”

Public Services (Social Enterprise and Social Value) Bill

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What are the options?

Profit distributing structures:

- Companies limited by shares
  - Including PLCs
- Limited Liability Partnerships
- Co-operative Societies
- Community interest company ltd by shares

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What are the options?

Non profit distributing structures:

- Companies limited by guarantee
- Community Benefit Societies
- Community interest company limited by guarantee

- Charitable status … (Charitable Incorporated Organisation – CIO)

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Key issues

- What will the public sector involvement be, if any? (NB linked to other issues esp. procurement)
- Who will the members and board be …
- …and, given that, how exactly will staff be involved?
- What will the new organisation do with surpluses that it makes?
- Is charitable status possible / relevant / desirable?

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Procurement

- Is getting business from the public sector (including the body “spun out of”) crucial?
- If so …new entity will have to compete with other suppliers unless “Teckal” exemption applies

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Staffing issues

- TUPE regulations may apply
  - If an in-house service is being outsourced then staff dedicated to that service will transfer under TUPE
- Will staff automatically become members of the new mutual?
- Beware of pensions
- Manage the risk in advance

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Transfer of assets

- Where will the new body be based? On what basis will it occupy those premises?
  - Community asset transfer
- What about equipment?
- What about IT or software licences, or intellectual property?

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State aid

- Branch of European competition law
- Aims to create a level playing field for business
- Concerns the extent to which public sector bodies can support specific organisations (because of potential to distort competition)

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State aid

- Key elements:
  - Aid from public sector
  - Which favours certain “undertakings”
  - And distorts competition
  - Which affects trade between EU members states
- “De minimis” level of €200,000 over three years (around £170,000)

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Contract / relationship management

- How will public body manage relationship
  - Framework agreement?
- And how will it manage contract?
  - Performance and accountability
- Will relationship change:
  - Procurement issues

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Thanks for listening!

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