



‘The Sharing Economy’: more than the sum of its parts? Implications for legal services

Summary of Proceedings of Workshops organized by Professor Bronwen Morgan and Dr. Declan Kuch with EDO Victoria

These events were part of a tour of Janelle Orsi, UNSW Visiting Research Fellow, practising lawyer in the US, and co-founder of the Sustainable Economies Law Centre ([hyperlink](#)). In tandem with public lectures in Melbourne, Sydney and Brisbane, Janelle participated in three workshops:

- ‘New Directions From the Sharing Economy? Using Law on Behalf of the Environment’
14 February 2014, Melbourne, co-hosted by UNSW Law and EDO Victoria
- ‘Challenges for ‘Business as Usual’ from the Sharing Economy: Perspectives from Law, Economy and City Life’
21 February 2014, Sydney, hosted by UNSW School of Law
- ‘Building Sustainable Communities by Supporting the ‘Sharing Economy’
25 February 2014, Brisbane, Southbank Graduate Centre, hosted by Australian Earth Laws Alliance

Organisers

Prof Bronwen Morgan, Dr Declan Kuch, EDO Victoria, Michelle Maloney, Brad Jessup

Acknowledgements

Financed through the ARC Future Fellowship and the UNSW Faculty of Law, with generous support provided by EDO staff. Thanks also to Jason Gardoll for his assistance.

Suggested Citation:

Morgan, B., Kuch, D. (2014) ‘The Sharing Economy’: more than the sum of its parts? Implications for legal services. Summary of Workshops with Janelle Orsi. UNSW Law.

Executive Summary - Key points of discussion

- ‘Taking back’ the economy from mainstream economic approaches is already happening in many creative ways; coordinating across and learning from sectors such as transport, community energy and co-working may be necessary to scale a sharing economy from the margins to the centre.
- Legal practice in the sharing economy is less likely to be risk averse and reactive, and more likely to be inclusive, proactive and group clients in new ways
- Scale of sharing economy is both a matter of jurisdiction and technology to enable participation in more democratic economic forms such as coops. Technology also vital consideration in enclosure of common resources by private interests
- Moral questions around consumption are revived in a sharing economy – agreements to purchase locally and sustainably may allow small-scale enterprises to operate effectively
- Much of the sharing economy existing is ‘grey areas’ between individual and social – this is uncomfortable for most legal practitioners
- Cutting edge initiatives have found legal support difficult to find, though waiting to get the right expert has been worth it
- The rules and policies of the ‘platforms’ that host the interactions constituting the sharing economy will be the constitutions of the 21st Century.

Contents

Executive Summary - Key points of discussion	2
Introduction and Motivation	3
Demand.....	4
Institutional Creativity and ‘commoning’	4
Supply.....	5
Existing Public Service/Interest.....	5
Bad Fit with State and Commercial Sectors.....	6
Box 1: Open Food Network.....	7
Grey Areas and Ethical Quandaries	7
Box 2: Cottage Food Laws as Activism: a story from California.....	8
Activism.....	8
Conclusions and paths forward	9
Small Scale ‘niche’ vs. next big thing?.....	9
The market – existing capital and the political economy of the sharing economy.....	9
Appendix: knocking over the hurdles and making it happen	10

Introduction and Motivation

The 'sharing economy' has risen to prominence in recent years as recession, outsourcing, environmental depletion and alienation drive workers and consumers into new forms of economic action. A variety of initiatives such as car-sharing, community energy, co-working and co-housing projects have challenged both individualised and conventional corporate for-profit economic organisation. Representatives from initiatives in these sectors were present at the workshop to share their motivations, experiences, and suggestions to build the sharing economy.

The likely trajectory of the sharing economy rests in large measure on the legal details of ownership, control, liability and the flow of money (as well as on different policy enabling roles). Much of this detail exists in navigating new paths between the corporate and social, individual and collective. Thus, practicing lawyers were key participants in the workshops to provide insights into how sharing may be enabled or constrained through transactions and organisational forms.

Transactional law – the law relating to contracts, organisational entity choice, intellectual property, securities and financing mechanisms - is increasingly key to new public justifications for economic arrangements. Janelle Orsi's pioneering work on locating transactional law at the heart of a nurturing – rather than extractive – 'sharing economy' provided the catalyst for the workshop series reported on in these pages, and her physical presence attracted participants in Brisbane, Sydney and Melbourne (details on the front page)

The workshops listed on the front page had varying emphases. The Melbourne workshop brought practicing lawyers and environmental advocates together to discuss new models of legal practice appropriate for a sharing economy. The Sydney workshop discussed the links between activism and enterprise in the context of urban initiatives around food, energy and transport, focusing particularly on how to respond to concerns about the externalities of the sharing economy.

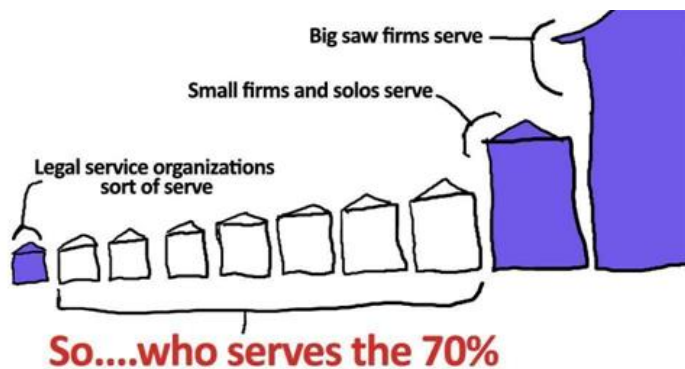
Our motivations for organising the workshops were fourfold. First, we sought to consolidate project findings from the first phase of the ['Activism vs Enterprise'](#) research project, drawing on interviews with some 50 participants in Australia and the UK about their experiences with these initiatives accessing legal support services and choosing structures for their organisations. Secondly, we sought to establish whether activity in these otherwise dispersed sectors added to anything more than the sum of their parts. Thirdly, we – and our collaborators in particular - were interested in the practical implications of the first two issues for professional legal services in Australia. Finally, we sought to strengthen our links with other major cities where a range of sharing activities were already taking place.

This summary paper is not a direct reconstruction of the workshop discussions, which were conducted under the Chatham House rule. Nor does it integrate information and sources from outside the workshop, or in any way seek to provide a comprehensive overview of links between the sharing economy and legal services. Rather, it extracts the key points of the discussion and structures them in a manner which we hope makes visible the key practical issues and strategic possibilities.

Demand

This image is Janelle's visual representation of the economic and ecological crises that provide the context for - and perhaps have directly spawned - the diverse initiatives in community-owned energy, local food initiatives, co-working, car-sharing and reuse/recycle schemes that were present at the workshops.

Founders and members of many of these 'sharing economy' initiatives have often struggled to find appropriate legal advice for their projects and therefore avoided lawyers until things went wrong. This reactive approach to seeking legal advice is symptomatic of a wider split in legal services between the poorest on one hand and corporate models of billing on the other. Janelle's lectures and seminar presentations used the following illustration of this disjuncture:



The ABA says: the legal needs of the middle 70% are largely unmet

Statistic cited by the Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Institutional Creativity and 'commoning'

The struggles of the creative initiatives of the emergent sharing economy are instructive, and may have much wider applicability to this huge, latent demand for accessible, reasonably priced legal services. By Janelle and Jenny Kassan's reckoning, some 500 000 sharing lawyers will be needed in the United States to transition away from extractive, parasitic economic models towards a sharing economy. Janelle's own experience shows that demand can be created for new forms of legal services, however lead times are long – she took 6 years to develop the expertise to effectively run clinics for not-for-profits and other non-corporate initiatives.

Workshop participants embedded in current Community Legal Centres reinforced that scaling sharing economy services to the 70% will not be a simple process of extrapolating existing practices, but would rather require careful judgements about eligibility. Criteria should include both innovativeness and need. This was a stimulating topic of discussion. Janelle suggested putting out a Request for Tender offering free legal help to 6 initiatives of a certain type for a limited amount of time.

The Property versus Commons binary has enormous weight historically and practically, and arose throughout the workshops and discussions. For practitioners seeking to 'Take Back the Economy', rethinking this binary in creative ways is crucial. 'Commoning' is an ongoing process whereby goods, knowledge and resources are accessible for use by all in a community. Janelle has suggested that Elinor Ostrom's principles for managing the commons can also apply to cooperatives: define boundaries and rules for use; ensure decision-making is participatory; monitor use in an accountable way; graduate sanctions for exploitation; ensure conflict resolution methods are accessible to the group; establish how group self-governance and autonomy will be recognised by other authorities. For larger groups: multiple layers of nested enterprises (to keep group sizes small).

Practically, the challenge of nesting disparate groups into a sharing economy means developing skills to nurture trust and patience. These skills suggest the sharing economy may require a distinctive set of emotional and collaborative competencies - ones that are not usually nurtured by markets embedded in highly extractive capital systems. Markets and capitalism both mix up categories of friendship and stranger in different ways to the temporalities of sharing and affective modes of nurturing alluded to in the workshops.

Technology and creativity cut both ways here: it can allow for group size and decision-making to be expanded through online networks and thereby augmenting decision-making essential to cooperative governance; however, innovative methods are used in sharing initiatives to keep users apart, keep users as strangers and extract profits (as with some car sharing organisations such as GoGet). The many possibilities for technological platforms to structure forms of life in such divergent ways led one participant to suggest that platform rules and policies will be the constitutions of the 21st Century.

Supply

Existing Public Service/Interest

The shifts producing 'demand' described above gave many legal practitioners at workshops fresh impetus, vision and meaning – a sense of renewed moral vision, vocational pull and community-endorsed purpose. This was in part experienced as an antidote to negative connotations associated with existing modes of practice; for example:

- some participants identified as corporate refugees: People felt like they were in therapy, confessing, 'coming from war-torn law firms, battered and wanting to reinvent things'.
- many participants identified with the need to move away from negative, adversarial, competitive, risk-averse modes of practising.

- what might be described as an ‘Eeyore fixation’ - a tendency to see (legal) impediments and hurdles at every turn was strongly felt by many

More positively, workshop participants saw specific opportunities for environmental law. The capacity for these kinds of initiatives to build, bottom-up and from within the economy, a more sustainable system was seen as:

- an antidote to the ‘Eeyore fixation’ (all three workshops)
- unifying disparate ‘social’ or ‘community’ groups with a common purpose (Brisbane)
- articulating a fresh and positive agenda for a depleted environmental law (Melbourne)

Many specific concrete legal barriers to developing the sharing economy were identified but two in particular stood out:

- lack of familiarity with non-corporate legal forms - one of the key reasons the cooperative form is marginalised
- liability and insurance - a barrier for both sharing economy initiatives wanting to ‘do the right thing’ and practicing lawyers advising clients.

Bad Fit with State and Commercial Sectors

Much pro-bono advice, whether given directly or via referral from organisations such as the Public Interest Law Clearing House (PILCH), is aimed at standard Not-for-Profit structures. Even when pro-bono private advice is given to social ventures that are choosing to form as private companies, the advice is often geared to large-scale corporate or commercial models of enterprise, which often do not fit the founders’ mixed goals or their envisioned scale. And for other structures which might fit a hybrid venture quite well, such as cooperatives, there is a very thin spread of legal support services altogether

Part of the challenge here is defining ‘eligibility criteria’ for support, broadly defined. Participants at Janelle Orsi’s clinics at SELC have been effectively self-selecting and she stressed an ‘instinctive sense’ of what fits in the arena and what does not. Some participants were initially unconvinced of the ‘public interest’ potential of a hybrid legal entity in the abstract, but changed their minds once exposed to the ‘story’ of an initiative rather than the ‘typology’ of more commercial or social entities.

Available structures for enterprises and initiatives are also ill-fitting. For example Janelle Orsi’s not-for-profit foundation SELC had difficulty initially getting insurance coverage for securities law advice because the provider was a not-for-profit provider who focused on legal clinics.

There are developments in the Australian context that are relevant to this: the cooperative legal model has a [new business council](#), and the Legal Models Working Group of the [Social Innovation, Entrepreneurship and Enterprise Alliance](#) will shortly deliver a report on the range of possible legal entity structures for social enterprise.

A non-legal, non-regulatory approach is to treat hybridity as a ‘branding’ issue. [B-Lab certification](#) is available to Australian companies. Janelle Orsi imaginatively coined the term ‘T-Corporations’ for cooperatives with reference to that section of the tax code, and shortly afterwards garnered enthusiastic interest from a venture capitalist.

Box 1: Open Food Network

The Melbourne workshop brainstormed the case of the Open Food Network which was recently launched [at the Melbourne Sustainable Living Festival](#). This initiative aims to help scale up local food systems in ways that challenge the norms and practices of large-scale food retail. To achieve its aims thus far it has had to set up as a dual legal structure, and is contemplating a third entity. The ‘pty ltd’ structure carries out small-scale redistribution of surplus food locally. A not-for-profit charitable foundation owns the copyright to modular open source software that can be used by other local food distributors. A third trading entity is also being contemplated to provide services to those distributors as their businesses develop. The complexity of this structure across multiple dimensions (tax, funding, contracts, intellectual property) has generated huge challenges in securing legal support services.

Grey Areas and Ethical Quandaries

Beyond specific legal barriers and the poor fit with existing structures, the workshops showed that a particular challenge is presented by the numerous ‘grey (legal) areas’ that arise in the sharing economy . Sharing economy initiatives can come under regulatory purview in a context where the regulations were originally designed for much larger-scale and more commercially-oriented initiatives.

The Sydney workshop discussed a range of responses to this ‘regulatory conundrum’ that tended to centre on aspects of internal entity governance (e.g. micro-insurance bundled with consumer contracts, changes to ownership and control rules internal to entity, devising a legal entity structure distinctive to social enterprise). The Melbourne workshop suggested ‘embrace the grey’, almost as a call to arms, a symbol of a more positive professional culture, open to experimentation and innovation, while the Brisbane workshop stressed the real risks embedded in this.

Activism embracing non-compliance with legal advocacy has been particularly prominent in the food sector where SWAT teams in the US have stormed stores to remove raw milk (Box 2). At what scale can a passionate consumer response protect you? This will be a big issue especially for enabling platforms. This is exemplified in liability issues for sharing a cow, as has already arisen in Northern NSW.

Box 2: Cottage Food Laws as Activism: a story from California

Cottage food laws: A government official appears at a man's door. The man has been breaking the law: He has sold bread baked at home. This isn't a page from Kafka - it happened to Mark Stambler in Los Angeles. For decades, Stambler has followed traditional methods to bake loaves of French bread. The ingredients are simple: distilled water, sea salt, wild yeast and organic grains. Stambler even mills the grain himself. To make it easier to steam loaves, he built a wood-fired oven in his own backyard. Stambler's loaves came in first place at the Los Angeles County Fair and the California State Fair. An inspector from the health department even showed up at his doorstep to make sure "no bread baking was taking place." For the next 18 months, Pagnol Boulanger was forced to go on hiatus. That's when he "became an activist," Stambler said in an email interview....

All three workshops emphasised the importance of a broader sense of ethical purpose and commitment as infusing both sharing economy initiatives and the legal services that support them. In other words, the ethical quandaries it raises were not something solved by external state regulation.

Activism

We resisted defining activism, and were challenged in the Sydney workshop for this. For whom does Activism operate and to what ends? How and by what justification can we distinguish activism from lobbying? The discussion there unfolded around 'taking back' the city, the law, the economy. This was essentially seen as a process of drawing lines in new places to let the sharing economy 'breathe' and also shift taken-for-granted 'common sense'. Various suggestions for creative legal advocacy arose in the context of discussing grey regulatory areas and the risk of illegality, including:

- 'cheeky non-compliance' to raise visibility of inappropriate regulatory scope
- mobilising newly recruited consumers of new initiatives to lobby for change
- lobbying for targeted exemptions from restrictive legal hurdles, with eligibility perhaps based on publicly certified 'sharing economy' initiatives
- creating new funding platforms (especially around energy) that could serve as a rallying point for arguing for regulatory change in, eg, crowd-funding rules

Activism was also discussed as a blend of a moral undertaking to choose 'where our dollars are best sent' (represented by a cute anthropomorphised dollar bill in Janelle's public talks); but also a technical one to 'hack' infrastructure and allow new project forms to flourish.

The dangers of 'credit card activism' were flagged – whereby online petitions and 'clicktivism' subsumed civic engagement. Discussion of this topic in Sydney was particularly vigorous - the distinction between 'outsourcing' advocacy on one hand and more direct participation on the other was as controversial as between 'activism' and 'lobbying.'

Conclusions and paths forward

'We are all policy lawyers. We are all planners. We are all economists.' These were the messages of the workshops. In that spirit this summary provides a 'brainstorm appendix' of all the ideas for moving forward that were mooted at or immediately after the workshops - in no particular order of priority, but rather, as a spur to imagination...But whatever the next practical steps might be for those in the field, we close by noting two related points about the larger institutional context that were brought up repeatedly.

Small Scale 'niche' vs. next big thing?

What is the envisioned scope of sharing economy activities? How can scaling from neighbourhood level to city level occur - and should it? What happens when social capital, relationships and shared value are scaled up? A big part depends on the extent to which wider publics can engage with policy activism and occupy the grey areas between personal and commercial. Common-pool resource management requires recognition by other authorities. Thus, Janelle's response was to emphasise role of the state as enabler of these activities – a very different conception to the 'steering' function of regulation that has arisen over recent decades in the shift away from government ownership of assets.

Lawyers can be creative, for example by recontextualising activities (open source sharing platforms could be categorised as public libraries so that they can be structured as charities, for example), or by reinterpreting words like 'possess' and 'own', sometimes with reference to ancient rights traditions. Analogies were drawn suggesting that techniques used for distinguishing precedents in case law could be applied to policy or legislative domains.

This is where legal detail of ownership, control, liability and the flow of money (as well as on different policy enabling roles) is highly consequential.

The market – existing capital and the political economy of the sharing economy

Strategic questions of whether to 'hack' (break into or cut through aggressively) or 'tweak' (make fine adjustments) existing support structures and infrastructure run into wider questions of 'capitalism' and the profit motive. The dynamism of modern capital markets has long been recognised, so it's unsurprising that attempts to 'common' have been met fiercely by various forms of enclosure.

Some saw collaborative consumption as the privatisation of sharing behaviours. Equally, stories of the sharing economy are being pulled in different directions – bottom-up participatory, cooperative, social justice vs highly concentrated private ownership.

Janelle phrased this as a distinction between 'extractive' and 'nurturing' economic practices, and workshop participants pointed to the 'different worlds' of, for example, Peers Inc ([hyperlink](#)) and the Business Council of Mutuals and Cooperatives.

Appendix: knocking over the hurdles and making it happen

Sharing, Finance and Support

- Janelle recommended grouping together and bargaining for cheaper services within one area – energy or food- group discounts from tax, accountants, law – linked to Sydney workshop Tom’s suggestion to build shared infrastructure that moves costs upwards by aggregating (Peers, insurance, Freelancers Union etc)
- Create a sharing economy insurance practice
- Have a central point of contact for enquiries - a help desk/one stop shop that could coordinate such documents as:
 - A guidebook/”how to” manual (including examples of ‘success’, eg: the “Community Investment” manual in the UK). In the Community energy sector, these have proliferated. One participant instead suggested ‘how have [you dealt with issue X]’ style documents that are less didactic and show contingency and specificity could be more helpful
 - legal templates
 - practitioner availability for referrals - specialists who could answer and respond to enquiries (perhaps through setting up an “experts panel”)
- Provide training in working collaboratively and in innovative internal governance approaches (split boards, holocracy, liquid democracy)
- Have the ability to respond rapidly to proposals with good ‘new business’ potential
- Have the ability also to then service the ongoing ‘start-up’ needs of project proponents and instil confidence regarding the pathway – generate commitment
- Brad stressed goal of creating a network rather than a mere list of excited people
- Penny Swales suggested an Arts/Law-type database of expertise
- Set in motion a PR “machine” to promote ‘the sharing economy’ and counter negative media
- Ensure that the professional advice in place can assist with:
 - (i) Feasibility/due diligence and business planning
 - (ii) Installing the legal model
 - (iii) capital raising
 - (iv) governance, membership and reporting
 - (v) service delivery
 - (vi) ongoing support.

Legal Support and Practice

- Another suggestion was to use [Legal Response Network](#) style initiatives to gather expertise within big law firms and provide answers that can be shared pro bono.
- Provide legal advice via a cooperative legal firm
- Create a not-for-profit modelled on SELC
- Janelle – suggested RFP and free legal advice to 6 people
 - Build clinics (Brad) and cafes (Anna/Joel, the Hub)
 - Establish networks eg QPILCH and Spiral Community Hub

- QPILCH and community groups (especially Spiral Community Hub) are meeting to see how they can help each other – QPILCH want to rearrange their method of how they select people/bring people in through the door
- EDO Victoria – keen to develop a proposal to do transactional work – Lord Mayors’ Foundation – Innovation funding – Brendan did EOI – can share that with us
- Victoria Law Foundation could be source of funding
- Model of SELC could be a basis
- Minter Ellison reorganising their practice – willing to list people who will help to provide advice – quasi- database
- EDO and AELA need to shape the expressed willingness of the private sector to give pro bono advice
- There is a dormant community of lawyers spread around Northern NSW. Brisbane workshop suggested potential connection to new activities such as clinics if it could be well coordinated.