

# Activism, Sustainability and the Sharing Economy

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## 1. Activism and Enterprise: Hybrid Endeavours

In 2008, the Green Alliance, a UK thinktank on environmental issues, argued that a ‘new politics of climate change’ was emerging (Hale & Alliance 2008). They suggested the novelty was three-fold. First, advocacy focused on government is increasingly supplemented or even displaced by social mobilisation focused on communities. Secondly, an emphasis on social goals is augmenting the narrower focus on environmental goals (Gilding 2011). Thirdly, a largely instrumental preoccupation with institutional design is increasingly supplemented by an insistence on the importance of values and identity (Crompton & Kasser 2010).

In this paper, we situate the rising interest in the ‘sharing economy’ in the context of the new politics of climate change, and provide a framework for thinking about the role of law and lawyers in relation to the sharing economy. 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. As a catch-all term, it has captured quite a bit of attention from the mainstream press, from [NPR](#) to [Forbes](#) and [The Economist](#). In these press accounts, the understanding of what the ‘sharing economy’ entails is relatively narrow, But as we discuss further below, there is robust debate about the scope, and even utility, of the phrase - debate that in our view is healthy, should be prolonged rather than jettisoning the term - and should be illuminated through a more legally-inflected lens than is currently the case.

The paper is based on research into small-scale initiatives in Australia and the UK that we view as a creative response to resource depletion and climate change. We have grouped these in five areas: community-supported agriculture; community energy projects; car-sharing; co-working; and reuse/recycle initiatives.<sup>1</sup> Together these five areas provide opportunities to restructure key infrastructural platforms (transport, energy, food, waste and work environments) that enable less carbon-intensive production, distribution, exchange and consumption. Put more simply, ordinary people, perhaps frustrated with the inertia of government policies and large-scale corporate routines and practices, are experimenting with different ways of moving around, powering themselves, securing food and making a living, making these transactions less wasteful and potentially more social.

These initiatives challenge well-worn dichotomies between public and private spheres, state and market forms of governance, and economic and social objectives. Some of them (car-sharing, co-working and reuse initiatives) use web-based technology to enable ‘access rather than ownership’ (which we discuss further below). Others (community energy and community-supported agriculture) focus on connecting consumers much more closely with producers and stressing the social nature of those ties. Collectively, these initiatives go somewhat beyond the narrower understandings of the sharing economy which often dominate popular media accounts. These narrower understandings focus on ways in which information technology is used to empower individuals or organisations to distribute, share and re-use excess capacity in goods and services. We would, however, situate the sharing economy on a spectrum ‘between activism and enterprise’, with the intention of unsettling what might otherwise be seen as an intuitively dichotomous relationship between these two sets of practices. We have been reluctant to *define* either, since so much of our empirical work shows that what most energises the participants of these practices and initiatives are the very ways in which they unsettle taken-for-granted definitions. It is more instructive to begin with a visual example of how the spectrum might work in, say, the transport sector. Figure 1 draws from our research on car-sharing:

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<sup>1</sup> We have conducted some 50 interviews with founders and key personnel in at least two examples of each type of initiative in the UK and Australia, as well as with legal and financial support organisations. We have also drawn on documentary analysis, LinkedIn biographies, network analysis of social media data and participant observation.

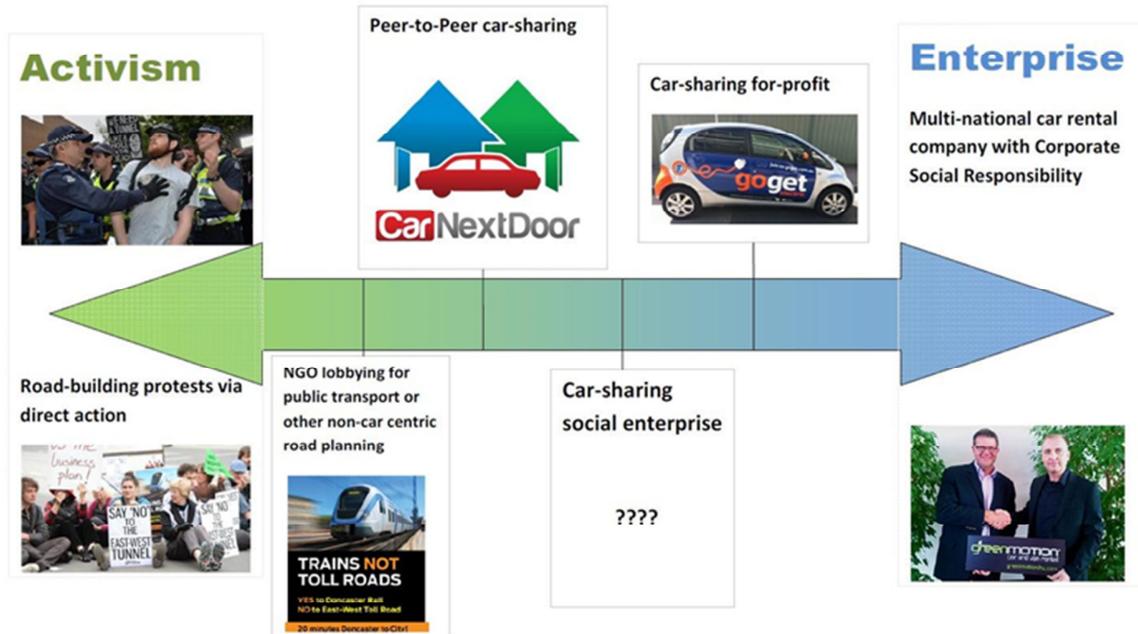


Figure 1: Activism -- Enterprise Spectrum

In part, it captures a biographical trajectory. Many of our interviewees have traced various moves between activism and enterprise over the course of a career. Someone who may have begun as protesting roads, or campaigning in favour of cycling infrastructure and public transport might set up a neighbourhood carsharing club, which itself may mutate over time to a small-scale for-profit business, or even to a [subsidiary of a multinational car rental company](#). Profoundly different energies and skills are mobilized over such a journey<sup>2</sup>. Indeed, the demanding nature of drawing upon disparate skills in these practices of social innovations means that it is fairly rare that particular individuals trace the entire trajectory. Rather they slot into the spectrum at points that can be made sense of in relation to their specific mix of skills, interests and qualifications. We have used LinkedIn as a ‘biography database’ to map this across our interviewees as well as others caught by linked search terms of ‘climate change’ and ‘social enterprise’. From this, we have distilled a preliminary typology of the ‘ideal typical’ inhabitants of the social enterprise/activism spectrum we have encountered so far:

<sup>2</sup> Ash Amin and Ray Hudson’s (2002) extensive work survey and in-depth case studies of social economic organisations documents the range and importance of entrepreneurial and administrative skills in their effective functioning.

<b>Ideal Type</b> Theoretical construct, <i>not</i> an empirical description, aimed at understanding a particular component of the emergent sharing economy	<b>Experience/Habitat</b> What skills and expertise do they bring to the initiatives?	<b>Social Drivers</b> Which social theories can help us understand their motivations and drivers better?
<b>Corporate refugees</b>	Large corporations, especially finance	Alienation: Experts looking for purpose and meaning
<b>Frustrated bureaucrats</b>	State and Federal Bureaucracies. Implementing and developing policies; good understanding of institutional politics	Calling/Vocation
<b>Millennial idealists</b>	School, organising protests, digital platforms	(Intergenerational) Justice
<b>Charismatic mavericks</b>	Eclectic, encompassing public and private sectors	Charisma; multiple justifications
<b>'Lefty' engineers</b>	Various large and small-scale engineering projects	Socio-technical

Such a typology is by no means static, and those participating in the space have often made a decisive shift, catalysed by a significant event such as bankruptcy, a change of government and so on. For example, Box 1 provides an example of the journey from disillusioned bureaucrat to non-capitalist food entrepreneur:

**Box 1: Another calling: From bureaucrat to food entrepreneur**

‘They all had mortgages and were hitched by the time the conservatives came in, promising to dismantle everything we’d just worked on.’ Kath was recalling how the inventive food enterprise she’d pioneered with her partner started out. They’d both worked in the upper echelons of state government with smart young bureaucrats who couldn’t resist the security and prestige of the work. For Kath, however, bureaucracy was not the calling, but the vehicle for her climate activism. Rather than stay on as an “apolitical” provider of “advice that is frank, honest, timely and based on the best available evidence” – as her young colleagues had – she started to implement some of the advice she had been providing, starting a not-for-profit foundation to develop tools to distribute fair priced food.

Kath’s biography, as well as the details of the initiative itself (which currently mixes ‘Pty Ltd’ trading structures with the not-for-profit structure) exemplifies the shift towards a ‘New Green Politics’ characterised by the shift in the locus of advocacy from government to social mobilisation focused on communities; and, an emphasis on social goals augmenting the narrower focus on environmental goals.

Biographical trajectories have been an important lens for stabilising patterns that in many other respects profoundly challenge conceptual assumptions around public vs private, and state vs market. But there are also many systemic dynamics at play within this spectrum. Three dynamics in particular are often invoked, albeit with varying emphases depending on the biographies of the participants. First is the relative dominance of the profit motive: many typologies of social enterprise are arranged on a spectrum between philanthropy and profit such as Figure 2, from (Dees 1998):

		Purely Philanthropic	←————→	Purely Commercial
Motives, methods, and goals		Appeal to goodwill Mission driven Social value	Mixed motives Mission and market driven Social and economic value	Appeal to self-interest Market driven Economic value
Key stake- holders	Beneficiaries	Pay nothing	Subsidized rates, or mix of full payers and those who pay nothing	Market-rate prices
	Capital	Donations and grants	Below-market capital, or mix of donations and market- rate capital	Market-rate capital
	Workforces	Volunteers	Below-market wages, or mix of volunteers and fully paid staff	Market-rate compensation
	Suppliers	Make in-kind donations	Special discounts, or mix of in-kind and full-price donations	Market-rate prices

Figure 2: Spectrum of Philanthropic and Commercial Enterprises (Dees, 1998)

When this dynamic is prominent, there is often an articulation of an evolutionary relationship between activism and enterprise. As one of our community energy interviewees commented: “Hopefully the enterprises show a tangible outcome for activism, or show what the end game is.”

Second is a different kind of dynamic, made most often by ‘corporate refugees’ who have a business and management background, contrasting direct action and indirect action. In a commentary broadly from this perspective, for example, Osberg and Martin (2007) (who are not our interviewees), structure contrasts between social entrepreneurship, social service provision and social activism by reference to direct action (provision) versus indirect action (influencing others to take action):

Instead of taking direct action, as the social entrepreneur would, the social activist attempts to create change through indirect action, by influencing others – governments, NGOs, consumers, workers, etc. – to take action. Social activists may or may not create ventures or organizations to advance the changes they seek. Successful activism can yield substantial improvements to existing systems and even result in a new equilibrium, but the strategic nature of the action is distinct in its emphasis on influence rather than on direct action.

This dynamic is more likely to foster an oppositional understanding of the relationship between activism and enterprise. Mused one community food interviewee: “[Activist friends] weren’t interested in change. What they really enjoyed was the ra-raring and the change would be that they were not longer out on the edge and therefore wouldn’t have a space to ra-ra in.”

A third dynamic is to contrast dimension protest and compliance, drawing on the late Albert Hirschmann’s (1970) account of the constructive tensions between private interest and civic-mindedness, between quiet compliance and loud protest. From this perspective, both activism and enterprise are aimed at changing the status quo but activism is much more allied with contestation and conflict (and, in contrast with the second interpretative dynamic, much more ‘direct’!) whilst enterprise works largely with the grain of current arrangements. An appreciative orientation to this dynamic generates a more dialectical understanding of activism/enterprise: as one interviewee who had founded a sustainability support organisation and then moved into Green politics commented: “I don’t feel like I am a traditional activist because I kind of rejected activism ... I’ve come full circle, I’ve come back ... the Greens is a very activist organisation, because I have seen the power that they have had in changing legislation”.

Clearly then, activism and enterprise are interpreted in the sharing economy space (and beyond Morgan & Seshadri forthcoming) in a plurality of ways, sometimes conflicting, sometimes overlapping. Before reflecting on the implications of this for understandings of the sharing economy more broadly, we first make some preliminary links to law, and briefly consider the (otherwise bracketed) question of sustainability.

## Sharing economy law - between cause lawyering and transactional clinics?

The hybridity of sharing economy endeavours has interesting links to cause lawyering and a recent rise in ‘transactional clinics’. Cause lawyering, more affiliated with activism than enterprise, uses law - often in the form of high-profile test cases - to promote and secure radical social change. Both left and right politics have mobilised this idea, most prominently yoked to constitutional rights (political and civil in the US, social and economic in South Africa, for example). Australia’s legal institutional environment provides very different opportunity: Arup argues that strong local traditions of labour law firms and community legal centres dominate, though the caseloads in both, particularly the latter, make this less of a ‘test-case’ mode of lawyering and therefore arguably less cause lawyering than political vocation (Arup 2010). What is actually more like cause lawyering in Australia, he suggests, is the creative use of conventional commercial law arguments, along with creative legal interpretation and lobbying around non-judicial regulatory governance frameworks. While the latter tends to focus largely on areas of social policy and benefits, the former may provide legal skills that could be creatively utilised in sharing economy contexts of the kind that Part 3 of this paper will discuss in more detail.

Clinical education is another area where hybridity has more recently shown its potential. While community legal centres in Australia mainly focus on public law-oriented and regulatory governance issues, the US has seen a strong rise in transactional clinics to more than 138 nationally since the late 1990s (Lee 2011). These clinics provide opportunities for law students to assist entrepreneurs, small business and not-for-profits in setting up their initiatives. This development has, in varying degrees, included some degree of social justice aims insofar as a significant number of these clinics seek to prioritise support for ethnic minority or socio-economically disadvantaged clients, or organisations that specifically target such groups. The same could be said of the pro bono transactional advice coordinated by the National Pro Bono Resource Centre in Australia. However, at least in the case of US-based transactional clinics, the rationale is primarily one of making economic growth and job creation more inclusive, rather than any goal of structural economic transformation.

By contrast, Janelle Orsi, a pioneer in developing legal support services in the US for the sharing economy, see a fertile hybridity between a more structurally oriented activism and new forms of enterprise. As [she puts it](#), ‘To most law students and lawyers, practicing transactional law isn’t an obvious path to saving the world...[but] transactional lawyers are needed, en masse, to aid in an epic reinvention of our economic system.’ (Orsi 2012). And in the UK, Will Davies, recalling his experience in drafting the [Blueprint for a Co-operative Decade](#) for the International Cooperative Alliance, boldly claims that [“twenty public-spirited lawyers could change the world”](#). As he observes it is not civil rights or legal aid lawyers to which he alludes. Rather, it is lawyers who can manipulate equity, voting rights, debt, share, audit and so on. In seeing, he says, “how far [these] can be tweaked in various directions, before they become something else...one starts to imagine a wholly different economy, simply through considering how freedoms, powers and responsibilities might be combined differently, via subtly redesigned legal instruments”.

We would suggest, then that Orsi and Davies are effectively calling for ‘radical transactionalism’ – a reframing of private, business legal skills that challenges established assumptions of public interest lawyering. This gels with Gibson-Graham's focus on diverse economies (Gibson-Graham 2010) who remind us to appreciate the rich array of institutional possibilities already present in our existing political economy. Equally, however, as our recent series of workshops with Janelle Orsi (Morgan & Kuch 2014) demonstrated, the legal support services in Australia currently available for cultivating this space are patchy and sparse – at their most comprehensive are the referrals and partnerships provided by the National Pro Bono Resource Centre but although these provide transactional advice they are less focused on for-profit or hybrid initiatives. Embryonic support structures in that respect include JusticeConnect's work with Social Ventures Australia to make referrals, some large law firms providing social enterprise-specific pro bono advice and two recent or imminent clinical initiatives emerging - a new Sustainable Business Clinic based at Melbourne Law School from July 2014, and a potential Social Impact Clinic currently being considered right here in UNSW.

### **Sustainability and the sharing economy**

In what follows, we spend much of our time engaged in discussion that may seem unrelated in any direct way to climate change, notwithstanding our title and our starting point in this introduction. Indeed, members of the organisations we are studying have tended to list climate change very low on motivations for activity. And some degree of turning-away from overtly ‘green’ frameworks and motivations is in fact precisely what the ‘new politics of climate change’ would predict.

One way of considering the link between the sharing economy and sustainability is to see sharing economy practices as activism against prevailing unsustainable economic practices and forms. Heinrichs (2013) suggests the sharing economy provides multiple pathways to sustainability with “the potential to serve as an umbrella concept ... [to] re-frame older and recent alternative forms of economic activity and their academic conceptualization.” There are three aspects to this reframing: empirical, conceptual and political. So empirically, for example, the cumulative effects of disparate sharing practices can be demonstrated to achieve considerable resource efficiency: re-use and recycle initiatives do this directly; car sharing means less driving, partly because it makes costs more visible ([SGS Economics and Planning 2012](#)); [backloading food delivery means lower transport emissions](#); community energy can drive renewable take-up beyond bureaucratic measures such as the Renewable Energy Target and Feed-in Tariffs. We do not pursue this empirical reframing directly any further in this paper, but note that studies tracking it are important weapons in the regulatory politics outlined in Section 3 of the paper.

Conceptually, the sharing economy could help to re-frame questions of value. One of the premises of even the narrower approach to the sharing economy mentioned above is that by expanding shared access to goods, services, data, skills and talent in a variety of forms, the value of those goods increases, for the business, for individuals, and for the community. As we shall see below in Section 2, however, the precise impact of this depends in no small measure on the detail and legal arrangement of incentives and responsibilities - and in particular, on the degree to which shifting understandings of ‘value’ are fed into existing financial strategies of growth-oriented business models.

Finally, whether the sharing economy is intensely monetized or not, however, its widespread take-up across disparate sectors could catalyse another kind of conceptual shift, by shifting existing political coalitions around urban issues. We can see early signs of this in some of the regulatory politics outlined in Section 3 of this paper. But first, we elaborate in more detail the plural visions of the sharing economy that are bred by its hybrid nature.

## 2. Sharing Economies: Plural Imaginaries

The role of law in allowing financiers and entrepreneurs to quantify investments is often overlooked in analyses of the success of capitalism. The calculability of economic life that is both mundane and enormously complex is only possible through the socio-legal formatting of contracts, property rights, shareholder voting rights and regulations. These instruments give corporations the power to ‘bring the future into the present’ as Will Davies (2013) puts it by promising profits and allowing risky investments to be traded, hedged, and securitized.

Finance ‘occupies the future’ through law as a real effect of our shared illusions about its institutions. As Davies points out, concentrating on the calculability misses the point here: “Economists may claim to recognize institutions, but they only do so via the effects, and miss the shared illusion which causes them.” (Davies 2013)

This oversight is repeated in debates around the sharing economy where sharing economy discourses tend to perpetuate an extractive mindset rather than nurturing new social and democratic possibilities. We chart the oversight historically through the development of the ‘competition state’ (Cerny 1990, 2010) as well as empirically through competing uses of the concept of ‘sharing economy’ online.

### 2.1 Competition Policy and the Sanitisation of Organisational Imagination

Australia’s National Competition Policy of the 1990s is one instance of the broader ‘competition state’ tendency for market-based perceptions of policy to replace the rule of law as the touchstone of legitimacy (Morgan 2003). Over recent decades, social objectives derogating from the productive efficiency of the corporate form have been progressively quarantined from the mess of policy-making:

In 1996, Treasury, and the Treasurer [rather than the Attorney-General’s Dept], became responsible for the implementation of [corporations law reform]. The physical location of the program shifted to Treasury, later to be slowly submerged into its inner labyrinth as a part of the Business Law Division. Economic theory was made available and other policy inputs were cut off. Cost/benefit analysis was deployed as the prime measure of the acceptability of reform proposals, the terminology of ‘transaction costs’ and ‘barriers to entry’, ‘industry self-regulation’ was configured as that against which government regulation was defined, and world competitiveness became a paramount concern. [Corporations law reform thus became](#) an instrument of on-going economic policy. In this context it is quite conceivable that the reform processes necessary to attain progressive reform wither away. (Wishart 2012)

The calculability of economic value achieved through the family of concepts, measures and practices associated with the competition state has facilitated financialisation over recent decades alongside

corporatisation. As Davies (2013) points out, “Concepts and instruments initially dreamt up at the University of Chicago, such as ‘human capital’, are crucial in this extension of investment logic beyond the realms of work and production, and into the crevices of everyday life.” Thus, proponents of an extractive sharing economy point to new possibilities for ‘consumption, productivity, unlocking capital and ‘micro-entrepreneurs’:

the emerging peer-to-peer, collaborative “sharing economy” will be a significant segment of the country’s future economic activity, stimulating new consumption, raising productivity and catalyzing individual innovation and entrepreneurship..... The economic engine at work here is an array of new peer-to-peer marketplaces that unlock dormant physical capital (real estate, vehicles, household assets) and put it to productive use, creating, in the process, a wide variety of new consumption experiences (contrast the modest range of hotel rooms with the diversity of AirBnBs), and catalyzing innovation by micro-entrepreneurs who can dip their toes into the world of small business unimpeded by the risks of an all-or-nothing start-up. (Sundararajan 2014)

Interestingly this capaciousness of ‘sharing economy’ has happened with remarkable pace. Even six months ago usage of the extractive concept of ‘collaborative consumption’ could be much more easily contrasted with ‘the sharing economy’. If, as Wittgenstein suggested, usage is meaning, this shift is highly consequential for those trying to reclaim the future from finance. In its initial iteration, Rachel Botsman suggested collaborative consumption rested on four elements of sharing: trust between strangers, belief in the commons, critical mass and idling capacity. The translation of these elements into corporate sharing platforms has reduced trust to online reputation metrics, regulated common space through property rights (as with proprietary car sharing), and calculated market potential through social network and other proxy metrics.

The sanitisation of the organisational form of sharing is completed through the concept of ‘idling potential’ – at once occupying the future and embedding the techno-optimistic, extractive version of sharing into the shared imaginaries of those drawn to this space. The image of dormant assets waiting to be monetised is made ever more attractive as sharing platforms promise low barriers to entry and low transaction costs: borrow a drill from a neighbour through a proprietary platform, rather than burdening yourself with ownership - once you’ve confirmed your identity, signed off on the extensive terms and insurance conditions (more on that below), and most importantly, given your cut to the platform owner.

From an investment perspective, collaborative consumption platforms have well and truly become new potential sites of securitisation and financialisation. Thus news of ride-sharing firm Lyft taking on Uber with a new round of capital-raising appears alongside more traditional business stories in the Wall Street Journal; AirBnB is subject to capital market valuations, whilst walking a tightrope of making hosts into both micro-entrepreneurs and appropriately friendly participants in your social network – just a few clicks to send off your pre-populated, secular Seasons Greetings cards to all your hosts and guests over the year.



extractive and nurturing proponents of the term. The green cluster mainly [tweeted this article](#) from Shareable.net about mapping the growth of new Mutual Organisations. The brown cluster is based around an article by Jeremy Rifkin arguing that lowering of marginal production costs is both responsible for and will inevitably lead to a rise in Sharing Economy. Capitalism, for Rifkin, is a victim of its own successes as certain gifts subsume prices. Thus, markets must be remade along the lines of collaborative consumption to allow monetized sharing where gift economies have not taken hold. The blue cluster is comprised of a number of unreflexively enthusiastic collaborative consumption articles. They mostly celebrate how great Airbnb is on its own terms. The Fringe dots are mainly ‘retweeters’ who pass on the article URL to their own followers. ‘New Age’ may be the common denominator in the sense that the black and grey information ‘brokers’ across these different articles are a prolific [Portland-based news writer](#), a communications worker at a meditation centre and a Yoga Association in the UK.

Another online network mapping tool can be used to demonstrate the gulf between extractive, for profit and nurturing, not-for-profit concepts of sharing economy. Figure 4, taken directly from [IssueCrawler](#), presents interlinking between online references listed by [Adam Parsons in a recent Open Democracy article](#) on the politics of the Sharing Economy. Most striking is the relative insularity of the for-profit .com (green) domain sites and not-for-profit .org (blue dots, sized by links into their websites below). The structure of the specific websites represented in this bibliographic reference list show very little interaction between the commercial sites such as Etsy and Collaborative Consumption on one hand, and Creative Commons and Janelle Orsi’s Sustainable Economies Law Centre on the other.



### 3. 'Access without Ownership': Will the Real Owner Please Stand Up?

The underlying argument of this section is that since legal categories are challenged by the hybrid practices of sharing economy initiatives, it is more useful to look at the practices of the initiatives, and to chronicle what might be called the 'everyday law' of these practices, in a nod to legal consciousness literature (Halliday & Morgan 2013). After cataloguing, through our interview data, when the initiatives encounter law most directly and what responses or actions eventuate, we suggest that the 'everyday law' can be mapped around four axes. These four comprise the choice of legal entity for an initiative, the prevention of harm, the blurred boundary between gift and contract, and access and control of shared infrastructure. Although distinct from each other, the four are arguably interlinked by shared - and often cloaked - dilemmas over ownership and control. These dilemmas are political in the sense of linking past with future through law. As [Davies puts it](#), "... law enables individuals and institutions to send laser beams (of varying quality, depending on cost) from one point in time and space to another, saying 'this is what will take place; this is what we agree has happened; this is what must happen; these are the conditions of co-operation'." The plural imaginaries of sharing hinge on legal expertise shooting these 'laser beams' along the current coordinates of concentrated, 'winner-takes-all' ownership or charting more democratic forms of economic life.

Before exploring these in more detail, however, it is worth noting that early on in this project, and particularly in the Australian context, we as researchers were asking the question: where are the lawyers? The networks that emerge through biographical and social media data contained relatively few lawyers, and with the exception of Janelle Orsi, most of both the popular and the (very small) academic commentary sidestepped both law and lawyers. Although this is now rapidly changing, particularly in relation to the prevention of harm as we discuss below, it is worth chronicling some of the likely reasons for this at least initial absence.

We would argue that there are three reasons why law is 'backgrounded' in sharing economy debates. The first is the heavy reliance on mutual trust and reputational feedback systems, the power of which are much touted particularly in the collaborative consumption arena. The second is a sense that many sharing economy initiatives are more personal rather than commercial, more informal rather than formal - at least at their inception. And third, even as the initiatives evolve, there is - particularly for those committed to a more nurturing and less extractive model of political economy - a powerful commitment to the practices existing in an anti-bureaucratic space, one that is resisting rational modernization. This may arise out of an instinct of how closely the protocols of rational modernization here are tied to extractive business models - but many interviewees spoke of finding a way to work and live in a more 'human' manner. We would argue that they are trying to create a different 'atmosphere' in the sense of 'a space of resonance in which certain kinds of thought and practice seem natural and desirable' (Sloterdijk cited in Amin & Thrift 2013)

These three reasons converge to give a particular quality to the legal conundra that arise in the everyday routines of sharing economy initiatives - and this is a sense of something new and puzzling, of legal categories being constituted by evolving custom in the interstices of existing - and inadequate - forms. It is, perhaps, a species of what (Weston & Bollier 2013) have described as 'vernacular law' - in this case,

an emergent vernacular law that tries to redefine or rearticulate customs around exchange, with as little reference as possible to an existing legal system which throws up numerous barriers and which treats ‘grey areas’ as disabling risk.

## The ‘everyday’ law of sharing economy initiatives

### a. Legal entity choice

The choice of a legal entity for the formalisation of an initiative determines the structure of property rights and the relative centrality of profit. New hybrid organisational forms that combine characteristics of for-profit businesses and community sector organizations have emerged in the [UK](#), [USA](#) and [Canada](#) in recent years. In the UK, the Community Interest Company structure legislatively constrains key internal corporate governance decisions via distribution caps, dividend restrictions and asset locks, as well as regulating the content of ‘community interest’ - Canada has largely followed this approach. The US has one similar, but relatively little-used hybrid structure (low limited liability company) but the US ‘benefit corporation’ is much more popular and was recently introduced in the influential Delaware jurisdiction. Benefit corporations are shaped by externally-focused reporting, disclosure and transparency obligations rather than internal governance constraints, and the content of ‘benefit’ is left to enterprise discretion. These are available in about 16 states, and a related certification system by a private organisation called ‘B-Lab’ is available more widely, including in Australia.

A muted debate is taking place in certain circles in Australia over the desirability or otherwise of introducing a specific legal entity structure that would explicitly address organisational hybridity. The Social Innovation, Entrepreneurship and Enterprise Alliance (SIEE), which is a kind of trade association body for social enterprise (albeit currently populated by support organisations rather than enterprises directly), has a Legal Models Working Group which will launch a report in May 2014 assessing the case for a new legal model. Meanwhile, there is still much interest in the alternative of relying on creative templates of articles adapted to existing legal entity structures, and particularly on reviving or expanding the use of cooperative legal structures since the introduction of uniform cooperative laws across the states (so far only NSW and Victoria).

Moreover, the B-Lab certification process mentioned above appears to be gaining some traction in Australia quite rapidly, with 20 companies so far certified, some 400 ‘in the pipeline’ and bi-weekly ‘B-Lab breakfasts’ at the Melbourne Hub to provide information to potentially interested applicants. Only one of our interviewees had applied for B-Lab certification, and most had adopted a standard ‘pty ltd’ company form without extensive thought. However, initiatives being crafted currently, particularly in the food area, are actively exploring ways of blending the social and economic beyond the standard form.

### b. Preventing harm

Legal support structures relating to the prevention or control of harm are the second of our four critical issues. Risk management is another way of framing this, more often invoked when it is seen as part of the financial strategies of an initiative rather than as part of the narrative of social purpose of the initiative.

Creative ways of providing insurance are central here. Web-based platforms that foster the sharing of tasks and household goods have begun to experiment with building insurance into the platform and pricing structure - in part to allay the fears of potential users, but also in part to generate an additional source of reliable revenue that will underpin their business model. Transport initiatives such as car-sharing and ride-sharing have faced very different levels of complexity in different countries, with the extension of coverage to collective use of transport seemingly more viable in Australia and the UK than in the US. But in the latter, creative reform has made possible this extension nonetheless - in the case of California, by making the extension of insurance conditional a rule that the provider's 'surplus' does no more than 'offset their costs'. Or, in more legalistic terms, peer-to-peer car-sharing is legal and covered by insurance if:

*(1) The personal vehicle sharing is conducted pursuant to a personal vehicle sharing program.*

*(2) The annual revenue received by the vehicle's owner which was generated by the personal vehicle sharing of the vehicle does not exceed the annual expenses of owning and operating the vehicle, including depreciation, interest, lease payments, auto loan payments, insurance, maintenance, parking, fuel, cleaning, automobile repair, and costs associated with personal vehicle sharing, including, but not limited to, the installation, operation, and maintenance of computer hardware and software, signage identifying the vehicle as a personal sharing vehicle, and any fees charged by a personal vehicle sharing program.*

*(3) The owner of the private passenger motor vehicle does not knowingly place the vehicle into commercial use...by a personal vehicle sharing user while engaged in personal vehicle sharing*

**(Bill 1871 of 2010)**

This example shows the intricacy that result from attempts to formalise a distinction between 'commercial' and 'non-commercial' activities in the context of initiatives that exist precisely to challenge that distinction. But the issue of harm prevention also raises the more general question of whether 'police powers' regulation (for health and safety, employment protection, environmental outcomes etc) should apply to 'sharing economy' types of initiatives. And this has raised fierce internal debate and also catalysed quite extensive litigation, particularly in the US around the sharing of transport and housing. The regulatory politics this has catalysed has led to the formation of an entity called Peers. Peers is a US-based member-driven organisation that claims to have more than 250,000 members globally. It seeks to grow, support and protect the sharing economy, in part by "policy campaigns for smart regulation". Network analysis shows their membership, encompassing both ends of the sharing economy spectrum, from Ouishare and Shareable to techno-optimistic and entrepreneurial initiatives, is actively using them as a quasi-peak body. One of their key advisors, Arun Sundararajan from the Stern Business School at NYU cited above, has argued recently in favour of self-regulation by platforms - and as one of our Sydney lawyer interviewees commented, 'platform protocols are likely to be the constitutional law of the 21st century'.

Outside of the narrower sharing economy examples, notably in the food and community energy initiatives we have researched, it has been interesting to note how much fledging initiatives rely on *non-legal* ways of compensating or preventing harm. They do so often by drawing on the embedded social relationships they are committed to fostering, whether through internet-enabled reputational feedback systems or more direct negotiations. One community-supported agriculture organisation even withdrew the collective insurance it initially offered to like-minded start-ups with a similar business model and brand - citing their own research that such insurance in the US, where large numbers of CSAs operate, was almost never claimed against.

This approach works arguably better in small-scale, face-to-face instantiations of the sharing economy - at a larger scale, the question of who takes responsibility for what kinds of risk is often treated as an analogy of ownership-type questions about assets and property rights. A not infrequent outcome in such contexts is that those who control assets and hold property rights shift *away* from themselves the legal accountability for responding to particular categories of risk.

### c. Gift economies

The third issue is closely related to the question of when (often informal) gift relations morph into, or ought to be treated as, formal contractual relations. Since many initiatives begin life as a start-up, the most common issues raised here involve employment law around the use of volunteers (this is a major issue in the US and more prominent in the UK than in Australia). But this general perspective comes up in a diverse range of area. In relation to intellectual property: for example, attempts by an Australian food initiative to design open-source software to support innovative food distribution business models have met with significant legal and financing barriers due to the insistence on keeping the model open-source.

In relation to financing itself, the legalities of expanding web-based crowd-funding from donation sites (such as Pozible or Kickstarter) to encompass the sourcing of equity financing are currently being considered by a Treasury Inquiry through the Corporations and Markets Advisory Committee. On the one hand the prospect of giving secured personal property rights in one's company to strangers over the internet raises all manner of risk and regulation fears. On the other hand, there is a curious insouciance about this sometimes expressed by advocates of such legalisation, occasionally as an explicit assumption that those investing equity in social enterprise are never truly expecting to be repaid, but rather to recycle any earned surplus as further donation. Thus the antinomies of gift and contract persist in the detail of specific initiatives.

### d. Shared infrastructure

Fourth, and underpinning all the others, the question of shared infrastructure raises interesting legal conundrums from multiple directions. The sharing economy, as [Gorenflo argues](#) for example, is a good way to attack poverty and climate change simultaneously. But the issue of the platforms for such sharing will be crucial. The tightrope of economic and social referred to above has been walked by AirBnB and others through a variety of technologies to manage everyday relations. And in the more corporate end of the sharing economy, platforms are much more visible than they were even six months ago. AirBnB,

for example, has developed a [hospitality code](#) which it will shortly use to educate its 350,000 hosts to behave “more like hotels”. These non-judicial mechanisms effectively shoot legal laser beams along more familiar, standardised, measurable and ultimately financeable lines.

Access to, or control by, shared infrastructure, from the national grid for community energy groups to public parking spaces for car-sharing companies to dedicated desks in co-working spaces, will depend in part upon the choices made by an initiative in relation to its legal entity structure and its intellectual property rights. But it will also depend on more elusive cultural and political views regarding the nature of infrastructure: is it a market asset, a democratic space or a commons? A recent roundtable of the P2P [\(peer to peer\) Foundation blends these three perspectives in a nuanced way \(with an emphasis on the commons\)](#), as well as connecting them to both legal entity (cooperative structures) and intellectual property issues (a commitment to open source) at a practical level:

You can only use [peer-to-peer created] commons if you reciprocate to some degree...the idea is to keep the accumulation within the sphere of the commons. Imagine that you have a community of producers, and around that you have an entrepreneurial coalition of cooperative, ethical, social, solidarity enterprise. The idea is that you would have an immaterial commons of codes and knowledge, but then the material work, the work of working for clients and making a livelihood, would be done through co-ops. The result would be a type of open cooperative-ism, a kind of synthesis or convergence between peer production and cooperative modes of production. That’s the basic idea.

## Conclusion: Where to From Here?

This paper has given a necessarily very brief overview of four different paths along which to map the emergent ‘everyday law’ of the sharing economy. All four are united by experimentation with ownership and control. This is most evident in debates over legal structure, which will define in very precise ways who in these emerging initiatives owns the assets, the income streams and the right to participate in decision-making. In relation to the prevention of harm and conceptualisations of a gift economy, the intricate detail of formal solutions to specific legal problems often leads to the imbrication of law with financialisation strategies, working against the grain of democratising the sharing economy. It is in community food (as with the Plunkett Foundation’s [Making Local Food Work](#) initiative) and community energy that the most thought has gone into crafting alternative formalisation strategies, but the detail of that must await a separate paper. Finally, the question of shared infrastructure brings to the fore the ways in which individualised and financialised models of ownership and control compete with broader visions of commons-based governance (Benkler 2006; Ostrom 1990). And as these rub up against each, multiple future trajectories emerge - as we stressed earlier, the very absence of unity and coherence at either end of the activism/enterprise spectrum is an opening and an opportunity, one that turns the task of imagining alternatives from one of wholesale redesign into progressive transformation.

Those transformations will be halting, contradictory and plural, and we see signs of highly mixed influence already in our fast-changing research landscape. We have found the influences on Australia

seem to come from both UK and USA. Those focused on policy reform in Australia typically more influenced by developments in the UK - for example, the Legal Models Working Group of the Social Enterprise and the new Business Council on Mutuals and Cooperatives both have more established parallels in the UK. By contrast with policy-oriented reform, social entrepreneurs in Australia often follow Silicon Valley or other West Coast USA networks more closely: thus 'social investment' firm [Small Giants champions](#) the B-Corporation certification in Australia.

On the other hand, New Mutualism is gaining traction in the USA through Janelle Orsi's Sustainable Economies Law Centre and Freelancers' Union. And less directly or obviously influential in Australia, but arguably the most committed to traditional political activism, are developments in continental Europe and further afield. For example, [Edgeryders](#), which grew out of a European Commission-funded research project, describes itself as a 'distributed thinktank' that brings artists, social innovators and radicals together to change the world, through an 'open consultancy'. Again grounded in a university-based research project, the Ecuador government has funded an extensive [initiative](#) which is collaboratively designing a suite of policies for a commons-based peer-to-peer system of production with a similarly activist spirit. These initiatives each challenge their respective versions of the neo-liberal sanitisation of organisation form.

We can see, then, that reforms are being pursued in different ways in these jurisdictions, constrained as much by political and bureaucratic imagination as enabled by economic circumstance. The relative success of Australian economic stimulus has reinforced status quo legal forms, whereas the UK and US have seen the Sharing Economy '[get real](#)', as Orsi suggested, in response to economic depression.

Will the trajectory be professionalised - managerial and rational, a "deliberate, dispassionate progression of research, modelling, issues papers, submissions, surveys, consultations, exposure drafts and so on" (Arup 2010, p. 121) - or will it take on a more uncivil tone of current politics and move into popular protest. The campaigns by the emergent Peers organisation exhibit intriguing mixtures of both, so that it emerges as simultaneously a lobby group for protectionist regulation and a funnel of grass-roots support for 'disruptive change' modelled along campaigning sites such as [change.org](#). In all of these approaches, campaigning, mobilising, coalition-building and media engagement all become important skills, and interactions between professional and vernacular law will provide a fascinating site for tracing the tensions. To cite Davies once more in concluding:

If 'financialisation' means extending the constrictive elements of productive capitalism into the 'social' realm (via logics of human capital, investment and leverage, especially with regard to housing and education) a counter project would mean extending the liberating elements of productive capitalism into the 'social' realm. This is partly what social entrepreneurship is about, it seems to me - but that remains limited by certain regulatory and legal tramlines that have already been laid down. The challenge is to perform society differently, lay out new routes and possibilities. And it is law that traditionally has the greatest influence over collective routines and rituals. (Davies 2013)

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