

Where are the community enterprise lawyers?

Towards an effective ecosystem of legal support for small-scale sustainable economy initiatives in Australia

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Executive summary

This discussion paper documents gaps in professional legal support for small-scale sustainable economy initiatives (SSEIs) in Australia. It draws on (Section 2 and Appendices) data from multiple sources, including a three-year research project on the legal and regulatory support structures for SSEIs, two small surveys of social enterprise, a review of eight cognate initiatives, a review of law firm websites and direct contact with nine social enterprise-related capacity building programs around Australia.

The paper first discusses what we mean by SSEIs and their relevance to current debates about innovation, the new economy and the need to respond to urgent economic and environmental challenges (Section 3). Broadly, SSEIs are small-scale enterprises that place a high value on economic democracy, social relationships and community development in their organisational design and provide services that are directly relevant to environmental goals. The definition of an identifiable 'sector' in this context remains diffuse, in part because the legal, financial and organisational structures of our current economy do not sit comfortably with these types of initiatives.

The paper then identifies existing patterns of support and their limitations (Section 4), especially when understood in the context of the distinctive needs of SSEIs (Section 5). Many of these limitations are shaped by assumptions of a divide between not-for-profit and for-profit legal structures, which maps onto a related gulf between pro bono advice and expensive commercial advice. The paper seeks to transcend this divide and work towards a vision of legal advice and support as a common pool resource.

There are three main sources of existing professional legal support for SSEIs. Some law firms provide advice to social enterprises, but most focus on not-for-profit and limited pro bono advice. However, recently some smaller firms are emerging with more of a creative and hybrid focus. There are also a number of cognate initiatives that service social enterprise specifically and in some cases SSEIs, though they have various limitations of scope and resources. Finally, social enterprise capacity-building programs broker select initiatives to access legal advice, sometimes at 'low-bono' fee levels.

Overall, pro bono legal practitioners appear to have access to well-developed networks to help them identify each other and to share knowledge. In contrast, those attempting to build their expertise and skills around working with social enterprises and SSEIs report difficulty in identifying a network and limited opportunities to share knowledge and expertise around the specific needs of SSEIs.

Building on an analysis of the unmet legal needs of SSEIs (Section 5), the paper outlines (Sections 6 and 7) four complementary pathways that would advance the development of an effective eco-system of professional legal support. These pathways are:

- Cultivating the vital yet elusive sense of what we call 'the touch' amongst legal practitioners
- Providing development opportunities around technical skill sets, adapted to the SSEI context
- Improving the accessibility and relevance of legal support available; and
- Reducing cost barriers to the provision of support.

Responses along these pathways would help produce a pool of community enterprise lawyers' that would fill an important social and technical gap in the professional legal services currently available. All these pathways could also benefit significantly from the systematic inclusion of non-legal personnel, strategies and organisations.

2. Introduction

From 2013-2015, the Activism and Enterprise Project ('the A&E Project') conducted primary research into community-based sustainability initiatives and grass-roots innovations that are responding to climate change challenges, across a continuum from social activism to social enterprise. The purpose of the research was to explore the legal and regulatory frameworks that helped or hindered these innovative initiatives.

The research focused on five types of initiatives that have emerged as creative responses to resource depletion and climate change: car-sharing, community-owned energy, community-supported agriculture, co-working and reuse/recycle projects. Some of these, particularly car-sharing, co-working and many reuse projects, use web-based technology to enable 'access rather than ownership', and as such overlap with emerging mainstream notions of sharing economies. Others, especially in the energy and food sectors, focus much more centrally on renewed forms of collective urban life that respond to the local situation and the interests and values of the communities, connecting consumers much more closely with producers and stressing the social nature of those ties, even while they also use technology to sidestep intermediaries such as supermarkets or large energy companies. The Open Food Network is an example of such an initiative:

Open Food Network (OFN)

<https://openfoodnetwork.org/>

OFN uses open source software to link producers and consumers of local ethical food. Based in Melbourne, it describes itself as: *An emerging networked e-commerce system for activating online food marketplaces and collaborative distribution ... [enabling] farmers, eaters and independent food enterprises to connect, trade, manage Food Hubs and coordinate logistics.* As a web-based platform that curtails the power of the middleman, OFN emphasises its desire to create positive social change of a systemic kind, one that will disrupt the existing dominance of large-scale commercial provision of food or housing. It has open-source principles at the centre of both its software and its human relations, designed to support small community groups anywhere in the world in setting up local initiatives easily and at low cost. However, OFN has struggled to source legal advice that helps it build an income stream flowing through its provision of a software platform while simultaneously protecting the inbuilt sociality and affordability of the practices of like-minded groups around the world in a collaborative community. Clear and affordable legal advice would greatly assist projects such OFN to replicate, rather than scale up, and thus to grow the SSEI sector. process.

Whilst the provision of professional legal services to the small-scale sustainable economy initiatives

(SSEIs) that the study was involved with was not the original focus of the A&E project, the research generated a clear sense that there are specific challenges in this area that would be useful to explore further. This discussion paper evolved from a process of cross-referencing the challenges appearing in the A&E data against a number of other existing data sources (outlined at Appendixes).

In relation to the issues and needs identified, the paper suggests steps that would help to develop an effective eco-system of professional legal support around SSEIs. The paper is addressed to a mixed audience of social enterprise founders and practitioners, supporting intermediary organisations, and interested legal professionals.

3. Is there an identifiable 'small-scale sustainable economy initiatives' sector in Australia?

What do SSEIs look like? Their growth is not easily defined as the emergence of a 'sector', but we can point to examples from the A&E project, including community-owned energy, community-supported agriculture, co-working and reuse/recycle projects. Drawing on this, as well as a survey distributed as part of the International Comparative Social Enterprise Models (ICSEM) research project,¹ we can say that SSEIs are a form of 'social and environmental innovation' (Barraket, Douglas et al. 2014) **that combine three characteristics: small-scale enterprise, services that are directly relevant to environmental goals, and an overt organisational design element that puts a high value on economic democracy, social relationships and community development.**

Many SSEIs, even those that might be classified as 'environmental services' in statistical terms, are not necessarily motivated primarily by overt environmental objectives. Rather, they prioritise legal structure and governance arrangements which de-emphasise growth, profit and intensification of production, and prioritise democratic decision-making and long-term community and ecosystem interests. These approaches may extend examples of SSEIs beyond those that appear obviously 'green', encompassing for example savings and credit co-operatives, co-operative publishers, local currencies, occupied factories, community schools, and some housing co-ops and co-housing projects.

As a result, there are considerable challenges in identifying the 'boundaries' of this sector. Some commentators (Pearce 2009) have pointed to the phrase 'community enterprise', signalling small-scale, locally-owned and community-embedded initiatives. These are related but not equivalent to notions of 'social enterprise', as the latter extends much more broadly and increasingly deploys more standard business methods and forms than community enterprise (Cameron 2009).

Recent research (Centre for Social Impact and Traders 2016) estimates there are approximately 20,000 social enterprises in Australia, 73% of which are small businesses, and a third of which 'exist to develop new solutions to social, cultural, economic or environmental problems'. Most, however, do so by focusing on specific 'disadvantaged' groups rather than on systemic reform of economic incentives and structures. Over the last six years however, social enterprise has shifted into more standard 'economic' areas (especially retail), and away from education/training and arts (Centre for Social Impact and Traders 2016), and there is also a larger proportion of recently formed and small social enterprises.

In this context, there may be growing overlap between social enterprise and SSEIs. There is also an overlap between SSEIs and the 'low-carbon SME sector' (Green Chrysalis report UTS 2012), referring to small and medium-scale enterprise providing services that are directly relevant to environmental goals. Again however, this sector would be more extensive, as not all low-carbon SMEs are likely to prioritise shaping the overall social fabric and the building of resilient communities. In short, it is fair to say that the definition of an identifiable sector in this context remains diffuse.

¹ See: <http://emes.net/research-projects/social-enterprise/icsem-project/>. Australia has a team participating in this international project, including two of the authors of this paper.

4. What pathways are currently available to SSEIs that require legal services?

The difficulty of identifying a clearly bounded SSEI 'sector' arises in large measure because they sit uncomfortably with the legal, financial and organisational structures of our current economy. As this paper will show, the very 'gap' that underpins the discussion presented here undermines the visibility of SSEIs. Improving the 'fit' between SSEIs and their larger ecosystem needs a baseline appreciation of the scope of existing services and their limits.

A range of services and programs currently cater to the legal needs of the social enterprise sector. These programs are strongly shaped by assumptions of a divide between not-for-profit and for-profit legal structures. All too frequently, pro bono advice is primarily available for the former, and expensive commercial advice for the latter. As will be discussed further in Section Five, by their nature, social enterprises - and SSEIs as a sub-group within the sector - often trouble the not-for-profit / for-profit dichotomy and therefore face significant challenges in finding the right 'pigeonhole' through which to access professional legal services.

There is evidence that SSEIs are also intentionally drawing on non-legal skills to develop bespoke and non-legal solutions to matters that arise. The most common of these is accounting, with advice around investment structuring also becoming more prevalent. For example, the list of advisors included on the Get Mutual website², a source of support for cooperatives, illustrates the multi-faceted professional services available and in demand.

The initiatives and programs discussed below are providing invaluable services that meet a range of needs relevant to the social enterprise sector and SSEIs. These programs and initiatives receive positive feedback from participants, and their efforts are to be lauded in this regard. Given the lack of available data, quantitative assessment of unmet need is not currently possible. Despite this, a number of gaps in service provision can be identified.

² See: <http://www.getmutual.coop/advisors/>

4.1 Dedicated legal initiatives and programs available via direct contact

In this section we outline those initiatives and programs that provide legal services for small start-ups and social enterprises that SSEIs could access through direct contact with the initiative.

Table 1: Overview of initiatives reviewed

Name	Specialism	Eligibility and access
Business Enterprise Centres	<ul style="list-style-type: none"> • Community-based not-for-profit business assistance organisations, linked through national network • Support creation, retention and development of sustainable businesses and foster local economic development • Provide a wide range of business support services, including referrals to local legal practitioners 	<ul style="list-style-type: none"> • Open to all, including not-for-profit enterprises • Over 100 around Australia • Most offer initial interview at no/ low cost • Different pathways at different costs • Specialized services, including group workshops on small business legal issues, attract fees
NSW Environmental Defender's Office	<ul style="list-style-type: none"> • Legal advice for environmental start-ups and not-for-profit enterprises • Legal workshops for local communities 	<ul style="list-style-type: none"> • Limited to environmental focus • Some free advice available - but a cap of 15 minutes on initial (due to funding cuts)
Expert Advice Exchange (NSW Government)	<ul style="list-style-type: none"> • Not-for-profits and social enterprises • Those with a focus on policy areas prescribed by the government 	<ul style="list-style-type: none"> • Limited to NSW enterprises focusing on specific policy areas allocated by government • Applicants are invited by public advertisement to apply via rounds throughout the year • Not accessible for advocacy or lobbying purposes, litigation, dispute resolution or for representation in major transactional work
Get Mutual	<ul style="list-style-type: none"> • Cooperatives and Mutuals • One-stop-shop for generic advice and information 	<ul style="list-style-type: none"> • Generic material available online, open access, no charge • Listing of specialist providers provided
Justice Connect	<ul style="list-style-type: none"> • Not-for-profits and referrals for social enterprises • One-stop shop for generic advice and information • Tailored support for not-for-profits 	<ul style="list-style-type: none"> • Generic material available online, open access, no charge • For tailored support must have a for-public-benefit purpose and have exhausted all other avenues for assistance • Referrals to legal practitioners • Prefers existing enterprises over start-ups • Primarily Victoria and NSW, although beginning to expand

Name	Specialism	Eligibility and access
Lex Mundi Pro Bono Foundation (global)	<ul style="list-style-type: none"> • Pro bono legal assistance to social entrepreneurs • Works through a network of local affiliates 	<ul style="list-style-type: none"> • Must be already associated with an affiliate partner • US-centric focus - one Australian affiliate member (Clayton Utz), which has not received any referrals via the foundation to date
University of Melbourne Law School Sustainable Business Clinic	<ul style="list-style-type: none"> • Small, start-up enterprises • Social enterprises • Links enterprises to students, who provide legal advice under the supervision of lawyers from a large commercial law firm partner 	<ul style="list-style-type: none"> • Only enterprises working in the public interest to improve environmental wellbeing • Only those that do not have capacity to pay for specialised legal services

For those SSEIs established under commercial structures, the Business Enterprise Centre (BEC) network around Australia is the most accessible source of business advice, mentoring, training, and a range of tools, templates and links that are geared towards smaller businesses in a ‘one-stop-shop’ model that includes a small number of in-house staff and draws on a ‘stable’ of specialists. The BECs do also work with not-for-profits and social enterprises, but have limited specialisms in this regard.

With the exception of Business Enterprise Centres, all of the above have operated for less (and often substantially less) than five years. While the programs that appear to be working most effectively clearly target either for profit (Business Enterprise Centres) or not-for-profit (Justice Connect), there is an appetite to expand the focus of existing programs to include hybrid entities.

However, in most of these initiatives, eligibility and access to any kind of tailored support is contingent on specific requirements. Many specify not-for-profit structures as the primary eligibility criterion, which limits accessibility to only some types of SSEIs. In some cases, the not-for-profit requirement is further refined based on a specific environmental or social focus. Interestingly, in both surveys drawn on in this paper (see Appendix A), at least half of the respondent social enterprises had adopted for-profit or cooperative structures. An emerging shift away from not-for-profit structures is arguably visible. For example, the not-for-profit crowdfunding company Chuffed.org recently did this in a very public manner, adopting a ‘pty ltd’ structure underpinned by a customised constitution that prioritises social benefit.³

The recent advent of technology-enabled clearing houses designed to assist small businesses and start-ups to find relatively low-cost legal advice could also be a useful channel for SSEIs with more of a commercial culture. In the broader legal sector, these are being heralded as ‘disruptive services’⁴ for their potential to reshape how legal professional support may be structured in years to come. In Australia, examples include LawPath, LegalVision and a division of law firm Kelly Hazell Quill which provides contract review services⁵ to larger SME

³ See <https://chuffed.org/blog/the-social-benefit-company>

⁴ For an interesting discussion on this, see: <http://www.lawyersweekly.com.au/opinion/16286-legal-market-ripe-for-disruptive-innovation>

⁵ See: khqapproved.com.au/contractreview

businesses and executives. However, most ‘new law’ services rely on standard commercial documentation which may be difficult to tailor to the SSEI context, particularly when the advisers are unfamiliar with its nuances, as discussed in more detail in Section Five.

4.2 Legal firms providing services to the social enterprise sector

This section draws on a listing of law firms that were identified (through all the data sources reviewed as input to this paper) as having some involvement with providing professional legal services to the social enterprise sector in Australia.

I am not aware of any individuals with particular expertise in this area – most are corporate lawyers who apply this generalist knowledge.

Each firm’s website was reviewed to determine whether any relevant specialisms and/or access requirements for pro bono programs and the like are made publicly available. Of course, individuals or enterprises with access to a network or contacts may successfully identify alternative entry points into one or other of these firms

The social enterprises we deal with generally access pro bono or low-bono support through personal relationships.

– where they could provide the name of a specific lawyer, for example. However, the aim of reviewing the firms’ websites was to determine how those without this information might identify where and how they could access legal support.

In essence, it appears that legal practitioners are drawing primarily on their existing experience to provide advice on legal matters to social enterprises, and therefore to the SSEI sub-group also. Again, this expertise is readily grouped into not-for-profit and for-profit specialisms and experience, with a small number of firms attempting to bridge this divide. A review of the top five skills listed on LinkedIn by Australian lawyers whose profiles referred to both ‘climate change’ and ‘social enterprise’ reinforced that generic commercial skills are predominant in those who seek to service SSEIs. Lawyers based in regional areas outside the main capital cities tend to have a broader skill-set that is more likely to include community development, alternative dispute resolution and even human rights.

Of the firms that identify a not-for-profit specialisation, some provide value statements that frame their reasons for working with particular individuals or entities.⁶ Many of the firms also identify a specialism in not-for-profit taxation concessions – an important issue for those SSEIs seeking to establish themselves as not-for-profits. Most of these firms also offer pro bono services, however the majority require the entity to be not-for-profit to be eligible to access these services.

There are a small number of firms attempting to cater specifically for social enterprises. For example, Gadens Lawyers positions itself as providing pro bono legal services to ‘foster sustainable communities’, and Clearpoint Counsel has built specialist advice on ‘social enterprise and sustainable economies law’ into its core offering of ‘holistic, collaborative and

Gadens Lawyers includes charities and not-for-profit organisations as an area of specialty expertise and aims to provide pro bono legal services to foster sustainable communities. Specifically, with regards to social investment and social enterprise, Gadens aims to help organisations with their commercial activities, outcomes reporting and investment capacity building. They have also worked with organisations such as the Environmental Defenders Office and Salvos Legal.

⁶ For example: Clayton Utz advises that it ‘acts for low income and disadvantaged people who cannot obtain legal aid and for the NGO organisations in society who support them’.

entrepreneurial services'.⁷ Through such methods, some legal practitioners are gaining a level of expertise in matters of specific relevance to SSEIs. This appears to be particularly the case where they are exposed to innovative SSEIs, their founders and participants. Information on these individual practitioners is difficult to locate however, and word of mouth seems to be the primary way for SSEIs to learn about what they may be able to offer.

As would be expected, expertise in a broad range of commercial matters is widespread - including in establishing for-profit structures - and this appears somewhat transferable to the SSEI context. However, the environmental and/or social focus of the particular SSEI plays a significant role in this, as the nature of the expertise required can become quite specific (for example in land use, or intellectual property). There are also firms that specialise in advice for SMEs generally, which would be useful for many SSEIs, such as John F Morrissey & Company, which also specialises in employment law.

For the legal practitioners themselves, overall, it appears that pro bono lawyers have access to well-developed networks to help them identify each other and to share knowledge including, for example, through the National Pro Bono Resource Centre and its activities. In contrast, those attempting to build their expertise and skills around working with social enterprises and SSEIs specifically report that, other than word of mouth, there is no way for them to identify each other. Opportunities to share knowledge and expertise around the specific needs and contextual issues of SSEIs are therefore limited.

4.3 Legal services accessible via social enterprise capacity building initiatives

In addition to the legal services available through the channels discussed above, there are also a number of capacity building programs that support the establishment and growth of the social enterprise sector and/or various sub-groups within it. A number of these programs were contacted and the list of those that provided some input is included at Appendix B. Some SSEIs are eligible to access these programs, depending on their specific mission and (in some cases) their legal structure. Whilst these entities and programs are not specifically focused on legal matters or access to legal services, most attempt to assist their program participants to access the expertise they need at various stages of development.

Capacity-building initiatives generally provide two pathways through which SSEIs can gain access to professional legal services. The first includes the provision of fairly general 'legal matters' style workshops or other material to groups of participants in a standard format. This type of format appears to be most useful for early stage SSEIs, where there is a need for generic content that cuts across many different types of initiative. In a similar vein, there are some groupings of SSEI types that potentially facilitate the provision of 'template' style advice for specific aspects of their operations - for example around how purchaser agreements, insurance arrangements or volunteer contracts are structured.

The second pathway is where the capacity building program secures a specific instance of legal support on behalf of a participant. This format is most useful when there is a clear legal matter requiring input, and where the SSEI participant has adequate knowledge of legal processes and capacity to act on the advice once received. Some programs use strategies to

⁷ See www.clearpointcounsel.com.

ensure the prevention of over-referral, including a purpose-designed form to screen matters they refer on behalf of their participants.

There are several limitations to both pathways:

- only those already admitted to the capacity building program can access the support;
- timeliness of advice is often an issue (especially where the provision is pro bono), there is often a need to consistently 'chase-up' advice committed;
- and advice provided is often quite standard, given by legal practitioners lacking sufficient time to think through more bespoke and/or complex arrangements.

Some capacity building programs also attempt to broker 'low-bono' specialist legal advice to counter these limitations. Standard legal rates are prohibitive for many SSEIs, and capacity to pay is therefore a significant consideration in determining what services it may be possible to utilise. In these instances, the capacity building program uses its networks and positioning to identify legal practitioners with the specific expertise required, and to negotiate a low-fee or fixed-fee arrangement on behalf of their participants.

A small number of examples of specific firms or individual practitioners associate themselves with SSEI-focused start-up incubators. They typically provide limited initial advice free-of-charge, with the understanding that this would convert to a low-bono style arrangement if further input were required. These relationships have good potential to foster SSEI-specific expertise and a sense of 'the touch' discussed in Sections 5.1 and 6.1.

5. What unmet legal services requirements does the SSEI sector have?

This section draws on the data sources discussed at Appendix A to consider the unmet legal services requirements of the SSEI sector. These stem from technical complexity, the focus of many on innovation, and most of all from the presence of a commitment to community scale and ethical purpose. As the A&E Project found across the eight workshops it convened:

“Beyond specific legal barriers and the poor fit with existing structures...a particular challenge is presented by the numerous 'grey (legal) areas' that arise in [the context of SSEIs]. [SSEIs] can come under regulatory purview in a context where the regulations were originally designed for much larger-scale and more commercially-oriented initiatives . . . All [the] workshops emphasised the importance of a broader sense of ethical purpose and commitment as infusing both the initiatives and the legal services that support them. In other words, the ethical quandaries raised [by SSEIs] were not something solved by external state regulation.”

The distinctive legal needs of SSEIs seem to require the development of a distinctive kind of legal professional, one that we refer to as a 'community enterprise lawyer'. This section develops a textured account of the gaps that lead to the need for such a professional.

5.1 Overarching unmet needs

The programs and initiatives discussed in Section Four are effective in some areas and for some types of SSEIs. For genuinely hybrid SSEIs however, and particularly those that are innovative in either what they do or how they do it, relying on these approaches to meet their legal needs has a number of significant limitations. In particular, many of the programs and initiatives currently available involve the application of skills and experience with not-for-profit, for-profit or cooperative legal matters to the SSEI context. **The key overarching unmet need, common across all the data sources reviewed, is therefore the extremely limited availability of skills and experience specifically relevant to the unique aspects of SSEI operations and context.**

While some of these skills and experience are technical, the most important can perhaps best be described as **a culture fit** with values prominent in the social enterprise sector and the SSEI sub-group. Described by one interviewee as ‘the touch’, and developed in more detail in Section 5.1, this is a mix of judgement capacity and affective connection to the client’s perspective, grounded in a mix of shared values, a holistic worldview and an understanding of how to meld social relationality with practical governance. This slightly amorphous concept appears in survey data (ICSEM project, see Appendix A) in the form of the ‘top three goals’ for over half the respondents: economic democracy, community development and capacity-building. These goals were given significantly more priority than goals such as income generation, productivity growth, economic viability through earned income and financial returns/investment.

This finding points to the key issue social enterprises and SSEIs grapple with on a daily basis, that of balancing the financial viability of the enterprise with achieving their social and/or environmental goals. This tension is real, constant and extremely demanding. In this context, reliance on not-for-profit or commercial legal expertise alone can result in advice that exacerbates these tensions. Examples of this have been identified through discussions with SSEIs, but the provision of specific named examples is overshadowed by confidentiality concerns.

Similar to SMEs⁸, **the cost of services** is also a key overarching issue for SSEIs. This is with regards to overall cost, but also in terms of the lack of surety around what a specific instance of advice may cost overall. Even at their peak, many SSEIs generate only moderate income and portions of this are also often re-invested towards the social and/or environmental objectives. Therefore, even SSEIs structured as for-profits often have limited capacity to pay commercial rates for legal services and advice. Cost of services can also be particularly problematic when the founder/s come from low socio-economic backgrounds (Hauber 2007, p.18).

The **basic accessibility** of relevant legal firms or practitioners is the final overarching issue. There is no listing publicly available, and certainly nothing that provides any kind of user-driven ranking (or other surety mechanism) as to the practitioner or firms’ exposure to and experience with issues of specific relevance to SSEIs. Reliance on word-of-mouth, personal or professional networks, and/or participation in a broader capacity building program is a

⁸ For example (Coverdale et al 2012) reported that 85% of SMEs identified cost as an important factor in considering whether and how to access professional legal services.

substantial inhibitor to the growth and robustness of the emerging social enterprise sector and the SSEI sub-group.

5.2 Needs related to stage of development (lifecycle)

In addition to these overarching unmet needs, the specific legal services SSEIs require can be broadly grouped according to their stage of development - 'pre-start-up and start-up', 'operational' and 'end stage'. These each require some areas of specific technical expertise, and are discussed in turn below.

5.2.1 Pre-start-up and start-up stages

For those at the pre-start up stage, the overriding need is for access to legal advice to support a considered approach to determining whether the enterprise will be established under a not-for-profit, for-profit, cooperative or bespoke hybrid structure. For SSEIs not-for-profit, for-profit and cooperative structures all have advantages and disadvantages that relate to their specific context and chosen field of operation.⁹ In the Australian context, despite neglecting to include cooperative structures, the guide published by Justice Connect (2014) provides a useful summary of the issues and considerations those seeking to establish an SSEI must navigate. For those interested in establishing under a cooperative structure, the recently launched 'Get Mutual' website¹⁰ and associated resources provide useful guidance.

Many SSEI founders are considering legal structure issues for the first time, and in the early stages often don't feel equipped (financially or in relation to framing their needs) to approach a firm for specific legal advice and so rely on the input of colleagues and others in their networks. However, lack of appropriate advice can lead to avoidable problems and potentially high costs at a later stage (Hauber 2007, p.16-18).

"There is a chart of what the differences between . . . structures are. But there is very little assistance to figure out which is then the best structure for your operation". *Australian SSEI*

To help address this issue, some of the capacity building programs discussed in Section 3.3 have offered introductory 'legal matters' style workshops to their program participants. They report these to be very useful around general content, but that more specific guidance is often needed quite quickly. The availability of these workshops has also been dependent on the participation of a law firm/s on a pro bono basis.

Proper consideration of legal structure prior to start up can be a critical success factor for the enterprise (Rodgers et al 2014). In particular, the legal structure chosen has a significant impact on the sources of finance and capital (eg. grant funding and/or investment) the enterprise will be able to access over its lifetime, and on the ongoing reporting and governance requirements that must be met. It can also extend to things like how intellectual property is

⁹ Some jurisdictions elsewhere have sought to address the limitations of existing options by establishing a new legal structure (eg. the Community Interest Company, or CIC, in the UK). However, due to the extremely varied nature of SSEI activity, the effectiveness of these in addressing key issues faced by specific enterprises is still questioned (ref). To date a specific structure is not available in Australia, and the arguments for and against the various options are discussed in detail elsewhere (eg. Rodgers et al 2014; JusticeConnect n.d.)

¹⁰ See: <http://www.getmutual.coop/>

handled, which for innovative SSEIs (and particularly those with technology aspects to their model) can be a significant issue that is best tackled at the outset.

For not-for-profit structured SSEIs, the relationship between earned income and deployment of surplus is often more complex than for standard non-profits, requiring highly specialised advice around any concessions it may be eligible for (e.g. public benevolent institution, deductible gift recipient status). The mirror problem for those SSEIs that establish under for-profit legal structures, is that the generic corporations template available through ASIC is quite limited in the extent to which the SSEI-specific characteristics of the enterprise can be integrated into the 'DNA' of the entity and importantly also how they can be protected over the longer term.

"People tend to go with what they are familiar with".
Legal practitioner

A key gap identified for pre-start-up SSEIs is that there are very few legal practitioners with expertise specific to navigating the nuances of the proposed operations. SSEIs also report that many legal practitioners seem uncomfortable providing advice around legal structures they may have had limited exposure to, and consequently tend to prescribe those that they are most familiar with.

For those SSEIs that wish to develop bespoke structures that mitigate the limitations of the not-for-profit / for-profit / cooperative divide, this issue is particularly pointed. Legal practitioners with experience in developing truly hybrid structures that integrate elements from across the available options are in short supply. The hybrid approach requires a high level of engagement with complex questions at an early stage of development, and ultimately the design of bespoke clauses for the constitution. Without access to legal practitioners experienced in identifying and considering relevant issues, and who are open to designing bespoke solutions to addressing these, the majority of SSEIs choose the short-term convenience of one of the standard structures over their long-term needs.

At a sector-wide level, it is likely (although further research is needed) that this is limiting the progress of specific enterprises, restricting the entry of start-ups, and skewing the trajectory of growth and development. Two innovations are emerging that help to address these issues:

- The Fair Shares model¹¹ offers a unique approach to enterprise ownership, governance, and management through its recognition and integration of founders, producers, employees, customers, service users and investors. The model inserts specific guidance and a range of clauses into the constitution of the enterprise, specifically seeking to securely embed the purpose and to institutionalise multi-stakeholder governance. Globally, only a small number of entities have incorporated using the Fair Shares model to date¹² and there is no specialisation with the structure in Australia.
- The Benefit Corporation (B—Corp)¹³ model uses a voluntary certification process and as such is a non-legal approach. Certification examines a company's governance, transparency, environmental and social impact. The process is overseen by the not-for-

¹¹ Through developing and making the model available, the Fair Shares Association aims to create and sustain networks of solidarity enterprises that share power and wealth amongst their entrepreneurs, producers, consumers and investors. For more information see <http://www.fairshares.coop/>

¹² For example, the innovative online platform Mass Mosaic: <http://peoplepower.massmosaic.com/> and <https://massmosaic.com/>

¹³ For more information see: <http://bcorporation.com.au/> and <https://www.bcorporation.net/>

profit B-Lab, which is now represented in Australia, and the uptake amongst enterprises is growing rapidly.

5.2.2 Operational stage

Once an SSEI is established and at the operational stage of development the needs for legal services become very specific – as relates to their business model, market sector and resource mix. The type of legal expertise required at this stage is often asserted to be similar to that required by commercial businesses and/or not-for-profits, in that it relates to specific operational matters that may arise in those sectors also, such as negotiating leases and/or insurance agreements; land use and development processes; employment; intellectual property protection; and so on.

However, SSEIs often attempt to innovate, either in their mission or in the governance of their enterprise, in ways that make them operationally distinctive. Particular areas where this was evident, and that indicate distinctive technical skills are often required for support to be effective, include:

- the use of commons-based models around intellectual property;
- structuring arrangements with ‘sweat-equity’ contributors;
- issues related to ‘gifts’ for voluntary work;
- the choice of legal form that would allow trading and income flows to supplement grant-based support without adding undue organisational complexity;
- how to amend existing constitutions to reflect commitments to economic democracy;
- and providing surety around insurance arrangements for these and other non-traditional activities.

At the operational stage, a key issue for SSEIs is ‘not knowing what we don’t know’. The task of identifying what constitutes a legal matter – as distinguished from an accounting, governance or other management-related issue – can require a level of expertise beyond that of many SSEI practitioners. In this way, SSEIs can best be likened to small business operators. Evidence from a legal needs survey of regional Australia points to the widespread reliance on non-lawyers for advice in this area, especially accountants, and to an expressed preference for specialist legal expertise where such generalist non-legal sources of support are insufficient (Coverdale et al 2012).

This unfamiliarity with the legal framework can cause both under-referring and over-referring of issues – i.e. legal matters not receiving pro-active attention, potentially leading to avoidable crises; and non-legal matters being referred, unnecessarily utilising scarce time and resources (of both the SSEI and the legal practitioner). These issues raise the need for advice targeted to the point in time when it will be drawn on, and which could complement generic advice provided at the outset. Some of the initiatives discussed above attempt to address issues of over-referral and under-referral through their own processes. But even these approaches often face the challenge that a lawyer is required to assist with identifying whether a matter is legal in nature or not - meaning that the need for legal input remains, albeit in a different form.

“... they write a global answer that takes a page and a half, doesn’t help the client and protects themselves” *Australian workshop participant*

In addition to technically unique areas, and notwithstanding that many other matters that arise during the operational stage are not unique to SSEIs, there are a number of areas where it is evident that ‘the touch’ introduced in Section 5.1, and the community enterprise lawyers mentioned earlier, are needed. In its absence, there is evidence of cases where the advice given is designed with protecting the legal firm against any risk it may be exposed to in mind, rather than what is going to be most effective for the SSEI. Aside from minimising their own risk, SSEIs report that the ‘fixation with legal impediments’ they often encounter in response to their aspirations and plans is a poor fit with the purpose of many SSEIs and with the culture of the enterprises themselves. One aspect of this is where legal practitioners provide ‘off-the-shelf’ advice that is overly complex and unwieldy for the purpose. When unsure about the extent of what is required, SSEIs will usually adopt the advice provided as given, sometimes adding layers of unnecessary complexity to operations.

“... the advice is often too much and too commercial . . .” *Australian workshop participant*

5.2.3 End-stage issues

End-stage issues usually present in two ways. When things go well the prospect of a buyout or merger can emerge. When things don’t go well, wind-up processes are needed, and may include a range of dispute scenarios. Many of the issues that arise are similar to those that any entity would face in these situations. For SSEIs, however, due to the for-benefit focus there is the additional concern of how to protect the purpose - in the case of continuation in another form; or how and where any accumulated assets and resources are distributed - in the case of wind up. For those that support SSEIs through the difficult start-up and stabilising phases (through volunteering, funding and investment, or purchasing, for example) these matters are also often of concern.

For example, in some cases, where philanthropic or other grant funding is part of the resource mix, SSEIs can be subject to clauses that require certain actions. Hence SSEIs often experience comparatively higher levels of scrutiny from stakeholders around end-stage processes and outcomes. Examples of specific clauses in SSEI constitutions that address this issue include:

- the asset lock that forms part of the UK’s Community Interest Company (CIC) structure¹⁴;
- the use of Golden Shares to protect social mission¹⁵;
- and the more multi-faceted and comprehensive Fair Shares model discussed in Section 4.2.

Aside from how ‘locked in’ the for-benefit purpose may prove to be under challenge, the other key issue for SSEIs at this stage is that their advisors may lack ‘the touch’. Similar to the operational stage, this can be experienced through a lack of sensitivity to the unique priorities of SSEIs, a lack of experience with developing bespoke solutions to the kinds of legal matters these raise, or a combination of the two. In cases where it’s relevant, the need for a community enterprise lawyer type approach extends to how dispute resolution and/or litigation is handled. For SSEIs, the relationships between the parties involved and the relationships with key

¹⁴ For more information see:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416360/14-1089-community-interest-companies-chapter-6-the-asset-lock.pdf

¹⁵ For more information see:

<http://www.bigsocietycapital.com/sites/default/files/pdf/Golden%20Share%20Report.pdf>

stakeholders can be such that they are unwilling to pursue aggressive approaches and are looking to develop bespoke solutions that allow them to maintain the integrity of these relationships.

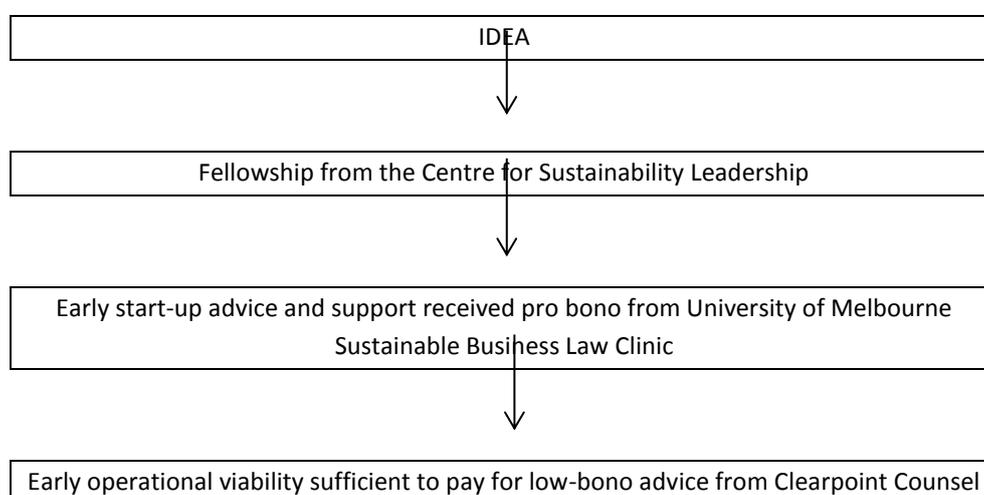
6. What could an effective eco-system of professional legal support in Australia look like?

This paper specifically focuses on professional legal services and it is important to keep this in context, as this type of support is one part of the overall eco-system that SSEIs require to foster their growth and long-term sustainability. This broader eco-system is not the subject of this paper, but the authors hope that it will be useful to those entities engaged in this broader endeavour as well as to others interested in supporting the development of the emerging SSEI sub-group of social enterprises.

This section is intended as a discussion starter around how the gaps and needs related to professional legal services presented above might begin to be addressed in the Australian context. It draws in part on the aspects of the A&E Project data that relate to US and UK experiences with attempting to address similar issues. It also draws on overseas examples of some small initiatives attempting to address elements of the needs emerging. This is similar to the Australian experience, where some aspects of identified needs are being met by the types of initiatives discussed above, but significant gaps are still evident and little attention is being given to the mix of – and links between – the various initiatives.

Figure 1 illustrates one hypothetical pathway into and around professional legal services that emerging SSEI practitioners in Australia might trace at different stages in their initiative's lifecycle. Other pathways are also possible, but this illustration shows that the seeds of an eco-system are evident, and this is supported by the earlier discussion on the support available through existing initiatives and programs. However, it is important to note that many of the legal services pathways currently available are largely under resourced and potentially not sustainable in their current form.

Figure 1: SSEI pathways in and around legal services at different stages of development



This section builds on the seeds evident here, aiming to identify areas where incremental progress could be made towards establishing a more comprehensive ecosystem of support, rather than focusing on complete ‘system-change’ level solutions.

At the holistic level, perhaps the most innovative and proactive approach that provides an example of what is possible is that developed by the Sustainable Economies Law Center

Sustainable Economies Law Center (SELC)

SELC exists to bridge the gap in legal expertise needed to transition from destructive economic systems to innovative and cooperative alternatives. It supports community resilience and grassroots economic empowerment, including through services for individuals, groups and enterprises. SELC delivers 10 programs that work together to identify key leverage points in the existing economic and legal systems, remove strategic legal barriers, and create replicable models for community resilience. These programs under four key strategy areas:

- Education - training and learning opportunities for legal practitioners; and workshops, webinars and generic-type guides for SSEIs
- Research – hosts five free online legal resource libraries that provide guidelines, FAQs, and templates to help navigate complex regulatory landscapes for urban farming, cooperatives, small and community-owned enterprise, community currencies, and food and farming enterprises.
- Advice – direct legal advice, workshops, teach-ins, discussions and legal services to businesses and organisations through its Resilient Communities Legal Café. Provided on a no-cost first-come first-served basis, with no appointments needed.
- Policy Advocacy – initiates and supports a range related campaigns at the national, state, regional and city levels.

(SELC) in California¹⁶.

SELC’s model balances a not-for-profit arm and a private practice arm to its operations. This balance allows it to offer services free of charge in areas that support achievement of its purpose, and also to generate its own income through fee-paying work – the returns from which also go into supporting its purpose-related programs. SELC’s multi-faceted approach is made possible through partnerships with various organisations and the voluntary participation of a network of committed legal practitioners.

The following sections outline the four broad gaps in the ecosystem that have been identified. The first two sections both focus on capacity building amongst legal practitioners potentially interested in becoming community enterprise lawyers. The remaining two sections focus on improving the accessibility and relevance of professional legal services for SSEIs, as well as their cost. Some examples of initiatives and

Legal services for local economies and earth friendly initiatives (LEEFI Legal)

The Australian Earth Laws Alliance (AELA) is currently working to secure seed funding for a new, national, not-for-profit law firm called ‘LEEFI Legal’, inspired partly by SELC (above). LEEFI aims to offer specialised legal services and advocacy support for businesses, cooperatives, organisations and community groups involved in building local economies and earth friendly projects.

Demand has been identified from emerging or potential cooperatives small scale local, organic and ‘alternative’ food production and distribution organisations, community energy, community land trusts, community health organisations and community-based environmental organisations.

¹⁶ See <http://www.theselc.org/> for information on SELC’s innovative and unique approach, including its own governance structure and policies that embody the values of SSEIs.

programs identified through the data sources reviewed as input to this paper (see Appendix A), including suggestions made by workshop participants in the A&E Project, are also provided.

6.1 Supporting legal practitioners to cultivate ‘the touch’

To support the inclusive and proactive business models many SSEIs are developing, professional legal services and practitioners that are comfortable working beyond traditional approaches to matters such as risk and governance are required. Currently there is little openness to exploring ‘grey areas’ and testing how boundaries might be expanded within existing legal frameworks. This is compounded by what one interviewee described as an ‘Eeyore fixation’, a tendency to see legal impediments and hurdles at every turn. There are technical elements to this need, which are discussed in more detail in Section 6.2, but as noted above a clear theme across all the data sources is the need for legal support and advice that incorporates ‘the touch’.

There is also a need for legal practitioners who are open to exploring whether **non-legal solutions** could be developed

to address some matters. Some understanding of other areas of professional practice is needed here, and access to a network of suitable professionals in these fields who also have ‘the touch’ would facilitate the development and ongoing sustainability of SSEI business models. As illustrated in the box here, these types of practitioners can also bring a unique perspective to legal matters and accelerate progress substantially.

A clear gap in this area is any kind of **capacity building or networking support** through which legal practitioners could proactively seek to develop and hone this ‘touch’, and effectively begin to establish a pool of like-minded community enterprise lawyers. Currently the practitioners attempting to provide services to SSEIs are quite isolated, both those working within larger firms and sole practitioners. These practitioners have few places to turn when they need SSEI-specific advice themselves, or when perhaps a ‘bounce-off’ type discussion with a suitably experienced colleague would improve confidence in exploring an innovative approach.

The importance of non-lawyers

UK experience shows that *non-lawyers* make significant contributions to shaping legal and organisational identity, drawing on backgrounds in organisational psychology, community development or governance and stakeholder management. Examples include

[Jim Brown](#), social economy training, research and development

[Rory Ridley-Duff](#), cooperative and social enterprise educator, researcher and advisor, and co-founder of www.fairshares.coop.

[Hilary Sudbury](#), cooperative development advisor

[Cliff Southcombe](#), social enterprise advisor; head Social Enterprise Europe

Non-lawyers are likely to be important partners in forging a distinctive ethos of legal practice: one that provides much greater affordability than big-firm comprehensive advice but is both more socially and environmentally attuned than legal support for ‘tech start-ups’, and more holistic and experientially informed than ‘discrete task support’ services offered by new law providers and/or by franchise models.

As the sector has grown and matured in the UK, the lack of peer-to-peer support resulted in the few pioneering practitioners involved in advising some of the early examples of SSEI activity becoming overwhelmed with contact from other practitioners as the requests for innovations in (for example) legal structure, ownership models, contracts etc began to build.

“ . . . you have a lot of people who have a practice-based approach to acquiring skills . . . so they'll often learn through doing it and then get so bombarded with requests . . . that they then become advisors to others . . . ” *UK legal practitioner*

For those working in **larger Australian firms**, an identified issue is the allocation of adequate time within billing regimes to develop their expertise and networks in this not very visible field. Establishing professional development channels that help to legitimise the social enterprise sector generally, and the SSEI sub-group specifically, as market segments with specific needs could help these practitioners to secure more internal support for their involvement.

For **sole practitioners**, there is evidence that some working in this area identify themselves as ‘corporate refugees’ from “. . . war-torn law firms, battered and wanting to reinvent things” (Orsi Final Workshops Report). These practitioners indicate a desire to move away from ‘negative, adversarial, competitive and risk-averse models of practising’. Many of these are clearly interested in developing their community enterprise lawyering capabilities, and their orientation towards ‘new ways of working’ is culturally well suited to partnership type approaches that could proactively push the boundaries around what is possible within the legal framework. Workshops participants also advised that in some areas (for example, Northern NSW) there are also ‘dormant’ legal practitioners, ‘burnt-out’ by commercial legal practice, who could potentially be re-activated with an SSEI focus.

To identify sole practitioners who may potentially be interested in developing new and different practice streams, there may also be opportunities to tap into technology-based networks that connect and support sole practitioners - such as Lawyer Mums Australia.¹⁷ These types of networks have the added advantage of “. . . reducing the impediment of geographical distances and creating a ‘virtual legal practice’ which allows for small firms to aggregate work whilst simultaneously allowing them to stay competitive in the marketplace (Hart 2011, p.252).

Amongst those who could be identified as ‘corporate refugees’, dormant practitioners and/or isolated (from peers and from mainstream markets) there are real opportunities to establish community enterprise lawyering as a **viable career option**. Similarly, building a sense of community enterprise lawyering as an attractive, versatile and rewarding career path for younger practitioners could be a productive strategy for building the pool of relevant expertise available.

These approaches require ‘signposting’ of pathways and support for those interested in exploring them. To address the gap in peer-to-peer support opportunities in Australia, an obvious approach would be to foster the development and ongoing maintenance of an SSEI-focused **professional development network**. This could include (for example) ‘Meet Ups’, Communities of Practice, online sharing forums, or some combination of these types of activities. Another key consideration is how to best structure and resource a network so that it acts as a key catalyst for breaking down the not-for-profit / for-profit / cooperative divide that runs deeply in this area of legal practice.

¹⁷ A Facebook group, see <https://www.facebook.com/LawyerMumsAustralia/>

Over time a network could also potentially facilitate ‘trusted’ partnering and/or referral between legal practitioners. This aspect could be particularly attractive to sole practitioners and small firms, including those outside the major cities, as it could facilitate the development of specialisms where it may otherwise be prohibitive to do so (Hart 2011, p.248-249). These types of practitioners are likely to use a network for these purposes in different ways than how a mid-size or large firm may do, and this would be an important consideration in designing a network. Over time local or regional clusters may also emerge, through which it may be possible to establish sub-networks that work in particular geographic areas; and clusters may also form around specific facets of technical expertise, and again these could become sub-networks with deep specialisms in those areas (see Section 6.2).

6.2 Establishing community enterprise lawyering as an identifiable skill set

A key gap identified through review of the data sources drawn on is access to legal practitioners that have the confidence and expertise to explore different ways of working within the legal framework. Application of ‘the touch’ is that *sine qua non* that allows key technical skills to be targeted to the specific needs of SSEIs. In short, even if all the technical skills identified as needed were assembled – and in an accessible and affordable manner – if ‘the touch’ were missing there would still be substantial limits to the extent to which this would meet the legal support needs of SSEIs. Whilst somewhat intangible, there is a need for the skills and perspectives that characterise community enterprise lawyers and entities to be identifiable in some form.

SELC and The Hive are good examples of this overseas. Indigenous Corporate Partners¹⁸ provides a useful example in Australia, within the Indigenous enterprise sector. It was established by a lawyer who saw a need for a broader role that coordinates all the professional services involved with a project, bringing a level of contextual sensitivity and ethical oversight to all aspects and developing strong trust relationships with its clients over time.

The importance of ‘the touch’ in relation to SSEIs is illustrated through the identified need for legal practitioners skilled in designing **bespoke legal structures**. The gap here includes guidance and support for practitioners to develop their experience in and comfort with designing hybrid forms. Hybrid entities often integrate relevant elements from not-for-profit, for-profit and cooperative sector structures and therefore practitioners who only work in one or other of these sectors often struggle in this area. In some cases, there is also a need to develop completely new clauses for constitutions and other governance guidance materials. Practitioners with exposure to emerging models that reflect the interest in tailored legal structures, such as Fair Shares, are also needed.

Hybridity matters also illustrate the importance of legal practitioners being aware of potential **non-legal solutions**. The B-Corps approach discussed above is a

“... so many lawyers still don’t have any clue about the unique legal needs of clients like this ...”. *US legal practitioner*

“We’re deliberately using this term ‘practitioner’ to try and identify this type of behaviour”. *UK cooperative sector practitioner*

“Lawyers can be creative, for example by re-contextualising 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.”
(Excerpt - A&E Project workshops report)

¹⁸ See: <http://indigenouspartners.com.au/>

non-legal, non-regulatory approach that is rapidly gaining popularity in Australia and overseas. In essence, B-Corps are a brand, albeit one that is underpinned by a fairly rigorous evaluation process that aligns with the values of many SSEIs. These examples show how ‘the touch’ interacts with advanced technical skills to design the types of solutions relevant to SSEIs. This type of approach broadens traditional ‘lawyer skills’ to include a range of practice-based expertise, and these types of multi-faceted approaches are well suited to the context of social enterprises and SSEIs.

As noted above, the needs around technical skills are likely to evolve apace as SSEI activity grows and deepens. Beyond bespoke legal structures, some of the other key areas where **technical skill gaps** have been identified to date include:

- Ownership arrangements – including designing flat structures, ‘sweat equity’ returns, scaling and growth models, and ‘end of life’ distributions
- The implications of tax status – particularly restrictions or incentives they may create around grant funding, earned income and investment models
- Innovative approaches to matters of intellectual property - including expertise working with emerging ‘sharing economy’ law, such as creative commons licensing
- Employee contracts – especially blurred lines between staff, volunteers, and other key stakeholders contributing to the enterprise’s operations
- Innovative approaches to addressing regulatory barriers and compliance issues – especially around land use, leases and other property related matters

These types of technical skills can be addressed in a number of ways, from fairly informal to highly structured approaches. **Informal approaches** include the establishment of peer-to-peer support and referral networks. As described in Section 6.1, these are particularly well suited to cultivating less tangible attributes such as ‘the touch’, but will also naturally facilitate the transfer and promulgation of specific skills as well. For example, the clinics and teach-ins run by SELC (see above) provide training opportunities for more junior lawyers. SELC also offers internships and a Legal Fellowship to further facilitate knowledge transfer around skills and ‘the touch’ spreading beyond the organisation. Australian firms and SSEI-related entities could develop similar opportunities.

More formal approaches could also prove effective, particularly where they offer clear **professional development** opportunities and pathways for legal practitioners. Some approaches that have been effective in fostering new service delivery areas and markets in other legal sectors include:

- Targeted seminars and training sessions focusing on the more technical aspects of the needs and gaps identified. It is telling that even in the more mainstream area of not-for-profit law there is limited activity in this area in Australia. A notable example is Justice Connect’s Continuing Legal Education seminars for its Member organisations, which cover a range of issues. However, for legal practitioners seeking to improve their skills around social enterprise broadly and /or SSEI specifically there is a major gap in the provision of professional development seminars and training that bridge the not-for-profit / for-profit / cooperative divide and that provide overarching generic content that is also specific to the SSEI context.
- Developing specific units of competency that accrue credits and could be linked to the continuing professional development requirements for legal practitioners could also be developed. These types of activities could be delivered as ‘electives’ within the structure

of training and accreditation programs delivered by other organisations, such as Justice Connect.

- At the most structured end of the scale is the integration of specific units and/or whole courses into relevant university degrees. Again, attention to not perpetuating the not-for-profit / for-profit / cooperative divide is a key concern.

For all of these approaches, the design of the distribution mechanism will be important. From promotion of the opportunities through to mode of delivery, building in accessibility for legal practitioners based around the country will contribute to the ongoing financial viability of the service offering as well enabling uptake of the skills across the broadest geographic base.

6.3 Improving access and relevance

For many SSEIs the thought of approaching a legal practitioner invokes fear and trepidation. This is not unique to Australia and some of the examples given below show how access to professional legal services is being improved for SSEIs and related entities. Much of the fear identified through the data sources reviewed for this paper (Appendix A) appears to be stemming from uncertainty around costs (Section 6.4).

“... there are so many people out there who need legal advice who are not getting it – they’re very intimidated by the concept of hiring a lawyer, setting up a talk with a lawyer . . .”. *US legal practitioner*

Cost notwithstanding, a key issue that was identified through all data sources was the lack of listings or any publicly accessible referral mechanism for **identifying legal practitioners** with expertise and interest in working with SSEIs. As discussed above, most rely on their own personal networks and / or the relationships established by a specific capacity building program they may be involved with. These programs have their own entry requirements, some of which cater for specific types of social enterprises or have a particular area of policy focus – and so are not accessible to the broad SSEI sub-group. For those without personal networks and not involved in any of the capacity building programs, there is little available beyond reviewing the websites of legal firms, which produces quite limited results and very few specific points of contact. As noted above, a professional network for SSEI relevant legal practitioners could assist with addressing this gap substantially. Over time, a listing could evolve to include ‘user driven rankings’ or similar (such as those used by a wide range of online platforms), to help identify specific specialisms and also to drive a healthy level of competition amongst the practitioners.

Improving access to appropriate legal support and advice also has a number of dimensions that relate to how the advice is conveyed. In some areas the provision of templates and other similar **‘generic- guide’ style information** can be useful. Justice Connect’s new Not-for-profit Law Information Hub¹⁹ provides an example of this. However, the key focus on not-for-profits does limit its usefulness for the broader social enterprise sector and some types of SSEIs.

The ‘generic’ approach is also evident within particular SSEI purpose-clusters, where there are similar needs arising amongst emerging groups. In some cases pioneering SSEIs that are leaders in their purpose-clusters (for example, Embark²⁰ - around community energy) make templates available to members or like-minded entities. In developing this type of material it is worth noting however that some workshop participants suggested this type of guidance can

¹⁹ For more information see: <http://www.nfplaw.org.au/>

²⁰ See <http://www.embark.com.au/> for information on the organisation and its activities.

be overly didactic in how it presents issues and that case studies highlighting ‘*how you dealt with issue X*’ could be more helpful. They also suggested this type of material could be collected into a library that together demonstrates the specificity of context required by SSEs – ultimately aiming to assist with moving away from the use of prescriptive and reductive approaches.

This **purpose-cluster** approach also lends itself to the development of support brokers, or one-stop-shops, that cater to the broad professional services needs of the particular cluster – beyond solely legal services. For example, Pure Leapfrog²¹ positions itself as “the leading provider of social investment and professional support to community energy projects in the UK”. Its Legal Services include access to a suite of over 20 templates with accompanying guidance notes of specific relevance to the community energy sector, and at different stages of development. It licenses use of these materials on a per document basis or through an ‘all-you-can-eat’ package, with discounts and free materials available to members of Community Energy England.

The Co-operative Enterprise Hub in the UK is an example of a successful approach to sector development, which groups its services around a **legal structure-cluster**. It also offers professional development for its advisor network around the country, including training and a qualifications framework. In February 2016 the latest iteration of this - ‘The Hive’²² - was launched. The cluster focus has broadened, with the aim now to support social enterprises as well as co-operatives, through providing a wide range of generic materials across different dimensions of co-operative activity and relevant to different lifecycle stages, and also a listing of preferred providers with experience in the specific needs of the cluster.

“... sector development is the key word ... in terms of the work with accreditation of advisers ... we want to do that on a sectorial basis if we can ... “ *UK cooperatives development practitioner*

Within its ‘Advice’ strategy, The Sustainable Economies Law Centre runs a Resilient Communities Legal Café that serves its local region. The Cafes model provides an example of a **geographic-cluster** approach and combines the provision of generic-style content with a measured amount of advice tailored to specific participants’ needs. Through the Cafes program, SELC provides advice and legal consultations around: legal formation for small businesses; legal entity choice; employment law; securities law; tax law; contracts; liability issues; IP agreements and licensing; environmental law; and food safety laws.

There are also a wide range of **co-working spaces** that provide opportunities for cluster-based approaches to providing legal professional services. Many of these are geographically focused, such as The Hub in Sydney and Melbourne, and Create Centre in Bristol in the UK (which is owned by the local Council). Others are open only to specific types of enterprise, such as Green Businesses.²³

For those firms and sole practitioners interested in supporting the growth and sustainability of SSEs, working with and through various cluster-based networks could lead to more effective and efficient ways of doing this. Rather than (or as well as) working with a small number of

²¹ See <http://www.pureleapfrog.org/> for more information.

²² For more information see: <http://www.thenews.coop/102813/news/business/hive-co-op-social-enterprise-development-hub-launches/> and <http://www.uk.coop/the-hive/>

²³ See <http://ecowatch.com/2014/02/12/5-incubators-future-green-business/> for examples

specific SSEIs, efforts could focus on developing and delivering generic materials relevant to specific SSEI purpose-based or geographic-based clusters.

6.4 Reducing cost barriers

Cost is a real and ever present barrier to SSEIs accessing professional legal services. This has led to an over-reliance on pro bono services, which are often limited to enterprises structured as not-for-profits. As a result, they usually rely on practitioners whose primary expertise is with legal matters of concern to not-for-profits. During the early stages of development many SSEIs have significantly limited capacity to pay for legal services, so **pro bono models** are likely to remain a key part of the eco system. For example, initiatives like the Social Enterprise Pro Bono Legal Panel described at Appendix B, could be expanded and improved upon in conjunction with a professional development network. In general, increasing transparency around the processes for accessing pro bono services, and in how they may transfer to low-bono or full fee paying arrangements if required, will be central to improving the usefulness of pro bono services for SSEIs.

The Sustainable Economies Law Centre's Cafes model provides a useful example of how accessible and relevant services can also be highly cost-effective. The Cafes provide a safe and cost-free space for SSEIs to raise issues of concern and seek preliminary advice on whether or not they are actually legal matters that should be referred. A number of the approaches described above – such as developing generic guides and templates, and delivering cluster-based seminars and training sessions – are in affect **'bulk purchasing' models** and as such (where appropriate to needs) can offer substantial reductions to the cost of accessing legal support and advice. This can translate into materials and generic-type seminars and workshops being provided at no or low cost, particularly when the involvement of legal practitioners is secured on a voluntary basis.

As SSEIs mature, **low-bono services** offer the most useful approach to reducing cost barriers. The most common approach identified is providing some level of surety around what the costs will be. These models generally rely on fee caps for particular types of advice and /or retainers that include access to a specified quantity of advice within a given period.

Marque Lawyers²⁴ provide another example, positioning themselves as "law done differently". Marque uses a mixture of **retainers, capped advice and/or fixed quotes** to provide clients with certainty around costs. Unlike most other firms, it will include litigation in its retainers.

Clearpoint Counsel was established to "revolutionise legal services to meet the demands of new economy businesses by providing values-based outsourced in-house services for fixed fee retainers". It has developed three service offerings to meet needs at different stages of the lifecycle:

- Case-by-case services using fixed fee quotes, suited to projects and/or pre seed-funding start ups
- Ongoing legal services on a monthly retainer, suited to start ups and others with seed funding
- Dedicated counsel, suited to fully funded and larger entities.

²⁴ See <http://www.marquelawyers.com.au/> for more information on the firm and its services.

7. Starting points

As identified throughout this paper there are a number of initiatives and programs that together are providing the starting points for an effective eco-system of legal support services for SSEIs. However, many of the existing initiatives and programs are under resourced themselves. There are also many gaps evident in the cultural fit of traditional approaches with the SSEI context ('the touch'), and in specific 'community enterprise lawyering' technical skills that the emerging sphere of activity requires to develop and grow. A number of examples and suggestions that have potential to assist with strengthening the fledgling ecosystem in Australia have been discussed.

In particular, the establishment and coordination of an **SSEI-specific professional development network** for legal practitioners and other key service providers is considered a key priority. A network of this type could be hosted by a specific firm/s, perhaps on a rotating basis. This approach would have the advantages of minimising costs to any one entity and ensuring there is no perception that the network 'belongs' to one firm or another. A key disadvantage is a lack of ownership to drive the focus and development, with the potential that early efforts could languish as they are overtaken by other priorities.

An alternative would be for a legal professional association such as a state Law Society to take on the key coordination role, which would have the advantage of neutral positioning in the market and potentially a greater commitment of time and resources to its ongoing effectiveness and sustainability. Within this approach there is also likely greater potential for attracting initial funding to assist with scoping and establishment from sponsors within the sector or philanthropic entities with an interest in related issues.

In addition to this key first step, any or all of the following activities would make significant contributions to the development of an effective eco-system of support in the short-medium term:

- Mapping the relevant services available - ideally across all the dimensions discussed (ie. pro bono, low bono, fee paying; not-for-profit, for profit, cooperative; stage of lifecycle development; geographic-cluster specific, purpose-cluster specific, legal entity-cluster specific).
- Creating a publicly available listing of the relevant services available, including making transparent the processes for accessing these.
- Creating a 'one-stop-shop' repository for all the various guides and materials already in circulation that are potentially useful to SSEIs.
- Developing various generic-style templates and guides to fill gaps in what is currently available.
- Identifying key partners for the development of cluster-specific expertise, and supporting the development and cross-fertilisation of these.

It is possible that several different entities could take on aspects of these priority activity strands. For example, there may be synergies with some of the activities already occurring that could see natural leaders emerging around different strands (as has been mentioned, where relevant, throughout). However, a market neutral entity with a specific legitimacy in relation to both SSEIs and law is an important factor here.

As discussed above, The Hive has just been launched in the UK representing a comprehensive sector development strategy around cooperatives and social enterprises. In

the current climate and context, this is the 'gold standard' to aspire to, as it also provides a pathway for the entity to **mature into a self-sustaining social enterprise** itself. SELC offers another useful example of an approach that can become self-sustaining over time. In addition to the training, accreditation and other professional development activities that could generate revenue, over the mid-long term developing a not-for-profit back-of-house services arm that provides some 'engine-house' capacity to sole practitioners and small niche legal firms that specialise in SSEI and social enterprise also has potential.

8. Conclusion

We hope this discussion paper will catalyse wider cross-sectoral and multi-disciplinary collaboration in the service of a flourishing SSEI sector. An effective eco-system of professional legal support that successfully transcends current divides between for-profit, not-for-profit and cooperative structures, practices and cultures is only one facet of that collaboration. But it is a facet that all too rarely receives focused attention, and one that we believe is vitally important for making a socially and environmentally sustainable economy stable over the long term.

We can no longer afford for the creative innovation that always flourishes in the interstices of the mainstream economy to remain peripheral or marginal. Legal professional support helps to stabilise SSEIs, providing a base for replication and flourishing into the future.

We invite comments, feedback and further action in response to our initial elaboration of the issues.

9. References

- Barraket, J., H. Douglas, B. Morgan, R. Eversole, C. Mason and J. McNeill (2014). 'Concepts and Classifications of Social Enterprise in Australia'. ICSEM Working Paper for the International Comparative Social Enterprise Models Project
- Cameron, J. (2009). Experimenting with Economic Possibilities: Ethical Economic Decision-Making in Two Australian Community Enterprises. *In: Amin, A. (ed.) The Social Economy: International perspectives on economic solidarity*. p. 92-115. London: Zed Books
- Centre for Innovative Justice. (2013). *Affordable justice - a pragmatic path to greater flexibility and access in the private legal services market*. Melbourne: RMIT University. Available at: <http://www.mams.rmit.edu.au/qr7u4uejwols1.pdf>
- Chong, J., S. Asker, A. O'Rourke and S. White (2012). *Green Chrysalis: Small and medium sized enterprises - innovation and transformation towards Australia's low-carbon economy*. Sydney: Institute for Sustainable Futures.
- Coverdale R., Jordan L. & du Plessis J. (2012). *Providing Legal Services to Small Business in Regional Victoria*. Geelong: Centre for Rural Regional Law and Justice, Deakin University. Available at: <http://www.deakin.edu.au/buslaw/law/rrjc/regionalsmallbus.php>
- Hart, C. (2011). Sustainable regional, rural and remote legal practice in Queensland: The importance of innovation in alliances and the use of information technology. *Deakin Law Review*, 16(1), 225-263
- Hauber, L. (2007). Promoting Economic Justice Through Transactional Community-Centered Lawyering. *Saint Louis University Public Law Review*, 27(3), 3-43
- Law Council of Australia & Law Institute of Victoria. (2009). *Report into the Rural, Regional and Remote Areas Lawyer Survey*. Braddon, ACT: Law Council of Australia
- Justice Connect. (2014). *Social Enterprise Guide: Legal issues to consider when setting up a social enterprise*. Melbourne: Author
- Justice Connect (n.d.) Not-for-Profit Law Information Hub, <http://www.nfplaw.org.au/>
- 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*. Sydney: UNSW Law
- National Pro Bono Resource Centre. (2011). *Review of Parramatta City Council's Social Enterprise Pro Bono Legal Panel*. Sydney
- Pearce, J. (2009) Social Economy: Engaging as a Third System? *In: Amin, A. (ed.) The Social Economy: International perspectives on economic solidarity*. p. 22–38. London: Zed Books
- Rodgers, M., S. Bennett, A. Greig, B. Morgan, F. Martin, R. Donnelly, J. McNeill and A. Perry (2014). Legal Models Working Group Report. Sydney: Social Innovation, Enterprise & Entrepreneurship Alliance

Appendix A: Methodology and data sources

The approach taken to compile the data drawn on in developing this discussion paper is outlined below.

Existing sources of primary data

As outlined in the Introduction, the Activism and Enterprise Project (A&E project) was the catalyst for this discussion paper. The data collected through that project was re-examined, and the material relevant to this extension project compiled. That data comprised 50 interviews conducted with founders or leaders (and sometimes with others from the initiatives) in Australia (mostly Sydney) and the UK (mostly Bristol); a further 10 interviews with support organizations (legal, financial, local government and business planning professionals); extensive informal contact with policy and support issues for social and sustainable business through participant observation in workshops, conferences and policy working groups or taskforces including the hosting/organising of eight workshops directly; tracking the biographical trajectories of founders and leaders using data from a premium LinkedIn account (as well as the interview data), triangulated with LinkedIn trajectories of individuals in Sydney and in Bristol that had both the key phrases 'social enterprise' and 'climate change' in them. A minor longitudinal perspective supplemented approximately a quarter of the interview data (mostly collected in 2013 and early 2014) with follow-up data collected in 2015 as part of an international comparative social enterprise survey (ICSEM 2013), and periodic network analysis of social media hashtags such as 'sharing economy' or 'social enterprise', to identify clusters in this hybrid field.

Two other projects that members of the project team have been involved with concurrently were identified as eliciting data relevant to the project. Permissions were sought and the data was re-examined to extract material relevant to this project. The two projects are:

- The Australian component of the [International Comparative Social Enterprise Models \(ICSEM\) project](#) , which has developed working papers on the history and structure of social enterprise in over 26 different countries, as well as the administration (still ongoing) of a model survey to explore the governance, finance and mission structure of social enterprises in over 30 different countries
- The Social Enterprise Legal Models Working Group (LMWG) report. The LWMG was originally convened by the Centre for Social Impact as part of the "Social Innovation, Entrepreneurship and Enterprise Alliance" (SIEE) and operated as a working group chartered to investigate the issue of social enterprise business models/legal structures. Over 2012 and into 2013, the group carried out a small survey of social enterprises and incorporated the results into its final report available at <http://www.employeeownership.com.au/wp-content/uploads/2015/02/Legal-Models-Working-Group-Draft-Final-Report.pdf>.

Review of existing cognate programs

The websites of the following existing cognate programs were reviewed to determine eligibility requirements for participants, aspects of their programs relevant to SSEIs, and limitations. In some cases, additional discussions and / or email contact were entered into to gather information not available on the public website.

- The Expert Advice Exchange
- Justice Connect - formerly the Public Interest Law Clearing House (PILCH)
- The Environmental Defender's Office
- The Sustainability Business Clinic - at Melbourne Law School
- The Business Enterprise Centres (BEC) Network
- The National Pro Bono Resource Centre
- Get Mutual
- Lex Mundi Global Foundation

Additional targeted discussions

Email and/or telephone contact was made with nine social enterprise-related capacity building programs around Australia, and information on how they currently support their participants to navigate any legal matters that may arise over the course of their involvement was compiled.

A listing of specific legal practitioners and SSEI supporters involved in activities relevant to this paper and warranting further exploration was compiled from the following sources:

- the review of existing primary data outlined above
- the targeted discussions with the capacity building programs, and
- a review of LinkedIn listings (as described above)

Contact was made with each and where they were willing to be involved, targeted discussions were held.

Review of law firms websites

Drawing on the primary data sources and the additional targeted discussions a listing was compiled of the Australian law firms specifically mentioned in the context of providing support relevant to SSEIs – either as existing providers or as examples of possible approaches to providing support. The websites of the resulting list of firms were reviewed to determine whether they publicly promote any relevant specialisations, and to see how easily any specific eligibility requirements and types of support available can be identified. The law firms included in this review were:

- Ashurst
- CapacityHQ
- Clayton Utz
- Clearpoint Counsel
- Corrs Chambers Westgarth
- Gadens Lawyers
- Gilbert & Tobin Lawyers
- Herbert Smith Freehills
- John F Morrissey Law
- K&L Gates
- Kingfisher Law
- Malleson Stephen Jacques
- Marque Lawyers

- Mattila Lawyers
- Mayweathers
- McCulloch Roberston
- Minter Ellison
- Neville & Co
- O’Laughlins Lawyers
- Pro Legis
- Salvo’s Legal

Publications on other relevant studies

Publications on the findings of other studies with potential relevance to the focus of this paper were reviewed. The following provides a description of those that were drawn on - see ‘References’ for full citations.

- *Providing Legal Services to Small Business in Regional Victoria:* The report explores the legal services needs of Victorian regional small businesses. It is based on a series of interviews with peak regional and state lawyers and small business organisations, which informed two subsequent surveys. Legal and small business lists were accessed and participants randomly selected to participate in the surveys, with 207 regional small businesses and 68 regional lawyers surveyed. Regional lawyers and small businesses also gave feedback on the findings and proposed recommendations.
- *Affordable justice - a pragmatic path to greater flexibility and access in the private legal services market:* The report is based on a review of secondary research from non-government and government reports, as well as broadsheet and online media; as well as consultations with various peak representatives from the justice system and private legal market.

Appendix B: Social Enterprise Pro Bono Legal Panel program

The Parramatta Social Enterprise Pro Bono Legal program was established as a pilot project in July 2010. The program was established and coordinated by Parramatta City Council (PCC), through its Social Enterprise Capacity Building program, in partnership with the National Pro Bono Resource Centre. The six law firms participating in the pilot were: Arts Law Centre, Blake Dawson, Dooley & Associates, Henry Davis York, Phang Legal and Sparke Helmore Lawyers.

The services of the Panel were made available to the pool of social enterprises funded through PCC's Social Enterprise Grants program. A review of the program was undertaken after the pilot year²⁵. At the time of review, the pool included 21 social enterprises. During the first 12 months of the panel's operation, five social enterprises submitted six Expressions of Interest in seeking legal support.

The small number of referrals was not expected. In light of discussions with local social enterprises it had been anticipated that the need for a service of this type was greater than eventuated. The early stage of development of many of the social enterprises funded through PCC's grants program is considered to be a major contributor to this.

Another key issue Panel members identified was with definitions of social enterprise. The definition adopted by PCC was deliberately broad, and not confined to a particular legal structure (for-profit or not-for-profit). As a result, some panel members had difficulties placing some matters within their pro bono program – particularly in cases where pro bono legal advice would contribute to generating profit (albeit for a social, environmental or cultural purpose).

As many early stage social enterprises need to navigate a similar list of legal issues (albeit with different outcomes), developing standardized introductory information for those considering or in the early stages of establishing a social enterprise was considered a useful approach. Panel members also advised that they would welcome greater contact amongst those involved in providing legal support to social enterprises, so that they could learn from each other and reduce duplication of tasks.

In 2011 the coordination of the Legal Panel program was transferred to Social Enterprises Sydney (SES) as part of its growth and development strategy. Advice around legal structures was the most common request for support received. To address this, as part of the SES program a number of introductory legal workshops were delivered, involving staff from the Panel firms. Two legal matters were also placed with Panel member for pro bono advice.

In 2015 SES' initial funding was expended and ownership of the entity was transferred to Settlement Services International (SSI) in July 2015. SSI also runs an 'Ignite Small Business Start-Ups' program that facilitates business creation and expansion for people from refugee backgrounds (many of which could be characterised as social enterprises), and the two programs were considered complementary. In late 2015 SSI restructured and the SSE program was not continued under the new structure.

²⁵ See:

[http://www.nationalprobono.org.au/ssl//CMS/files_cms/Review%20report%20and%20discussion%20paper%20-%20PCC%20Pro%20Bono%20Panel%20FINAL%20\(for%20publication\).pdf](http://www.nationalprobono.org.au/ssl//CMS/files_cms/Review%20report%20and%20discussion%20paper%20-%20PCC%20Pro%20Bono%20Panel%20FINAL%20(for%20publication).pdf)

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