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# Legal models beyond the corporation in Australia: plugging a gap or weaving a tapestry?

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Legal models  
beyond  
corporation

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## Abstract

**Purpose** – This paper aims to explore the availability of new legal models for social enterprise development in Australia, asking the question: what does a distinctive focus on legal form add to the scholarly exploration of social enterprise? The paper has a dual purpose: firstly, to present a general empirical review of the fact, possible causes and implications of the absence of new legal models for social enterprise in Australia; and secondly, to make a polemical argument highlighting some of the advantages of developing a distinctive legal structure for social entrepreneurs in Australia.

**Design/methodology/approach** – The paper reconciles two contending accounts. One would stress the absence of new legal models (the “gap” analysis). The other would acknowledge the absence of new legal models, while stressing the relevance of existing legal models for pursuing social enterprise goals. Both accounts are descriptively true, but the tension between them relates in part to the level of analysis (legal-political, collective voluntary action or bottom-up individual actors) and, in part, to longstanding tensions in the conceptualisation of social enterprise.

**Findings** – The paper provides evidence of the rising salience of existing cooperative legal forms, rising diversity in the legal model choices of individual social enterprises and the emergence of two significant bottom-up developments in voluntary model rules. The legal-political bottleneck that remains is related to the constitutional structure of federal and state power, key macro-political policy trends in the late 1990s and the distinctive nature of the Australian “wage-earners” welfare state settlement.

**Originality/value** – The paper highlights that what may appear as a “gap” in the legal landscape of Australian social enterprise is more nuanced. Despite the striking absence of any distinct new legislated legal models, the overall situation is a complex landscape providing multiple threads for weaving together diverse forms of social enterprise. Although legal frameworks may not be as salient as governance design choices, they generate three important second-order effects: signalling, legitimisation and professional networks. Taken together, these may support a case for the distinctive value of a specific hybrid legal model for social enterprise.

**Keywords** Australia, Cooperative, Legal models

**Paper type** Viewpoint

## Introduction

This article explores the question: what does a distinctive focus on legal form add to the scholarly exploration of social enterprise? The article responds to this question in a hybrid manner, blending empirical and polemical argument. Empirically, the article presents a general review of the fact, possible causes and implications of the absence of new legal models for social enterprise in Australia. It traces two contending accounts of the availability of new legal models for social enterprise development in Australia. One would stress the *absence* of new legal models, framing that absence as a gap waiting to be filled. The other would acknowledge the absence of *new* legal models, while stressing the relevance of existing legal models for pursuing social enterprise goals. While both accounts are descriptively true, the tension between them relates in interesting ways to longstanding tensions in the conceptualisation of social enterprise.



The paper argues that despite the striking absence of any distinct new *legislated* legal models, the overall situation is not fairly described as a picture with a clear “gap”, but rather is better depicted as a complex landscape providing multiple threads for weaving together diverse forms of social enterprise. To support this, the paper provides evidence of the rising salience of existing cooperative legal forms, rising diversity in the legal model choices of individual social enterprises and the emergence of two significant bottom-up developments in voluntary model rules.

The legal-political bottleneck that remains is related to three aspects of the institutional context for the development of social enterprise in Australia: the constitutional structure of federal and state power, key macro-political policy trends in the late 1990s and the distinctive nature of the Australian “wage-earners” welfare state settlement over the longue durée.

The existence of multiple threads with which to weave social enterprise forms may suggest that the design of governance matters more than legal form *per se*. To develop this point, the article moves towards a polemical conclusion. Firstly, the article presents three short illustrative examples of how governance design matters more than legal form, which supports an inference that there is no strong evidence for the independent causal relevance of new legal models. However, the paper concludes with a brief consideration of a range of important second-order effects that are plausibly associated with the introduction of a new hybrid legal model at national level. These second-order effects suggest a positive normative dimension to the value of a distinctive legal structure for social enterprise. This value, however, is buttressed by appreciating the importance of creative legal approaches to governance using existing threads in the legal materials available to social entrepreneurs.

The overall mix of argument and evidence in this paper has a hybrid quality. The article draws both on the empirical traditions of social science scholarship and the conceptual and normative traditions of legal scholarship. The first half of the article draws on three sources of survey evidence: one conducted by others (FASES) and the other two carried out by the author in connection with broader collaborative work in both a policy (LMWG) and a scholarly (ICSEM) context. The three illustrative examples used in the second half of the article are based solely on material in the public domain that the author has primarily encountered in policy dialogue and debates she has engaged in, although the first example stems originally from more detailed primary research that was carried out by the author, and written up in more detail elsewhere (Morgan, 2018). The final argument has a polemical dimension often regarded as integral to the nature of legal scholarship (Rubin, 1987/1988) and also accepted in management scholarship (Grey and Mitev, 1995).

#### *Trends in legal forms for social enterprise in Australia*

Empirically, Australia stands out in the Anglophone and European world as almost unique in lacking a recently enacted legal structure that is distinctively useful for social enterprise. In 2009, an international overview of the conceptual evolution and legal implementation of social enterprise published in this journal (Galera and Borzaga, 2009) highlighted some of the early movers in this regard: the introduction of the social cooperative form by Italy in 1991 (Savio and Righetti, 1993), the social purpose company by Belgium in 1995 and the community interest company by the UK in 2004. Since then, the USA has made available the low-profit limited liability company in 11 states and the benefit corporation in 30 states, while Canada, strongly influenced by the UK approach, introduced the community contribution company in British Columbia and the community interest company in Nova Scotia (Liao, 2013). Also important and increasingly widely influential (Utting, 2015), have

been the development of solidarity cooperatives in the USA and Canada, especially in Quebec (Lund, 2010).

In Australia, however, no new form has emerged or appears imminent at the formal-legal level, notwithstanding the ongoing growth of a robust social enterprise sector (Barraket *et al.*, 2010, 2016) with a significant history (Barraket *et al.*, 2014). The energy and growth of social enterprise more generally in Australia has been accompanied by a relatively marginal position of the question of legal structures for social enterprise. Legal structures are an issue usually buried in a small sub-section of broader policy documents, as illustrated in a recent governmental discussion paper, which briefly references (Australia, 2017, p. 32) selected aspects of a dialogue with government that originated in more detailed civil society exploration of this issue (LMWG, 2014).

However, a more nuanced picture emerges if the perspective on legal form shifts from formal policy initiatives at state level, to a more bottom-up perspective from the point of view of social enterprise activity. In other words, an absence of legal-political innovation in this area does not rule out bottom-up innovation from business and civil society actors. There are two indicators of this more nuanced picture: a rise in the pluralism of legal forms adopted by social enterprise and the recent emergence of voluntary model rules in three different contexts within or relating to Australia.

In relation to the first indicator, the most comprehensive survey data on social enterprise in Australia, the FASES study (Barraket *et al.*, 2010, 2016) showed that state-level not-for-profit legal structures dominate social enterprise both in 2010 and 2016<sup>[1]</sup>, but also that there has been a steep rise over the last six years in the proportion of social enterprises that are proprietary limited companies. This increase in the pluralism of legal forms used by social enterprise is reflected in three recent data sources that together confirm the rise in popularity of both share-based companies and cooperatives in the context of social enterprise.

Two of the data sources are much smaller social enterprise surveys carried out in Australia in 2013 and 2015, the first by the Legal Models Working Group (LMWG) affiliated with the now dormant Social Innovation, Entrepreneurship and Enterprise Alliance (the LMWG survey), and the other in connection with the International Comparative Social Enterprise Models project (the ICSEM survey).

The LMWG and ICSEM surveys drew primarily on data from what the FASES study described as initiatives formed “to develop new solutions to social, cultural, economic or environmental problems” (FASES, 2016, p. 9): a self-consciously innovation-centric formulation which can be distinguished from the perhaps more traditional social enterprise goals of improving employment opportunities for specific disadvantaged groups or simply helping people to participate more in their communities (FASES, 2016, p. 9 and 13). Notably, half of the ICSEM and well over half of the LMWG respondents chose a company limited by shares for their social enterprise<sup>[2]</sup>, while the remaining respondents spread their choices over a range of other legal forms.

The third data source is the National Mutual Economy Report released annually by the Business Council of Cooperatives and Mutuals, which itself was founded in 2013. The three reports released to date show a steady and significant increase in both average annual turnover and combined total assets for large cooperatives and mutuals in Australia, and a recent Senate Select Committee report has endorsed the health of the sector and made a range of recommendations for supporting the ecosystem in which cooperatives operate (Australia Government, 2016).

As the above indicates, both companies limited by shares and cooperatives are salient legal forms in the context of social enterprise in Australia. The inclusion of cooperatives as a form of social enterprise is potentially contestable, however, and in different national

settings, cooperatives may be more or less likely to be included in general understandings of social enterprise. The cooperative legal form is an existing hybrid legal form, the principles of which prioritise the democratic power of members within the governance structure in ways that are not directly tied to shareholder wealth. In this respect, cooperatives are “social” in that they internalise social, democratic or non-financial principles, where other forms of social enterprise may pursue their “social” goals through monitored outcomes.

It is helpful to place this conceptual ambiguity in the context of the oft-noted bifurcation in conceptualisations of social enterprise. The understandings of the term divide along broadly geographic lines in relation to the USA and Europe (Defourny and Nyssens, 2010; Galera and Borzaga, 2009), in ways that are normatively as well as geographically distinct. European-derived conceptions blend “the more entrepreneurial component of the non-profit sector and innovative component of the cooperative movement” through institutional structures, which give priority to collective and participatory dimensions (Galera and Borzaga, 2009, p. 213). The US-influenced notions of social bottom-up tend to highlight the individual dimension of the social entrepreneur as an agent of change working with a concept of “social enterprises as organisations running commercial activities, not necessarily linked to the social mission, with the goal of collecting incomes to fund a social activity” (Galera and Borzaga, 2009, p. 215).

These two different conceptualisations of social enterprise characterise recent developments in the Australian setting regarding the bottom-up emergence of voluntary model rules that respond to the pluralistic array of demand from social enterprise actors. Each of the two most significant recent developments could be seen as linked more strongly to one of the two strands of social enterprise.

In relation to the more commercially inflected model emerging from the USA, Australia has hosted since 2014 a local branch of the private company B-Lab (B Lab Australia and New Zealand), whose US-based equivalent worked with a US law firm in the early 2000s to draft the Model Benefit Corporation Legislation, which underpins many of the legislative rules in the 30 US states that have adopted rules for benefit corporations. Although no legislative model exists in Australia, B-Lab can certify “B corporations” globally. The certification entails the company producing evidence that it is committed to producing a range of social and environmental outcomes and maintaining these by complying with ongoing reporting, disclosure and transparency obligations. B-Lab Australia has so far certified over 100 companies, and is involved in preparing draft legislation that would, if adopted, introduce benefit corporations into Australia (Cooper, 2016).

A second development in the cooperative sector reflects the collective participatory strand of social enterprise. Building on the UK experience of community share offers, the Business Council of Cooperatives and Mutuals released in 2016 a Manual for Community Investment (Donnelly, 2016). This provides a light-touch means of raising finance from members of the community to support cooperatives. Community investors become members who acquire withdrawable fixed-value shares in the venture, giving them both legal title in the venture and a one-member, one-vote (i.e. democratic) capacity to participate in decision-making. Community share offers, while not a legal model in themselves, provide a new way of resourcing a range of legal entities, from cooperatives to private companies, but the structure of the finance thereby raised imports participatory democratic elements into the legal model of whatever entity is raising the funds. Thus, the principle of community shares could be extended beyond cooperatives, and indeed the UK community share model can be used by private companies and community interest companies as well as cooperatives.

The differing conceptual underpinnings of these two developments place them in a degree of competition between each other in terms of efforts to secure policy, legislative or

public attention. Given that even in countries where distinct legal models exist, systematic research on them is still in very early days with little evidence yet produced, it is difficult to evaluate criticisms made mutually between them, such as the claim that compliance with benefit corporation reporting requirements is patchy (Regulator, Community Interest Company, 2015) or that community interest companies' legal structures hinder investment relative to mainstream companies (Australia, 2017). However, it is interesting to note the high salience of finance, not only in the framework of debate as to the relative merits of different legal models, but in terms of what innovation has occurred thus far in Australia.

The question of whether a particular legal model will be able to attract investors or not is often central to debates in this area, consistently with the finding that difficulties in attracting finance are viewed as a priority issue in Australia's most recent survey of social enterprise (Barraket *et al.*, 2016). Moreover, there have been repeated attempts to secure legislative backing for equity-based crowdfunding at the federal government level in Australia – albeit with limited success (Nehme, 2018). In a similar pattern to that displayed in relation to legal model innovation, most other Anglo – Saxon jurisdictions have secured legislative change in relation to both (although New Zealand has introduced only equity-based crowdfunding, stating in 2013 that “a new legal structure was not viewed as an immediate priority” (NZDIA, 2013: 4).

To conclude this descriptive overview, it would be inadequate to characterise Australia simply as a jurisdiction with a notable gap in the availability of legal models for social enterprise. Notwithstanding the striking absence of any distinct new *legislated* legal models, there is evidence of the rising salience of existing cooperative legal forms, rising diversity in the legal model choices of individual social enterprises and the emergence of two significant developments from the bottom-up that are based on voluntary model rules or standardised approaches. This more nuanced picture is important. Yet for new legal models, as for the kind of legislative amendments that would revitalise cooperative legal forms, there is a distinctive bottleneck at the legal-political level. With Australia led for its recent past by a government that prioritises a culture of innovation in general, what might account for the difficulty of doing so in this area?

### *Key aspects of the institutional ecosystem for social enterprise in Australia*

There are three aspects of the institutional context for the development of social enterprise in Australia, which are relevant to the distinctive absence of any development of new hybrid legal models. The first of these is the constitutional structure of federal and state power over different corporate forms. The second arises from macro-political policy trends in the late 1990s, which were inhospitable to plural legal models, including hybrid models for social enterprise. The third flows from broader and more long-term perspectives on the political economy of the Australian regulatory and welfare state.

The Australian constitution grants legislative power to the federal government in respect of laws about corporations in Section 51(xx) of the constitution. As a result of the specific wording of this, power to legislate for and to regulate incorporated associations and cooperatives lies with state governments. Many small-scale or locally embedded initiatives choose the latter legal forms, and the division of power along federal lines reinforces a sense that choice of legal form for for-profit, national-scale initiatives is monopolised by the federal corporation model. Concern over the time and resources needed to respond to two or more reporting and accountability regimes for activity that crosses state borders discourages adoption of state-based forms for many initiatives.

This is potentially mitigated, at least in part, for the cooperative legal form by virtue of the Cooperative National Law (CNL) passed in 2012. Owing to the constitutional barriers,



this is not federal legislation but “template legislation” based on a formal agreement made between the ministers responsible for consumer protection and cooperatives in all Australian States and Territories “to implement a scheme to promote uniform or consistent systems of legislation and systems of administration for cooperatives” (Apps, 2016). When the agreement came into force in 2012, it contained a:

[...] model template [set of rules] known as the CNL, [and an [...]] agreement [to] provide that each State or Territory will adopt the CNL or an alternative consistent law as a law of its own jurisdiction (Apps, 2016).

This novel power-sharing agreement is intended to leave each state or territory to administer its own uniform law, but with a commitment to achieve uniform administrative processes and policies. The CNL was adopted by New South Wales and Victoria, the two most populous states in 2014, and by Tasmania, South Australia and the Northern Territory in 2015. Western Australia and Queensland have not so far participated, demonstrating that both the current situation and the possibility of attritional amendments over time recreate the likelihood of a patchwork of laws returning hopeful co-operators to the initial dilemma posed by the federal structure in the first place.

There is no barrier, in principle, to the federal government amending national corporations law to create a distinctive legal model for social enterprise. Thus far, however, government interest in institutionalising social enterprise strategy through formal policies that go beyond funding (which might potentially flow through to a distinctive legal model), seems more pronounced at state level than at federal level, as can be illustrated by the Expert Advice Exchange of the NSW Office of Social Impact Investment and the recent adoption of a Social Enterprise Strategy by the Department of Economic Development in Victoria (Victoria Government, 2017; Morgan *et al.*, 2017). Even where there is interest in social enterprise strategy at the federal level, however, it does not translate into any interest in a distinctive legal model, as evidenced in a recent discussion paper on social impact investment discussion paper from the Treasury (Australia, 2017). This is more related to the second aspect of the institutional ecosystem for social enterprise: key macro-political policy trends at the federal level since the late 1990s.

Australia’s National Competition Policy which was carried out from 1995 to 2005 is one instance of the development of a broader “competition state” and the dominance of economic, especially market-based, criteria for evaluating policy (Morgan, 2005). The policy included a ten-year programme evaluating the legislative corpus of the Australian polity against a criterion of maximising market competitiveness. True enough, a range of “public interest” criteria could be balanced against and even nullify this benchmark goal of maximising market competition. But the structure of inquiry and reflection thereby created inherently separated the “economic” from the “social” (or public interest). Moreover, where the latter did prevail, it primarily did so by translating the social or public interest benefits secured by particular legislation into economic language, often at the cost of their redistributive dimensions and, more elusively, their underlying contribution to social cohesion and community (Morgan, 2005).

In parallel with these processes, policy developments in relation to the corporations law reform served to further quarantine social objectives derogating from the productive efficiency of the corporate form. As David Wishart notes:

In 1996, Treasury, and the Treasurer [rather than the Attorney-General’s Department], became responsible for the implementation of [corporations law reform]. The physical location of the program shifted to Treasury, later to be slowly submerged into its inner labyrinth as a part of the Business Law Division. Economic theory was made available and other policy inputs were cut off.

Cost/benefit analysis was deployed as the prime measure of the acceptability of reform proposals, the terminology of ‘transaction costs’, ‘barriers to entry’ and ‘industry self-regulation’ was configured as that against which government regulation was defined, and world competitiveness became a paramount concern. Corporations law reform thus became an instrument of on-going economic policy. (Wishart, 2013, p. 21)

These policy developments suggest a preference for a narrowly economic view of the corporation, one which is inhospitable to reforms which would inscribe social and/or environmental purposes into the structure of the most widely used form, and which is also cautious about fostering a diversity of legal forms. More recent requirements in 2015 that all federal indigenous funding be channelled only through (not-for-profit) indigenous corporations replicate this approach, albeit from the opposite direction, thus constructing a bright line between for-profit and not-for-profit forms, which militates against hybrid legal models.

This explanation, however, raises the question of why hybrid legal models for economic activity might not be more attractive to a Labour government, even if the right wing Coalition policies of the 1990s had not been so inhospitable. Here, the third aspect of the institutional ecosystem for social enterprise is particularly helpful: that is the longer view of the political economy of the Australian regulatory and welfare state, seen in comparative perspective, is helpful. This view suggests that Australia’s broader political economy trajectory has been distinctive in ways that might account for the low appeal of hybrid legal models in legal-political reform.

Janelle Kerlin’s comparative analysis of social enterprise development (Kerlin 2010) provides a useful foil for elaborating this argument. She develops and extends Esping – Anderson’s well-known account of three “welfare worlds” in relation to developed countries. While Kerlin’s sample of countries does not include Australia, as she notes in building her model, Australia would be included as a “liberal” regime in a group together with NZ, Canada and the US and UK. “Liberal” welfare states typically have comparatively low spending on welfare and highly individualistic policy frameworks for addressing social risks. From this perspective, as noted at the start of this article, Australia’s absence of new hybrid legal models stands out as disparate in the context of the family of liberal welfare states.

But seen from another angle, to group Australia with other Anglo-Saxon nations is misleading. Central here is Francis Castles’ argument that the Australian welfare settlement was based on a distinctive political bargain sometimes referred to as the “wage-earners’ welfare state” (Castles, 1985) (Castles and Uhr, 2005). The distinctive nature of this type of welfare state model is its focus on “predistribution” rather than “redistribution”. More specifically, the policy framework for a wage-earners’ welfare state focused particularly on creating an infrastructure that enhanced levels of primary income distribution via the market – a different approach from redistributing income via state-funded welfare programs outside of the market. Although Australia has adopted tightly means-tested versions of the latter, its initial political bargain supported generous levels of wage security by implementing restrictive immigration policies, protectionist tariffs and quotas in the manufacturing sector, and a highly centralised and legalistic wage bargaining system that used courts to set wage levels nationwide (Castles, 1985, p. 87).

Because this approach combined relatively strong state intervention at the macro-economic level with a *laissez-faire* attitude to the micro-economy operating at firm and transaction level, it could be termed a form of “statist *laissez-faire*” (Bell and Head, 1994). Recent scholarship argues that as of 2012, and once the policies pursued by Labour after the retrenchment of the Howard government years are taken into account, the “wage-earners”



welfare state has largely endured over time, although globalised free trade has diluted the salience of protectionist tariffs and dual-income “working families” are now the intended target of relative wage security rather than male breadwinners (Deeming, 2013). The important point is that in comparative perspective, Australia’s welfare state model has married a strong state with pro-market approaches in a relatively distinctive way.

In light of this long view of Australia’s political economy, it may be that its “statist laissez-faire” quality is distinctively inhospitable to the creation of hybrid social and economic legal forms at firm level. In both European and the US environments for social enterprise, “state” and “market” influences pull against each other, and social enterprise forms emerge and bifurcate according to the relative strength of one over the other – the more commercially-focused in the USA and the more collective and participatory in Europe (Galera and Borzaga, 2009; Kerlin, 2010). But in Australia, the longer historical provenance described above embeds practices that ally the scope of “the social” in politics primarily with labour relations, and (though to a lesser extent) in macro-political tax and benefit regimes. This militates against legal-political innovation *at firm level* to foster hybrids of the kind that has been introduced in other parts of the Anglo-Saxon world.

#### *Legal reform and governance design: alternatives or complementary?*

As we saw in Part I, a bottom-up demand does exist. That suppressed demand for legal-political innovation has resulted in creative customisation of existing legal models. Three brief accounts of instances where this has occurred in recent years in Australia help to set the scene for the closing analysis of the implications of the above account. These examples make two important points. Firstly, they have been chosen to represent the variety of innovative forms encountered in the course of the author’s original primary research (not reported on here) and related participation in policy discussions. More specifically, they help to represent the underlying bifurcation between participatory and outcome-focused approaches to social enterprise. While recognising the considerable complexity involved in making such classifications (Dart *et al.*, 2010; Ridley-Duff and Bull, 2011), the first two examples taken together illustrate this dichotomy, while the third challenges the oft-made assumption that only the latter model is capable of scaling or raising significant amounts of capital investment. Secondly, they usefully raise in a polemical way the question of the relationship between the availability of a specific legal model with legislative backing, and the range of discretion relating to governance design choices at firm level.

*Creative customisation.* FoodConnect is a Brisbane-based multi-farmer community-supported agriculture-inspired scheme. Formed as a proprietary limited company, the founder members crafted a *sui generis* constitution, experimenting with modifications of the articles of association with the assistance of *pro bono* legal advice from a large national law firm, sourced through a connection with Social Ventures Australia. The primary founder placed three features at the heart of the modified company structure, to maximise trust amongst the different stakeholders: an asset lock (ensuring company assets can never be sold for private gain), a 2:1 wage ratio between highest and lowest paid, and a commitment for all profits to be reinvested in the business without distribution to individuals (Morgan and Kuch, 2015). Although the founder went on to acquire certification from B-Lab Australia of the social and environmental benefits of the company’s approach, the intersubjective relational benefits of a participatory business model which directly links producers and consumers was the true motivation for the creative customisation of the legal structure. To quote the founder:

For farmers [...] the real incentive is the contact with people who eat their food. We run farm tours to our growers. [...] They have never had so many questions about what they do or been so

acknowledged. Farmers are almost in tears because people have come out to see what they do and they have hugged them and thanked them. (Robert Pekin quoted in [Gibson et al., 2015](#))

The trajectory of FoodConnect echoes the collective and participatory strand of social enterprise development. Although FoodConnect itself is small-scale, these commitments affect subsequent efforts to scale out, such as the founder's recent involvement in creating a multi-stakeholder investment cooperative that will, as a member-based organisation, assist in raising finance to support organic and environmentally sustainable farmers in Australia.

The second example of creative customisation is linked more closely to the outcome-focused strand of social enterprise. Chuffed is a donation-based crowdfunding organisation that supports social and community profits. It was one of the few crowdfunding companies to incorporate as a charity, a structure that allowed it to source philanthropic grant funding (from Telstra) to support its early stages of growth. Early success in raising substantial additional funding led the company to make an explicit choice to change its legal structure. In converting from a charity to a private proprietary company with a creatively customised constitution, the founder chose to discuss the reasons for this publicly on the company website, in an account that puts growth and scaling-up at the heart of its vision ([Paramanathan, 2016](#)):

Philanthropy is great at funding shiny things to get from \$0 to \$5m. It's not great in helping a successful venture get from \$5m to \$50m and pretty much non-existent in helping you get from \$50m to \$500m. And so we knew we had to change the type of capital we were raising – in order to grow, we would need to raise equity.

Unfortunately, that's not possible in a charity model, so we needed to convert our structure [. . .]. We wanted our new structure to allow us to raise equity while embedding our purpose into our DNA.

The public account continues on to give a reasonably detailed account of the technical effect of their new constitution, which is inspired by – but also strengthens – the US benefit corporation model. The Chuffed constitution creates a “mission lock” – a social purpose that cannot be changed without the unanimous consent of all shareholders: this is even stronger than the US benefit corporation model, which requires only a supermajority to remove or change social commitments. Chuffed's constitution also ensures that directors are entitled to pursue this social mission without the fear of liability. Their effort to customise the US benefit corporation approach to their particular circumstances was supported by general legal advice provided by another large national law firm (a different firm from the one who advised FoodConnect), sourced through a connection with the Social Impact Hub.

The third example of creative customisation is the most recent of all and blends the participatory and outcome-focused approaches in interesting ways. AnyShare is a company founded by an Australian entrepreneur with a multinational team that provides a simple, accessible and open source web-based platform for groups or individuals who wish to create local exchanges, crowdsourcing projects or sharing platforms themselves ([www.anyshare.coop](#)). AnyShare shares the growth, scaling and social impact focus of Chuffed in many ways, reflected in its success in securing venture capital support at an early stage. But AnyShare has also elected very publicly to structure its private company legal structure as a multi-stakeholder cooperative, adapting the model rules provided by the FairShares Association ([Ridley-Duff, 2018](#)). In explaining why on the company website, the founder appeals to participatory and collective values: ([Doreian 2016](#)):

AnyShare as a FairShares Cooperative ensures that all the stakeholders that make AnyShare a success, are involved in the decision-making process as well as share in its profits [. . .]. It also

ensures that greed can't set in, which would see AnyShare be bought out by a larger player. For that to happen, there would have to be 75 per cent approval and a majority vote from the Founder, Investor, Employee and Customer stakeholder groups. You can rest assured that our founding principles will remain intact. Something other businesses can never promise.

The FairShares Association provides technical and ethical support for companies to modify either (or both) their internal governance or their formal legal structure to “create and sustain networks of solidarity”, as they express their guiding philosophy. Although UK-based, the association has crafted a “rules generator”, which supports the adaptation of its model rules to the needs of different national jurisdictions, and has recently been funded to set up FairShares Labs in Croatia, Hungary, Netherlands, Germany and the UK (Ridley-Duff, 2018).

This final example, thus, brings together the growth-focused outcome-based approach to social enterprise with the collective and participatory strand, and does so by drawing on a set of voluntary model rules that aspire to be applicable transnationally. It is perhaps no accident that this fusion of the various trends discussed in this article is undertaken in the context of commons-oriented digital innovation. As Danielle Logue argues (Logue, 2017)

[...] citizen-driven projects that embody collaborative cultural exploration using digital networks  
[...] potentially speak to a profoundly new context for legal models, which will begin to respond to corporate entities that are increasingly virtual and fragmented.

While the full implications of such trajectories take us beyond the remit of this Australia-focused paper, it is worth noting that AnyShare's Australian founder received its venture capital funding from the US. Its heady mix of social impact at scale and participatory structure is not yet standard fare within Australia, or at least not sufficiently so to attract significant funding. Instead, as noted above, recent policy discussions in Australia continue to favour the more mainstream social impact investment model in ways that overtly downplay the need for creative tapestries of legal form (Australia, 2017).

*New legal models vs governance design.* The above three examples of creative customisation illustrate the fertility of weaving together threads from the tapestry of available legal options, using in each case a simple proprietary limited company, to create three quite different visions of social enterprise. One could argue, drawing from these examples, that this kind of nuanced governance design is much more salient to social enterprise trajectories than legislated legal models. Carol Liao has made a not dissimilar argument in relation to the salience of the US benefit corporation model for Canada (Liao, 2017), and the weight of the evidence in this article suggests it is necessary to at least pose the question: what does a specific hybrid legal model distinctively provide that governance design does not?

The international overview of social enterprise cited at the start of this paper asserts, without arguing in detail, that “the legal recognition of social enterprise contributes to conceptual clarification in the countries concerned” (Galera and Borzaga, 2009). And it is certainly true that the diverse legal models outlined there give concrete expression to the two primary bifurcated strands of social enterprise development noted there and in this paper. Yet, this is a conceptual concretisation that goes, at least as stated in that paper, no further.

If we return to Kerlin's comparative study of contextual variables (Kerlin, 2010), also discussed earlier, we see that the legal framework of a social enterprise is one of six variables that Kerlin uses to characterise differences in social enterprise across seven regional areas worldwide. Interestingly, however, after analysis of her data, she omits this variable from her synthetic analysis on the basis that the legal framework has no *distinctive* influence. In effect, she suggests that the legal framework has a causal effect which is

redundant with that of the relative strength of the state, and consequently does not distinguish one geographic regional influence from another. Another way of putting this is that legal framework does not, given her sources and data, generate variation in the socio-economic environment for social enterprise.

It may be, then, that the legal framework is more likely to *reflect* such variation rather than generate it, at the first-order level. This is quite consistent, however, with legal frameworks generating important second-order effects. The surveys and examples discussed in this article point to three of these which may constitute, particularly *en masse*, a case for the distinctive value of a specific hybrid legal model for social enterprise. The three second-order effects relate to signalling, legitimisation and catalysing professional support communities.

While governance design can achieve both conceptual and communicative goals in signalling to its various stakeholders a company's commitments to moving beyond a narrow profit bottom line, the existence of a specific hybrid model provides a notably efficient shortcut to such a signalling process. Qualitative data from the surveys cited earlier in the paper often documents frustration with the time taken to explain, especially to potential financiers, the nuance of a customised legal model.

While sometimes dismissed as “mere branding”, this effect goes beyond the generation of marketing value, as the legislative provision of a distinctive legal model effectively legitimises a socially oriented new economy. It can achieve this while leaving open the question of whether to prioritise participatory/ownership or outcome-oriented approaches to social enterprise. As Yockey notes in the context of the USA, a general advantage of a distinctive social enterprise law is its capacity to “create a new institutional structure that will motivate the development of self-regulatory standards and provide a helpful coordinating mechanism for legal advisors and pro-social investors” (Yockey, 2015). However, the detailed choice of strategies that might flesh out such a legitimisation process will likely be implicitly shaped by preferences for one or other social enterprise approach in this regard. For example, outcome-oriented approaches tend to prioritise legal reforms or advice that remove or quieten the risk of breaching directors' duties. This has been a major focus of the debate sparked by B-Lab in Australia for example, and Carol Liao's recent account of B-Lab advocacy efforts in Canada suggests a similar pattern there (Liao, 2017). Outcome-oriented approaches also mesh well with models that place high value on transactional relationships with beneficiaries, because this assists in the measurement of specific need (Eldar, 2015). By contrast, for those considerable number of social enterprises that prioritise economic democracy and community development over financial returns/investment income generation or productivity growth (over half in the ICSEM survey cited earlier), legal reforms that institutionalise shared ownership and decision-making as mandatory internal governance may be much more attractive. The FairShares model developed in the UK is an excellent example of this (Ridley-Duff, 2018).

Of course, legitimisation via a specific legal model can be double-edged because it may also entrench the “alternative” economy or fringe status of social enterprise, cooperative and solidarity economies. To some extent, this is an eternal dilemma of all oppositional social movements that gain partial acceptance, and is as such more valuable as a starting-point for analysis than a conclusory premise in an argument. Taken as such a starting-point, one valuable second-order effect is the creation of a professional community around specific legal models that is likely to eventuate. Analysis of clustering in social media data related to social enterprise has shown clear evidence that existing distinct legal forms act as nodes, and that dialogue swirls around these nodes rather than cutting across them. It may well be, then, that rather than a “gap” in the legislative landscape, the gap if any is in the professional services landscape. Lawyers (and indeed accountants, business planners and

tax agents) who are creative at bridging the divide between for-profit and not-for-profit legal structures are sparse and at best emergent in Australia, and the professional networks in which they flourish would be a likely second-order effect of enacting a distinctive legal model for social enterprise (Morgan *et al.*, 2017).

## Conclusion

This paper has highlighted the tension between two competing accounts of the Australian social enterprise landscape: one that stresses the *absence* of new legal models and the other the absence of *new* legal models. The article has reconciled these accounts by integrating data from diverse levels of analysis: legal-political, collective voluntary action and the preferences of bottom-up individual actors. The reconciliation is partial and complex. It is complex in that it depicts a nuanced landscape that provides multiple threads for weaving together diverse forms of social enterprise.

It is partial in that it acknowledges that a legal-political vacuum or bottleneck can still be considered salient. Such a bottleneck is likely related to the constitutional structure of federal and state power, key macro-political policy trends in the late 1990s, and the distinctive nature of the Australian “wage-earners” welfare state settlement. It is mitigated by the possibilities of governance design, but such bottom-up dexterity cannot negate the advantageous second-order effects of a distinctive legal structure for social enterprise: signalling, legitimisation and the formation of professional networks. The capacity of formal legal provisions to act as a kind of “laser beam”, a promise that some form of action will indeed take place in the future (Davies, 2013) can be potent. The congealed politics of legal form in the arena of organisational form for economic activity may not be the stuff of popular drama – but in its distinctive role as both an expressive beacon and a means of reducing transaction costs, legal form does matter for social enterprise. This is so even where, as in Australia, creative approaches to governance design reduce the apparent gap.

## Notes

1. In 2010, 51.6 per cent of the surveyed organisations were an incorporated association; 24.5 per cent were a company limited by guarantee; 5.5 per cent were cooperatives; and 5.2 per cent were “other”, most of which were proprietary limited companies (Barraket *et al.*, 2010). In 2016, 33 per cent were incorporated associations, 32 per cent companies limited by guarantee and 18 per cent proprietary limited (Pty Ltd) companies (Barraket *et al.*, 2016)
2. Responses were relatively small in number (39 for the LMWG survey and 15 for the ICSEM survey), and in both cases, not all questions were answered. In the LMWG survey, 8 of 13 who answered the legal models question were companies limited by shares, while 4 were a not-for-profit form (2 CLG and 2 incorporated associations) and 1 was an aboriginal corporation. In the ICSEM survey, 7 of 14 who answered the legal models question were companies limited by shares, while 4 were a not-for-profit form (2 CLG and 2 incorporated associations), 1 was a cooperative and 1 was a trust. Despite the low numbers of responses overall, these detailed surveys, which included narrative responses, provided a reasonably deep range of semi-qualitative data that casts useful light on the question that is discussed later in the article: the conceptual value of a distinctive focus on legal form.

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