

Deakin Research Online

This is the published version:

Coverdale, Richard, Jordan, Lucinda and du Plessis, Jean 2012, Providing legal services to rural and regional small business : gaps and opportunities, *Deakin law review*, vol. 17, no. 2, pp. 283-306.

Available from Deakin Research Online:

<http://hdl.handle.net/10536/DRO/DU:30052865>

Reproduced with the kind permission of the copyright owner.

Copyright : 2012, Deakin University School of Law

PROVIDING LEGAL SERVICES TO RURAL AND REGIONAL SMALL BUSINESS: GAPS AND OPPORTUNITIES

RICHARD COVERDALE^{*}

LUCINDA JORDAN^{**}

JEAN J DU PLESSIS^{***}

This article examines the findings from a survey of 207 regional small businesses and 68 regional lawyers that explored the small business experience of accessing legal services in rural and regional Victoria. In particular, it considers small business expectations of local legal practices, their degree of satisfaction with existing legal services and identifies current and potential demand and supply gaps. By doing so it seeks to determine potential areas in which regional law firms can improve, expand and refine their services in response to the current and emerging demands on them and the communities they serve.

I INTRODUCTION

Regional Victoria is a substantial contributor to Victoria's export wealth through primary industry such as agriculture, mining and forestry, as well as processed and manufactured products. Service-based industries, such as tourism, have diversified the economic base of many areas, while building and construction continues to be driven by the increase in smaller households, the rise in second home ownership (especially in coastal areas), and the increasing population across regional Victoria.¹ However, recent environmental events of floods, drought and fire, the spectre of climate change and the 'debt crisis',

^{*} Director, Centre for Rural Regional Law & Justice, Deakin University.

^{**} BA, BAppSci (Psych) (Hons), PhD (Monash); Research Fellow, Centre for Rural Regional Law & Justice, Deakin University.

^{***} BProc, LLB, LLM, LLD (UOFS); Professor of Law and Fellow, Centre for Rural Regional Law & Justice, Deakin University.

This article is based on the findings from a research project funded by the Legal Services Board of Victoria: Richard Coverdale, Lucinda Jordan and Jean du Plessis, *Providing Legal Services to Small Business in Regional Victoria* (Deakin University, 2012).

¹ Fiona McKenzie and Jennifer Frieden, *Regional Victoria: Trends and Prospects* (Spatial Analysis and Research Branch, Victorian Government, 2010); Department of Planning and Community Development, *Victorian Population Bulletin 2011* (Spatial Analysis and Research Branch, Victorian Government, 2011).

together with the challenges to primary industry and subsidiary industries created by increasingly competitive local and export markets, have impacted significantly on Victoria's rural and smaller regional centres.² More innovative business structures have also been required to respond to changing business needs as a result of larger-scale production and emerging niche industries; increasingly sophisticated contractual arrangements between suppliers and processors; traditional succession structures that are increasingly seen as inadequate; and environmental and planning laws that are having a greater impact on resource management and production activities.³ The steady increase in legal regulation of business activity nationwide adds further complexity to the flux of change underway.

The continuing provision of quality legal services to rural and regional Victoria is of strategic importance to the future of these communities and the state and national economies. Yet, recent studies point towards a growing gap in the local availability of legal services for regional communities and commerce.⁴ Legal Services Board statistics, for example, indicate that while there are 13 953 registered solicitors practising in Victoria, 1167 practice in regional Victoria, equating to 8.3% of the total number of registered practitioners.⁵ This represents a ratio of 1:1243 lawyers to citizens in regional Victoria, compared to 1:252 lawyers to citizens in metropolitan Melbourne. In March 2009, the Law Council of Australia and the Law Institute of Victoria undertook a survey of legal practitioners in rural, regional and remote areas of Australia.⁶ Approximately 40% of Victorian regional legal practitioners surveyed stated that they currently had insufficient staff to serve the needs of their community, and 38% indicated they would no longer be practising in regional Victoria in the next five years. Compounding this is the significant difficulty regional legal firms encounter attracting graduates and experienced lawyers to regional communities.⁷

² For a more detailed summary, see Municipal Association of Victoria, Submission No 26 to House of Representatives Standing Committee on Infrastructure, Transport, Regional Development and Local Government, Parliament of Australia, *Inquiry into the Impact of the Global Financial Crisis on Regional Australia* (March 2009). <www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/itrdlg/financialcrisis/subs/sub26.pdf>

³ Richard Coverdale, *Law and Legal Compliance Training Needs of Primary Producers* (Rural Industries Research Development Corporation, 2009).

⁴ Law Council of Australia and Law Institute of Victoria, *Report into the Rural, Regional and Remote Areas Lawyer Survey* (Law Council of Australia, 2009). See also Richard Coverdale, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria* (Deakin University, 2011).

⁵ Legal Services Board of Victoria, *Practitioner Statistics* (30 November 2012) <<http://www.lsb.vic.gov.au/lawyer-search/practitioner-statistics/>>.

⁶ Law Council of Australia and Law Institute of Victoria, above n 4.

⁷ Coverdale, above n 4.

As is the case with the communities and small businesses they serve, regional law firms are also confronted with a challenging and changing commercial environment, requiring them to keep pace with the increasing complexity of business legal regulations, a changing industry landscape and client demands. Furthermore, regional practitioners are increasingly competing against the cost-driven competition of non-lawyer/paralegal services. It is critical, consequently, that practitioners ensure their services are well targeted, efficient and sustainable. However, in the absence of research, little is known of the nature of legal services provided and how effectively regional legal practices meet the needs or expectations of their clients. Indeed, no research to date has focused on the legal needs of regional small business in Victoria.

This article assesses the nature and extent of legal service provision to small businesses operating in regional Victoria, and identifies a number of areas in which law firms must change if they are to adapt to the changing needs of regional small business. For the purposes of this research, the term ‘regional’ refers to the areas defined in the *Regional Development Victoria Act 2002* (Vic) comprising of the Council areas outside metropolitan Melbourne.⁸ The Australian Bureau of Statistics (ABS) definition of ‘small business’ was also used: a private sector businesses employing 20 people or fewer.⁹ Categories of small business include: ‘non-employing businesses’ — sole proprietorships and partnerships without employees; ‘micro businesses’ — businesses employing fewer than five people, including non-employing businesses; and ‘other small businesses’ — businesses employing five or more people, but fewer than 20 people.

II METHODOLOGY

A series of interviews were first conducted with peak state and regional small business organisations and lawyers to ascertain key concerns in relation to regional small business access to legal services. These consultations informed the design of two surveys to explore the legal needs and experiences of Victorian regional small businesses and the experiences of lawyers assisting them. The survey design was also broadly informed by research conducted with

⁸ For a complete list of Council areas, see Department of Planning and Community Development, Victorian Government, *Find Your Local Council* (1 November 2012) <<http://www.dpcd.vic.gov.au/localgovernment/find-your-local-council>>.

⁹ See for example ABS, *Characteristics of Small Business Operators* (7 November 2005) <http://www.abs.gov.au/ausstats/abs@.nsf/dossbytitle/6842F95F5722DAE4CA256D0200821236?OpenDocument>.

accounting firms in regional Australia,¹⁰ as well as the Law Council of Australia's survey of rural and regional lawyers.¹¹

Lawyers practising in regional Victoria were randomly selected from the Law Institute of Victoria's legal referral list. In total, 250 surveys were mailed to regional lawyers, each addressed to the principal lawyer in the practice, and included a letter of invitation and a plain language statement which explained the research. Small business survey recipients were targeted in regional centres and surrounding rural communities. ABS data from the *Count of Australian Businesses, including Entries and Exits, June 2003 to June 2007*, were used to select the proportion of surveys to be sent out according to industry division.¹² This data set shows counts of businesses sourced from the ABS's Business Register (ABSBR) and businesses are coded to industries based on the Australian and New Zealand Standard Industrial Classification 1993 (ANZSIC93). ANZSIC is comprised of four levels ranging from industry division (broadest level) to the industry class (finest level). For the purposes of this study, data relating to industry division were used. Small businesses were randomly selected using the *Yellow Pages* and *True Local* business directories, according to the proportion of Victorian regional small businesses in each industry division within the ABS data set, with 1200 surveys distributed in this way. In total, 275 participants took part in the study, comprising 207 regional small businesses and 68 regional lawyers. This represented an overall survey return rate of 21%, with a 29% return rate for lawyer surveys and a 19% return rate for small business surveys.¹³

III FINDINGS

A Participant Demographics

The Australian Standard Geographical Classification (ASGC) was used as a measure of remoteness for this research, which distinguishes between five

¹⁰ Rodney Carr et al, *Public Accounting Firm Services in Rural and Regional Australia* (Research Monograph No 2, Melbourne University, 2010).

¹¹ Law Council of Australia and Law Institute of Victoria, above n 4.

¹² ABS, *Count of Australian Businesses, Including Entries and Exits, June 2003 to June 2007* (14 December 2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0Jun%202003%20to%20Jun%202007?OpenDocument>>.

¹³ To calculate survey return rates, the final number of small business surveys was adjusted to 1068, after 132 surveys were returned due to incorrect mailing or business details. Similarly, the final number of lawyer surveys was adjusted to 239, as 11 surveys were returned due to incorrect mailing details.

categories of remoteness, based on an area's distance from major services. These five categories are: major cities, inner-regional, outer-regional, remote, and very remote.¹⁴ In this study, most survey participants were based in inner-regional areas (72%), with 23% working in outer-regional and remote areas. This distribution was broadly reflected across both lawyer and small business respondents (see Table 1).

Table 1. Respondents by remoteness

	Major Cities*	Inner Regional	Outer Regional	Remote	Missing	Total
Lawyers	4 (5.9%)	49 (72.1%)	14 (20.6%)	0 (0.0%)	1 (1.5%)**	68 (100%)
Small Business	10 (4.8%)	149 (72.0%)	46 (22.2%)	2 (1.0%)	0 (0%)	207 (100%)
Total	14 (5.1%)	198 (72.0%)	60 (21.8%)	2 (0.7%)	1 (0.4%)	275 (100%)

*In Victoria the 'Major Cities' category refers only to Melbourne and the major regional centre of Geelong.
**One lawyer participant did not indicate their postcode/region.

There were proportionally fewer female respondents, with only 20% of lawyers and 32% of small business participants being female. Lawyer respondents were also marginally older, with two-thirds aged over 50 years and almost a third aged over 60 years, compared to 56% of small business respondents aged over 50 years and 18% aged over 60 years (see Table 2).

Table 2. Respondents by age

	20-29 years	30-39 years	40-49 years	50-59 years	60-69 years	70+	Total
Lawyers	1 (1.5%)	8 (11.8%)	15 (22.1%)	24 (35.3%)	14 (20.6%)	6 (8.8%)	68
Small business	8 (4.0%)	25 (12.4%)	55 (27.4%)	76 (37.8%)	27 (13.4%)	10 (5%)	201
Total	9 (3.3%)	33 (12.3%)	70 (26.0%)	100 (37.2%)	41 (15.2%)	16 (5.9%)	269*

*Six respondents did not indicate their age.

The majority of lawyer respondents worked in small firms of one to two lawyers (60%). Of these participants, 71% were aged over 50 years, and over a third (36%) was aged over 60 years. These demographics are comparable with previous reports which have raised concerns regarding the ongoing supply of legal services in regional areas, given the ageing population of lawyers and the tendency for practitioners to be based in small practices with only one or two principals.¹⁵

¹⁴ For further information on the ASGC, including methodological strengths and weaknesses, see Australian Institute of Health & Welfare (AIHW), *Rural, Regional & Remote Health: A Guide to Remoteness Classifications* (AIHW, 2004).

¹⁵ Law Council of Australia and Law Institute of Victoria, above n 4. See also Susie Forell, Michael Cain and Abigail Gray, *Recruitment and Retention of Lawyers in Regional, Rural and Remote New South Wales* (Law and Justice Foundation of NSW, 2010).

The small business survey sample reflected the distribution of industry categories for small businesses in regional Victoria as calculated by the ABS, with each industry category within 2%-5% of ABS data.¹⁶ One-quarter of small business respondents were involved in agriculture, forestry and fishing (25%). This was the most common industry type amongst respondents, followed by the professional, scientific and technical (11%), and construction (11%) industries. In regard to business structure, half of the small businesses in this study were private companies (50%), one-quarter were partnerships (25%), 15% were sole traders, and 9% were trusts. Almost half had four or fewer employees (48%), one quarter (25%) had 5-10 employees, and 27% had more than 11 employees. The majority of small business respondents had operated their business for over 10 years (67%), with 43% of respondents having been in operation for 20+ years.

B Accessing Legal Advice

1 Frequency of Accessing Legal Advice

Half of all small business participants responded that they rarely (either never or less than once a year) sought legal assistance (55%). Sole traders were the least likely to seek legal assistance, with 70% responding that they rarely or never accessed legal advice. This is perhaps not surprising given that business structures such as partnerships and private companies have additional legal requirements to comply with and tend to have a larger number of employees, increasing the likelihood of requiring legal advice. There was also a relationship to remoteness, with 65% of participants in outer-regional areas responding that they rarely or never sought legal assistance, compared to 50% in major cities and 52% in inner-regional areas. Importantly, this relationship was not attributable to business size which was evenly distributed across regions, with a similar proportion of larger businesses (11+ employees) based in inner-regional (27%) and outer-regional areas (24%), and a comparable portion of medium-sized businesses (5-10 employees) in inner-regional (24%) and outer-regional (22%) areas.

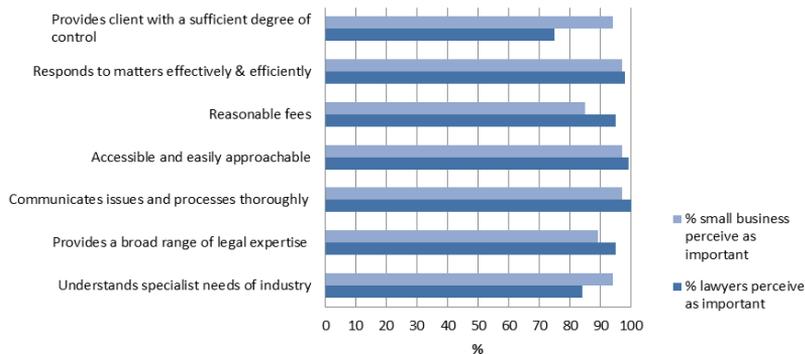
2 Factors Influencing the Choice of Lawyer

Participants were asked to rate the importance of a range of factors that may be taken into account by small businesses when they are selecting a lawyer. Overall, there was a high level of agreement between both the lawyer and small business survey groups on most variables, including the importance of lawyers

¹⁶ ABS, *Count of Australian Businesses, Including Entries and Exits, June 2007 — June 2009* (31 January 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0>>.

responding to matters effectively and efficiently, being accessible and approachable, and clearly communicating legal issues and processes to clients (see Figure 1). Surprisingly, a slightly greater proportion of lawyers rated reasonable fees as important (95%) compared to small business respondents (85%). This is of particular interest given research which suggests that the cost of legal advice is a major barrier for clients, particularly in rural and regional areas.¹⁷ Indeed, the cost of legal services was raised as a major barrier for small businesses accessing legal advice by stakeholders interviewed during the course of the initial consultations for this research. The importance given to this by lawyer respondents may simply reflect an acute awareness of the necessity for regional law firms to provide an affordable and accessible service to clients, in order to remain competitive in an environment which includes paralegals and specialist non-local firms.

Figure 1. The importance of specific lawyer skills & attributes



A greater proportion of lawyers (95%) in this study also rated offering a broad range of expertise as important compared to understanding the specialist needs of small business industry (84%). This is in contrast to 94% of small businesses rating a specialist understanding of their industry as being important. In this research, the term 'specialist' refers to a lawyer's understanding of the specific needs of a small business' industry and related areas of law, with a particular understanding of these needs within a regional context. These findings suggest that while lawyers in regional areas may be more focused on providing a breadth of services to a wide variety of small business clients, small businesses place greater emphasis on the importance of accessing more specialist advice. This highlights the considerable dilemma regional law firms encounter, where it is an economic necessity to accept a wide range of clients and provide a breadth

¹⁷ See, eg, Jeffrey Giddings, Barbra Hook and Jennifer Nielsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) *Alternative Law Journal* 57.

of services,¹⁸ yet also provide the specialist expertise small business owners require and expect.

The most noticeable difference between the two groups was on the importance of lawyers providing clients with a sufficient degree of control over their legal affairs, with 75% of lawyers rating this as important compared to 94% of small business respondents. It would be of interest to examine these differing expectations in further detail, including the key elements small businesses perceive as important to enable a greater sense of control over their legal affairs, as well as some of the reasons lawyers may be more reluctant to facilitate a greater sense of ownership and control for their clients. Indeed, the literature highlights the benefits of a more collaborative client-lawyer relationship, including enabling clients to feel a greater sense of responsibility and acceptance of case outcomes.¹⁹

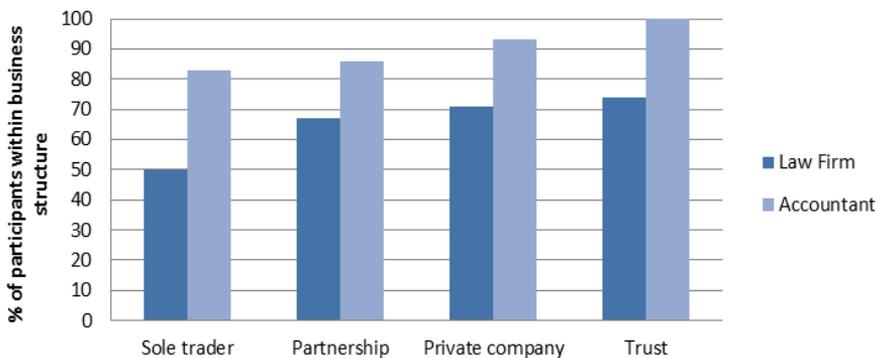
C *The Use of Lawyers Compared to Other Professional Services*

Small business participants were asked whether they engaged a particular law firm or accountancy firm in relation to their business affairs. Respondents were significantly more likely to have a specific business accountant (90%), rather than a law firm (67%). This would partially reflect the difference in the nature of the small business/lawyer relationship compared to the small business/accountant relationship, in which small business has cause to meet more regularly with accountants (at least annually) to attend to general taxation matters. While no relationship existed between the remoteness of small businesses and their likelihood of having a specific business lawyer or accountant, there was a trend within business structure type. Trusts, for example, were marginally more likely to have a business lawyer (74%) than other business structures (see Figure 2). Sole traders were the least likely to have a business lawyer (only 50%). Similarly, there was a relationship between the size of the business and the likelihood of having a lawyer, with larger businesses more likely to indicate that they utilised a specific business law firm.

¹⁸ TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia* (2006).

¹⁹ See, eg, Julie Macfarlane, 'The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law' (2008) 73 *Journal of Dispute Resolution* 61.

Figure 2. Use of law and accounting firms by business structure



These findings suggest that the greater the complexity of the business, the more likely small businesses will use a specific law firm. For example, because of the unique nature of trusts they are often perceived to be relatively more complex than partnerships and private companies, increasing the likelihood that a specific firm would be used when trusts are involved. This complexity is enhanced by the use of trusts for taxation purposes, requiring specialist legal taxation advice, again making it more likely that such businesses would use a specific law firm. Furthermore, the greater the number of employees, the more likely it is that legal issues may arise between employers and employees, such as employment contractual issues and occupational health and safety (OHS) matters, and between the business and its clients, as well as broader statutory obligations.

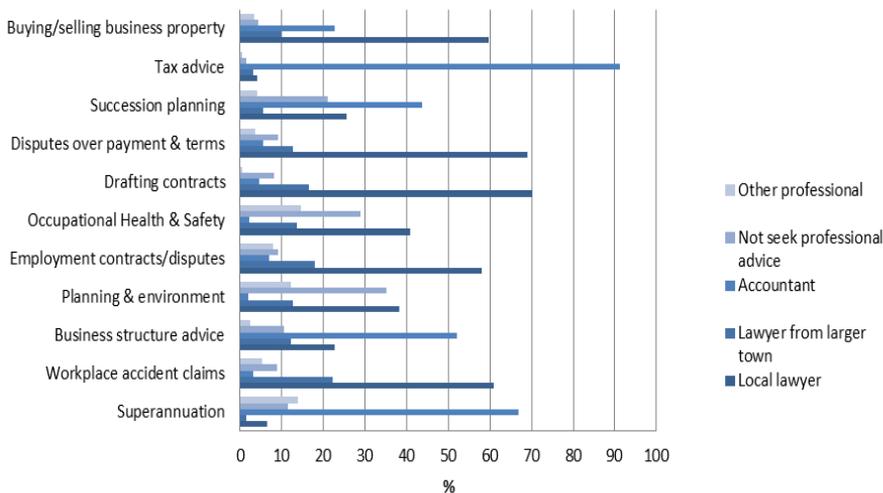
To further explore the choice between accessing legal advice or other professional services, small business participants were asked to indicate who they would access for advice on a variety of issues. These results are summarised in Figure 3, which shows that small businesses were *most likely to seek a lawyer's assistance* for: drafting contracts (87% of small business respondents); workplace accident claims (83%); disputes over payment, quality and terms (82%); employment contracts and disputes (76%); and buying or selling property (70%). In contrast, small businesses were more likely to engage an *accountant rather than a lawyer* for: taxation advice and superannuation; business structure advice; and succession planning.

1 Taxation and Superannuation

Almost all small business survey respondents (91%) indicated that they would most likely seek an accountant's advice for taxation matters, compared to 7% that would engage a lawyer. The majority (67%) stated they would also seek advice for superannuation from an accountant, with 14% nominating another professional service such as a financial advisor and only 8% nominating a

lawyer. The provision of taxation and superannuation advice is clearly and understandably considered the domain of accountants. However, it is important to note that in some instances, lawyers may be better placed to provide such advice, particularly where, for example, there may be complex taxation rulings or where decisions may have broader legal implications for clients in their personal and business activities.

Figure 3. Small business use of professional services



2 Business Structure Advice

Half of all small business survey respondents (52%) indicated that they would seek an accountant's advice for business structure matters, compared to a third (35%) who indicated they would access a lawyer's advice for such matters. While the type of business structure will impact on taxation implications and the advice of an accountant on such matters is important, there are various other considerations which also need to be taken into account when establishing an appropriate structure to meet the particular circumstances of each business. In particular, the range of regulatory and legislative requirements associated with setting up and managing a business suggests that business structure advice is an area in which legal expertise would be essential. For example, the drafting of a trust deed or constitution for a company can be of vital importance for the smooth operation of small business enterprises. Additionally, management and governance issues, risk management, reporting requirements, succession arrangements, supply and employment contracts are all important considerations where expert legal advice is invaluable. While many experienced accountants will be able to draw on their knowledge across those considerations additional

to taxation implications, the prevalence with which small businesses seek advice from accountants on business structure is somewhat surprising.

Furthermore, it is interesting to note that almost 50% of small businesses surveyed did not use private companies as a business vehicle. This structure offers a number of protections for shareholders and directors against personal liability, in contrast with the sole proprietor and partnership structures, which offer little individual protection or taxation advantage. This, in particular, was an issue raised during the course of stakeholder interviews, as one farming representative remarked:

We recently ran a workshop with 30 farmers. They were all running their farming businesses as sole traders. These are significant businesses with potential legal risks and (tax) costs which could be better dealt with through other business structures.²⁰

Again, the reliance on accountants as a 'first port of call' in relation to business structure advice may, in part, be a result of small businesses consulting accountants on a more regular basis, which may then potentially lead to the client deferring to their accountant for the provision of advice that sits more appropriately within the realm of legal expertise.

3 Succession Planning

The survey findings revealed that a higher proportion of small business participants would engage an accountant for succession planning advice (44% of respondents), compared to a lawyer (31% of respondents). A further 21% indicated that they would not seek any professional advice for succession planning issues. These findings are of particular concern given succession planning is a complex process involving several areas of law including, for example, business structure, taxation, superannuation, property, family law, and wills and estate planning.²¹ Couple this with the often intergenerational nature of business succession and the importance of an understanding of the industry context, and the skill sets required are both broad and specialised. However, given the majority of survey respondents referred to accountants for tax advice (91%), superannuation advice (67%), and business structure advice (52%), all of which are integral to succession planning, it is perhaps not surprising that they gave preference to the services of an accountant for assistance in this area.

²⁰ Interview with Anonymous Stakeholder (September 2010).

²¹ For a comprehensive guide to the principal areas of law, see Michael Perkins and Robert Monahan, *Estate Planning: A Practical Guide for Estate and Financial Service Professionals* (LexisNexis, 2011).

Finally, approximately one-third of small business respondents indicated that they would not seek any professional advice for planning and environment issues (35%). This is particularly perplexing given that these issues were identified by survey respondents as key issues facing regional small businesses in the future, which will be discussed later in this article. Similarly, almost a third of participants indicated that they would not seek any professional advice for OH&S issues (29%). While the majority of these respondents worked in arguably 'low-risk' sectors, such as professional services, retail and real estate (54%), 16% worked in primary production and 11% worked in the building and construction sectors. Research shows that legal issues are a major concern in the context of accidents in primary industry and construction.²² Major legislative changes are also afoot with OH&S regulatory frameworks becoming incorporated under national legislation.²³ It is vital that small businesses comply with and keep abreast of this changing legislative environment.

D The Use of Local Lawyers Compared to Non-Local Lawyers

While, overall, small businesses indicated that they would prefer to engage local lawyers rather than lawyers in larger regional centres or in Melbourne, a significant proportion indicated that they would access legal services outside of their local area (see Figure 3). For example, of those respondents who stated that they would consult a lawyer for business structure advice, over one-third indicated that they would engage a lawyer outside of their local area. This is an important finding, since relationships are often formed at the initial point of advising on the structure of a business and the opportunity to build upon this relationship is consequently lost for local lawyers. One in four small business respondents also indicated that they would seek legal advice from a firm in a larger regional centre or in Melbourne over a local firm for planning and

²² For Australian farm safety statistics see, eg. Better Health Channel, *Farm Safety — Machinery*, (9 May 2012) <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Farm_machinery_and_safety_issues>. See also Emily Herde and Tony Lower, *Farm Injury-Related Deaths in Australia* (Australian Centre for Agricultural Health & Safety, 2011). In regard to the construction industry, WorkSafe estimates that each week 50 Victorian construction workers are seriously injured, see WorkSafe Victoria, *Construction*, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/WorkSafe/Home/Safety+and+Prevention/Your+Industry/Construction/?zz=1&a=Construction&p=Popular&utm_source=SHORT_URL&utm_medium=redirect&utm_campaign=SURL_construction#>.

²³ New 'harmonised' national work health and safety laws commenced in New South Wales, Queensland, the Australian Capital Territory, and the Northern Territory on 1 January 2012. An additional review has been requested by the Victorian government which will see a delay of approximately 12 months before implementation in this state – see Safe Work Australia, *Model WHS Legislation* <<http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/pages/model-whs-laws>>.

environment issues, workplace accidents, OH&S, and employment contracts and disputes. No significant differences were observed when these variables were examined by remoteness. Interestingly, when small business participants in this study were asked to rank in order of importance the locality of their lawyer, whether their lawyer had been recommended by a trusted source, or whether their lawyer is a specialist in the area they require advice — the latter was the most important consideration, with 57% of small businesses rating this as their primary concern. Indeed, while access to a local lawyer was a consideration, it was the least important consideration of the options presented to small business respondents within the survey.

The survey findings revealed a number of reasons why some small businesses choose non-local lawyers over local lawyers. In particular, confidentiality and conflict of interest concerns were identified as a major inhibitor for small businesses attempting to access legal advice in their local area. These concerns were echoed in the interviews held with representatives from small business peak bodies and stakeholders, and concur with previous research that has highlighted conflict of interest issues as impeding the effective provision of legal services in rural and regional communities.²⁴ Indeed, areas where complaints to the then Legal Ombudsman by regional Victorians represent the highest levels include breaches of confidentiality (27% of complaints) and conflict of interest concerns (30% of complaints), with these issues consistently recognised as a potential problem in small towns with only one or two law firms.²⁵

Compounding these concerns is the perception that local legal firms do not provide adequate specialised advice. Lawyer survey respondents themselves raised the lack of specialised expertise within regional law firms as a major inhibitor for small businesses in their local area attempting to access legal assistance. Similarly, the initial consultations for the research revealed considerable concern amongst stakeholders around the level of expertise of regional and rural lawyers.

I feel more comfortable to refer clients out of town because I know they will get the services they need.²⁶

These views are reflected in the 2001 Parliamentary Committee review of legal services in rural and regional Victoria.²⁷ Various submissions to the

²⁴ Giddings, Hook and Nielsen, above n 17. See also Law Reform Committee, Parliament of Victoria, *Review of Legal Services in Rural and Regional Victoria* (2001); Coverdale, above n 4, 85.

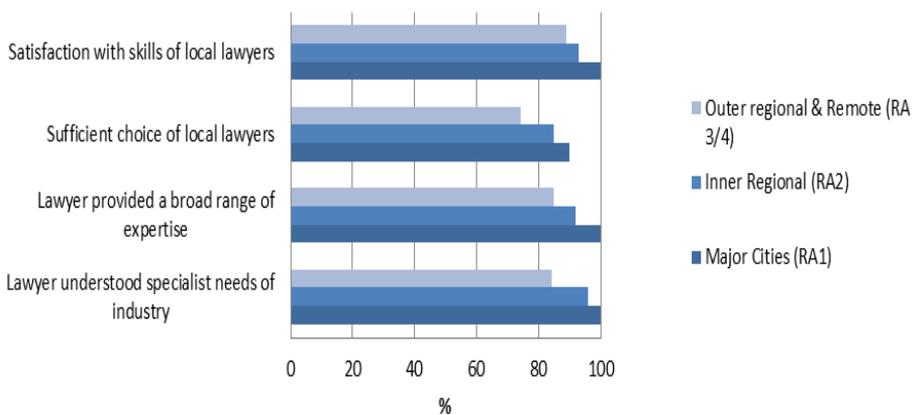
²⁵ Law Reform Committee, above n 24.

²⁶ Interview with Anonymous Stakeholder (23 August 2010).

parliamentary inquiry noted how highly-specialised legal work continued to be taken up by Melbourne-based firms, bypassing regional practices.

Yet, almost all small businesses who responded to this survey indicated that businesses in their local area were either very satisfied or satisfied with the skills of local lawyers (92%). Additionally, the majority of small businesses either agreed or strongly agreed that the lawyers they had consulted in the past provided a broad range of expertise (91%), understood the specialist needs of their industry (96%), and that they had sufficient choice of lawyers in their local area (83%). While small business reported an overall high level of satisfaction with the services provided by law firms, where satisfaction was analysed by remoteness a consistent trend emerged, with lower overall satisfaction in outer-regional and remote areas compared with inner-regional on each variable (see Figure 4 below).

Figure 4. Small business satisfaction with local legal services by remoteness



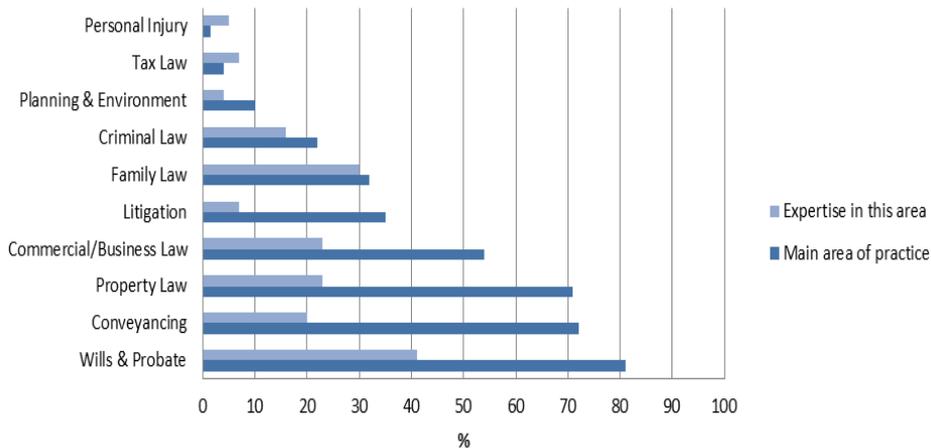
Note: Calculations are based on omitting 'neutral' responses, as participants tended to provide a 'neutral' response where they had limited experience accessing legal services, and these responses were skewed heavily by remoteness.

²⁷ Law Reform Committee, above n 24.

E The Provision of a Breadth of Legal Services Versus Specialist Advice

Lawyer survey participants were asked in this survey to indicate the main areas of law that they practise as well as any specific areas in which they considered they had particular expertise. As Figure 5 below demonstrates, respondents practised in a breadth of areas, with the proportional distribution of practice areas broadly reflecting those indicated by the ABS Legal Services Australia data.²⁸ However, as Figure 5 also shows, areas of practice significantly exceeded the areas in which lawyer respondents considered they had expertise. Personal injury and taxation law was the only exception to this trend.

Figure 5. Main areas of legal practice & expertise



It is important to note, however, that there may have been differing interpretations of specialisation in this study. Specifically, some areas may have been considered by respondents as part of the skill set necessary for general practice which, while requiring a degree of competence, do not require specialised skills to perform tasks adequately. The survey design may also account for some difference, as participants were asked to provide their areas of expertise in an open-ended question format, which they may not have responded to fully, compared to a simple tick box response for areas of practice. Notwithstanding these design limitations, in the areas of wills and probate, conveyancing, property law and business/commercial law, the disparities were particularly marked.

²⁸ ABS, *Other Legal Services* (24 June 2009) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features52007-08>>.

The need for regional solicitors to respond to a wider range of legal matters than their metropolitan counterparts is acknowledged.²⁹ Understandably, smaller regional law firms are more likely to be generalists rather than specialists, both in response to community needs and to ensure they accommodate the diversity of work necessary to sustain their practice. Indeed, the findings from the current survey revealed that lawyers placed more emphasis on the importance of providing a breadth of services to a wide variety of small business clients, rather than the provision of more specialist advice. Given the proportion of regional legal practitioners to regional communities is expected to continue to decline,³⁰ this issue will be further exacerbated in the future. Yet, expertise may not just equate to an understanding of specialist areas of law, but also to an understanding of specific industry and local area needs. In these cases, a regional knowledge of industry is important. A specialised and local understanding of industry will, consequently, be further lost if regional firms continue to decline.

F Opportunities for Regional Practices

1 Developing a Stronger Referral Culture amongst Regional Practitioners

There is generally a high level of trust by clients that their legal practitioners hold the appropriate level of expertise and, should that expertise exist elsewhere, they would be referred to the relevant professional services. Where there exists limited opportunities to refer locally, or the professional service initially approached by clients chooses to provide their limited knowledge rather than refer, the client's best interests will not necessarily be served. Yet, despite earlier findings that small businesses placed greatest importance on accessing specialist advice and expected law firms to understand the specialist needs of their industry, half of all lawyer respondents (48%) indicated that they rarely (never, once a year or less) refer small business clients to specialist lawyers. However, where respondents were based in outer-regional areas, it was evident that they refer clients to specialist lawyers with greater frequency compared to their inner-regional counterparts, although this association was limited due to the small number of lawyers in the sample.

While in many instances accountants were identified as the first point of contact by the small businesses in this research, the survey findings also indicated that accountants do refer a significant proportion of clients to lawyers. Indeed, 59%

²⁹ TNS Social Research, above n 18.

³⁰ Law Council of Australia and Law Institute of Victoria, above n 4. See also Forell et al, above n 15.

of lawyers stated that a quarter of their work is referred to them by accountants. A further 26% indicated that over half of their work is referred to them by accountants. The survey did not ask lawyer participants how often they referred clients to accountants. Anecdotal evidence from interviews suggests that this was likely to be much more limited. As one accountant remarked:

There is not enough collaboration between lawyers and accountants. Accountants tend to refer to lawyers but there is less reciprocity.³¹

While the number of lawyers in this sample was relatively small, a cross-tabulation between the proportion of work referred to them by accountants, by how often they referred clients to specialist lawyers, also shows a slight, although not significant relationship. Specifically, the survey findings indicate that the greater the proportion of referrals lawyers receive from accountants, the more likely they were to also refer clients to specialist lawyers, suggesting a culture of referral amongst some lawyers. Unfortunately, the survey did not ask lawyer participants to indicate the type of work usually referred to them by accountants, and limited responses were provided in relation to the type of work they referred to specialist lawyers. Clearly, the lawyer/accountant relationship is an important one (at least within regional areas) and deserves further discussion and investigation. Future research could examine these issues in greater detail, as well as comparing these findings to a metropolitan context.

Research with law firms in regional rural and remote areas of Queensland has found that many regional firms have ‘alliances’ with other regional firms, and with specialist legal practices such as patent attorneys.³² The primary reasons given for this behaviour were to broaden practice areas, to source and retain clients, to reduce risk of inaccurate advice, and for reasons of collegiality.³³ A limited body of literature has similarly raised the potential of multidisciplinary collaborations between accountants and lawyers for cases requiring specific expertise.³⁴ The potential benefits for regional practices and small businesses alike of such collaborations between lawyers, as well as with other professionals, require further exploration. Specifically, future investigations could examine how referral processes could be improved to better respond to

³¹ Interview with Anonymous Stakeholder (23 August 2010).

³² Caroline Lydia Hart, ‘Sustainable Regional, Rural and Remote Legal Practice in Queensland: The Importance of Innovation in Alliances and the Use of Information Technology’ (2011) 16 *Deakin Law Review* 225.

³³ *Ibid.*

³⁴ Margaret Castles, ‘Possibilities for Multidisciplinary Collaboration in Clinical Practice: Practical Ethical Implications for Lawyers and Clients’ (2008) 34 *Monash University Law Review* 116–46. See also Janice A Alwin and Jason P Eckerly, ‘Raising the Tax Bar: Redefining the Roles of Accountants and Lawyers for a Practical Solution to the Multidisciplinary Practice Debate’ (2003) 1 *DePaul Business & Commercial Law Journal* 257.

both small business and lawyer needs, and the implications of more formalised and transparent referral processes between lawyers and other professionals. Given the continued limitations associated with distance in regional Victoria, the expanded use of technologies, particularly the National Broadband Network, is also an important consideration in improving collaborations and communication between regional lawyers, across professions and with court and regulatory bodies. The emerging opportunities for different forms of legal practice such as collaborative law³⁵ and ‘freelance lawyering’,³⁶ can also be enhanced through developing communication technologies.

2 *Opportunities for Future Specialisation: A More Proactive Approach to Service Provision*

The limited level of engagement with lawyers across the range of issues discussed in this article suggests that the use of lawyers by small businesses in this research was primarily reactive rather than preventative. In fact, over two-thirds of small business participants (69%) responded that they would only access legal assistance when a significant legal problem had arisen. As one stakeholder noted:

The role lawyers play in risk minimisation is not well understood — this requires education and marketing. But to be proactive is much cheaper [for small business clients] than just being reactive.³⁷

These findings (combined with the overall low frequency of small businesses accessing legal advice shown across the study) highlight the narrow understanding by small business participants of the value of accessing legal advice regarding the operation of their business.

Survey participants were invited to elaborate on whether there were particular issues confronting small businesses in regional areas which would require additional legal support into the future. Interestingly, there was a high level of agreement between small business and lawyer participant responses, which could be grouped into the following key areas of concern: carbon trading,

³⁵ Collaborative law uses an interest-based negotiation model. It is a non-adversarial dispute resolution process facilitated by lawyers with the objective of achieving an ethical and enduring settlement for the clients. For further details see Law Institute of Victoria, *Collaborative Practice and You* (2012) Collaborative Professionals Victoria <<http://www.collabvic.com.au/>>.

³⁶ See Rachel Nickless, ‘At Home, at Work and Half the Price’, *Australian Financial Review* (Melbourne), 7 October 2011, 20 which describes an emerging system where freelance lawyers (described as ‘law firm refugees’) are supplied to legal practices and directly to businesses to undertake both ‘routine’ and specialist legal services .

³⁷ Interview with Anonymous Stakeholder (May 2012).

succession planning, water trading, planning laws, and the increasing complexity in local, state and federal regulations.

(a) *Carbon Trading*

In November 2011, the Clean Energy legislative package³⁸ was passed by the Senate, which introduced new laws relating to the management of carbon emissions, with emissions trading commencing on 1 July 2012. The Clean Energy package has a direct impact on the top 500 or so emitters and will result in both potential costs and incentives for regional small business. Regional law firms have a significant role to play in advising and assisting clients in relation to this scheme. For some regions with industries involved in carbon intensive activities, significant changes will be imposed, including major restructuring of their activities. New industries will also be established as a result of the carbon trading legislation.³⁹ Advice on matters such as regulatory compliance obligations, including reporting obligations, business and financial structures for optimising taxation incentives, the ability of the emitters to pass on costs of the carbon price through supply contracts, as well as the applicability of offsets and incentive schemes, will be valuable areas of advice and guidance for regional small business.

For the agricultural sector, the Carbon Farming Initiative⁴⁰ enables farmers to generate carbon credits through reducing emissions or storing carbon on their land, which they can then sell to industries wishing to offset their emissions. This initiative, potentially, offers significant income generation opportunities for primary producers, if implemented effectively. The legislation does, however, involve some complexity and requires an informed interpretation of the relevant Act. Building expertise in advising the agricultural sector and other areas of small business offers the potential for regional law firms to establish themselves as specialists in this area and to provide commercially valuable services to local industries. The legal and regulatory issues around carbon capture and storage more generally also provide opportunities for regional law

³⁸ See Department of Climate Change and Energy Efficiency, *Clean Energy Legislation* (10 September 2012) <<http://www.climatechange.gov.au/en/government/clean-energy-future/legislation.aspx>>.

³⁹ See ABC Victoria, *Truckers, Coal Miners, Aluminium Producers and Farmers: Victoria's Reaction to the Carbon Tax* (11 July 2012) ABC Ballarat <<http://www.abc.net.au/local/stories/2011/07/11/3266677.htm>>. See also Australian Government Clean Energy Future, *New Opportunities in Our Regions* (2012) <<http://www.cleanenergyfuture.gov.au/clean-energy-future/an-overview-of-the-clean-energy-legislative-package/new-opportunities-in-our-regions/>>.

⁴⁰ *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth). See also Emma Field, 'Carbon as Produce', *The Weekly Times* (online), 27 October 2012 <http://www.weeklytimesnow.com.au/article/2011/10/27/398431_on-farm.html>.

firms.⁴¹ In broader terms, regional communities and small business will be particularly affected by climate change and clean energy laws.⁴² Increasing transportation and power costs, the use of renewable energy such as wind-power and alternative energy sources such as natural gas and ethanol, food security, and the increasing management of natural resources such as water, will have a particular impact on regional communities, which will all require, to a growing degree, independent, expert, and industry-relevant legal advice.

(b) Succession Planning

The ability to facilitate and potentially mediate intergenerational succession where there may be competing family member interests, together with knowledge of the range of laws which may come into play, as well as local industry knowledge, positions local lawyers well in their capacity to provide succession planning services. In some regional industries (eg primary production) where there is an ageing proprietor population,⁴³ the opportunity to build a specialised succession planning expertise remains significant. However, to a large extent, the opportunities are not being taken up by regional law firms, as suggested by the findings of this study and previous research, and many family-owned businesses remain without a plan.⁴⁴ This can have a significant impact on their survival and growth in the future:

SMEs that engage in strategic planning (which includes documented succession planning) are more likely to be those that achieve higher sales growth, higher returns on assets, higher margins on profit and higher employee growth.⁴⁵

The importance of law firms building relationships with small businesses early in their development, or, conversely, the lost opportunities for both small

⁴¹ Ian Havercroft, Richard Macrory and Richard Stewart, *Carbon Capture and Storage — Emerging Legal Issues and Regulatory Issues* (Hart Publishing, 2011).

⁴² Nicola Durant, *Legal Response to Climate Change* (Federation Press, 2010).

⁴³ The average age of Australian farmers has grown from 40 years in 1990 to 57 in 2007 and the average age is still increasing: see Erwin Lagura and Glenn Ronan, *How Profitable is Farming Business in Australia* (21 July 2009) Agrifood Australia <http://www.agrifood.info/connections/2009/Lagura_Ronan.html>.

⁴⁴ While figures vary, a Cameron Research Group Report of 2006, referred to by the Australian Businesswoman's Network, *Why Your Business Needs a Succession Plan* (18 August 2010) Her Business <<http://blog.abn.org.au/grow-your-business/why-your-business-needs-a-succession-plan>> suggests that 94% of small business owners do not have a documented succession plan at all. See also Mike Stephens, 'Planning Farm Succession: How to Be Successful' (2011) 8 *Agricultural Business Management & Farming Systems* 61; KPMG, Submission to Department of Prime Minister and Cabinet, *Asian Century White Paper* (2012).

⁴⁵ Calvin Wang, Elizabeth Walker and Janice Redmond, 'Explaining the Lack of Strategic Planning in SMEs: The Importance of Owner Motivation' (2007) 12 *International Journal of Organisational Behaviour* 1.

businesses and regional law firms when legal services are not provided at the foundation stages of a business, are well demonstrated by the succession planning data.

(c) *Water Trading*

Growing and competing demands for water and the uncertainty of supply, have brought about significant legislative reforms in the management and trade of water. Laws pertaining to water entitlements/ownership, water trading, drainage, easements, fees and charges have rapidly developed and evolved since the *Water Act 1989* (Vic). The introduction of the *Water Act 2007* (Cth) further establishes a regulatory environment for water management within the Murray Darling Basin. Water reform continues to evolve with the recent introduction of the Murray Darling Basin Plan⁴⁶ and the ongoing National Water Initiative.⁴⁷ Water rights issues will also vary regionally and by industry, depending on the reliance on either surface or ground water supplies — eg, water right issues will vary for an irrigation farmer near Kyabram and a dairy farmer in western Victoria using a deep bore aquifer. Amendments to the *Water Act 1989* (Vic) provided a legislative structure for water trading, including buying and selling high and low reliability water shares, and buying and leasing water entitlements. Water trading is now a major industry across regional Australia. Australia's water markets have consistently increased in value over the last few years from \$2.8 billion in 2008–09 to \$3 billion in 2009–10.⁴⁸ The Murray Darling Basin constituted 92% of all water trade allocations nationally.⁴⁹

Water trading brings with it the requirement for specialised legal expertise in providing advice to industry and water catchment authorities, the preparation of contracts for the sale of water, and advising clients on government water entitlement contracts and water shares. The emergence of 'water brokers', whose role it is to facilitate trade between those who hold water rights and have excess water they wish to sell and those who require additional water, provides an additional potential client group for regional lawyers interested in specialising in this area of law. The growth in regulation of water usage and the expanding water market indicate increases in future demand for the services of regional law firms in water law, and opportunities to build expertise in this area.

⁴⁶ See Murray Darling Basin Authority, *Draft Basin Plan* (November 2012) <<http://www.mdba.gov.au/proposed-basin-plan>>.

⁴⁷ See National Water Commission, *National Water Initiative* <<http://www.nwc.gov.au/water-reform/national-water-initiative>>.

⁴⁸ See National Water Commission, *Australian Water Markets Report (2009–2010)* (2010) 6 <http://www.nwc.gov.au/__data/assets/pdf_file/0009/11340/Sec1.pdf>.

⁴⁹ *Ibid* 5.

(d) *Planning Laws*

As a consequence of the increasing need to control and manage human impacts on the environment and land use, greater regulation is occurring at all levels of government. Population movement as a result of ‘sea changes’ and ‘tree changes’ and changing land use activities also bring urban-based and agriculture-based populations closer together, creating potential tensions. Environmental management and land use issues are further exacerbated by climate change, requiring a more strategic approach to settlement planning, through both mitigation and adaptation measures. In addition to the capital cities, major regional growth centres are likely to be particularly affected by planning regulations in response to climate change, with ‘some communities particularly affected by regional adjustment challenges’.⁵⁰

A Discussion Paper on an *Integrated Approach to Planning for Climate Change* indicates “a range of measures (which) have already been identified, such as:

- revising, renewing and enforcing building codes to take account of changing climatic conditions;
- introducing more consistent planning measures (eg, planned retreat, dune management, building designs, regulation of new structures);
- managing urban growth in climate sensitive areas through zoning and regulation”.⁵¹

These measures all imply a greater degree of regulation which will affect a range of small businesses including agriculture, developers, trades and the construction industry, as well as the regulators — primarily local government authorities. Again, the demand for specialist legal advice in regional areas has the potential to grow significantly. Demand for expertise in planning and subdivision, land acquisition and compensation, environmental and conservation controls, and administrative law in relation to jurisdictional powers and procedures is likely to increase. Further, legal practitioners with local knowledge and mediation or collaborative law skills, which foster a less adversarial and less costly approach and which are more appropriate to smaller communities where those in dispute need to be able to continue to work together may hold particular relevance.

⁵⁰ Department of Premier and Cabinet, Parliament of Victoria, *Victorian Climate Change Green Paper* (2009) 59.

⁵¹ Barbara Norman, ‘A Low Carbon and Resilient Urban Future — A Discussion Paper on an Integrated Approach to Planning for Climate Change’ (Discussion Paper, Department of Climate Change and Energy Efficiency, 2010) 7.

IV CONCLUSION

The survey findings revealed limited use of legal services by regional small businesses with over half of all small business participants responding that they rarely (either never or less than once a year) sought legal assistance. Complexity of business structure influenced the frequency with which businesses accessed legal advice, with larger businesses that have more complex structures accessing legal assistance more frequently. There was also a relationship to remoteness: participants in outer-regional areas were more likely to respond that they rarely or never sought legal assistance, compared to those in inner-regional areas. Additionally, small business respondents were significantly more likely to have a regular business accountant who they used for their business affairs, rather than a law firm. The findings indicated that a considerable portion of work is performed by accountants that could arguably be better dealt with by lawyers, including succession planning and business structure advice. Indeed, small business use of lawyers was primarily reactive rather than preventative.

Confidentiality and conflict of interest concerns were raised as major inhibitors for small businesses seeking to access timely legal advice in their local area. Adding to these concerns was the perception by some participants of an inadequate level of specialist advice available, particularly within smaller regional centres. Overall, a high level of satisfaction with legal practices was observed across the small business sample. However, where satisfaction with the skills and availability of local legal practitioners was analysed by remoteness, a consistent trend emerged, with a higher level of satisfaction in inner-regional areas compared to outer-regional and remote areas. The research also revealed considerable concern amongst small business peak bodies about the level of expertise of regional lawyers. Despite findings that small businesses placed greatest importance on accessing specialist advice and expected law firms to understand the specialist needs of their industry, half of all lawyer respondents indicated that they rarely (never, once a year or less) refer small business clients to specialist lawyers. Instead, lawyer respondents prioritised the importance of providing a breadth of services to small business clients, with findings indicating that lawyers practised in more areas than they considered they had expertise. In the areas of property law and business/commercial law this disparity was particularly marked. Lawyers in outer-regional areas did, however, refer clients to specialist lawyers with greater frequency compared to their inner-regional counterparts. The disparity between areas of practice and expertise, the expectations of small businesses, as well as conflict of interest and confidentiality concerns arguably highlights the need for strengthening a referral culture amongst regional lawyers.

The findings also revealed an important symbiotic relationship between accountants and law firms which deserves further research in the future. The

majority of lawyers responding to the survey indicated that at least a quarter to a half of their work is referred to them by an accountant. While the sample size was not sufficiently significant to draw a strong conclusion, there was also evidence that those who received a greater proportion of their client referrals from accountants also had a greater propensity to refer clients to other specialist law firms, thus fostering a culture of referral. It may be argued that this referral culture is a component of the broader flexibility required of law firms if they are to continue to provide the level of service necessary to respond to the changing demands of small businesses. In addition to building a more effective referral regime, both with specialist legal practitioners (and with other professional services) regional lawyers will need to give greater consideration to other forms of service delivery to their small business clients, such as multidisciplinary collaborations, the provision of mediation services, and collaborative lawyering.

Recent studies have raised concerns around the continuing viability of law firms in regional Australia yet this research clearly demonstrates that there are unique opportunities for rural regional practitioners to firmly establish themselves as local specialists. Climate change and greater competition for natural resources are predicted, as are changing markets influenced by international trade and labour markets, and demographic changes across communities as a consequence of ageing regional populations and population movements. Hence, the need for local law firms to provide advice and assistance to guide regional small businesses through the maze of local, state and federal regulations which impact on their business activities is critical. The findings highlighted throughout this article demonstrate an array of service gaps, and in many instances, effective advice requires a local understanding of the unique circumstances of a particular region or industry. Thus, regional law firms are in an enviable position essential to providing small businesses with the capacity to optimise their commercial opportunities well into the future. However, further research is required to examine the most effective ways of assisting regional firms to harness the potential of providing localised specialist advice on these complex and emerging areas of law. Finally, independent research is needed that examines the prevalence and implications of conflict of interest issues for regional legal practices to ensure regional small businesses and legal practices are not disadvantaged.