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## **The unmet promise of occupational health and safety harmonisation: continued complexity for small, multi-jurisdictional firms**

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### **Abstract**

Harmonisation of state-based occupational health and safety (OHS) regimes is a Council of Australian Governments (COAG) initiative designed to 'cut red tape' for Australian firms. However Western Australia's, South Australia's and Victoria's lack of harmonisation makes it problematic for firms that conduct business in multiple jurisdictions. In this paper we investigate what impacts harmonisation has on firms generally and specifically smaller, multi-jurisdictional firms. First, we look at the requirements of the model WHS Act and what it said about managerial responsibilities for OHS. We focus on the due diligence clause which places personal liability on company directors or persons conducting a business or undertaking (PCUBs) for breaches in their duty. As a new duty, this also increases complexity for small, multi-jurisdictional firms depending on the jurisdiction in which they operate and the legislation to which they need to attend. We then question how these small firms may deal with this problem and draw on findings of a study where the impact of the harmonisation on safety professionals and training design and delivery was explored. Although the focus was not specifically on small firms, the data suggests small firms do not use dedicated safety professionals and instead rely on industry associations to understand their OHS obligations. Indeed, some small firms attempt to avoid compliance entirely, until ordered by regulators to comply. This is a risky strategy as the costs of being found guilty of a breach or non-compliance are significant. Moreover, small, multi-jurisdictional firms need to be conversant with at least two sets of OHS legislation with differing requirements and levels of penalties. The paper contributes to the debate on small firm regulation and shows that despite attempts to ease the regulatory burden in smaller firms that operate across state borders, complexity remains.

### **Keywords**

Small firms, occupational health and safety, regulation, complexity, qualitative

### **1. Introduction**

The Council of Australian Governments (COAG) National Reform Agenda (Safe Work Australia, 2011) has been driving the process of harmonising state-based OHS legislation. A fully harmonised system was expected to operate from 1 January 2012, but unfortunately this aim was not reached. Whilst most states have committed to harmonisation, some have resisted. For several States a critical issue was the extra burden harmonisation would impose in relation to additional training and documentation that small firms would be required to undertake in order to comply with the model WHS Act (Baillieu & Rich-Phillips, 2012). Small firms generally have limited resources and there was concern about the potential costs this regulatory change would impose upon them.

The small firm compliance challenge is underscored by evidence of their repeated attendance at harmonisation information sessions (Bahn & Barratt-Pugh, 2012). For small, multi-jurisdictional firms (or those that operate across state borders) the inability for all states to harmonise has meant that they need to adhere to multiple legislative requirements. Moreover, in the model WHS Act fines for breaches were significantly increased (up to \$3M) beyond the insurance limits of many small firms. These fines, should they be incurred would harm small firms and some owner-managers have indicated their uncertainty about how they could manage if found guilty of a breach and fined (Baillieu & Rich-Phillips, 2012).

The purpose of this paper is to investigate what impacts harmonisation has on firms generally and specifically smaller, multi-jurisdictional firms. In the next section we outline the current state of play in terms of harmonisation and this is followed by a discussion about specific requirements in the model WHS Act. From there we examine the literature on small firms and consider the burden the WHS Act may have on small firm's operations and in particular what happens to firms that conduct business across state borders. Finally, we detail the key themes that emerged from a study conducted in 2011/12 that explored the burden on small firms in their uptake of the harmonised legislation from a sample of training organisations, advisory bodies and Unions.

## **2. The WHS Act and small firms**

By late 2012, the harmonisation of state-based OHS regimes had not been completed despite calls from Prime Minister Gillard for this to occur. While the states were expected to mirror the model WHS Act, what resulted was considerable variation between the states (Tooma, 2012). The picture of harmonisation at November 2012 is shown in Table 1.

Harmonisation was supposed to benefit multi-jurisdictional firms but clearly this has not occurred. The current state of play both improves and complicates the situation for multi-jurisdictional firms. For example, in Queensland and NSW the legislation is very similar and if firms operate in these two jurisdictions then complexity is reduced. However, if firms operate in Victoria and NSW or Queensland and WA, complexity remains and they need to abide by two sets of legislation. Moreover, the legislative environment in these cases is no better than what it was pre-harmonisation except that firms must adjust to the requirements of at least one new state-based Act. In short, the promise to reduce complexity for all Australian firms from harmonisation has not been met. In the next section, we examine specific requirements in the model WHS Act including due diligence and communication.

Table 1: State of Harmonisation

State	Outcome	Differences between model WHS Act and resultant legislation
Commonwealth	Passed legislation 24 <sup>th</sup> Nov 2011	Change to the definition of ‘officers’ Additional requirement to consult, co-operate and co-ordinate with other duty holders
New South Wales	Passed legislation 7 <sup>th</sup> June 2011	Toughening up of provisions for unions to prosecute breaches
Queensland	Passed legislation 6 <sup>th</sup> June 2011	None
Australian Capital Territory	Passed legislation 20 <sup>th</sup> Sept 2011	Retained existing provisions relating to asbestos, hazardous chemicals and major hazard facilities
Northern Territory	Passed legislation 1st Dec 2011	None
Western Australia	Not yet passed	Concerns about impact on small firms, the high penalties for breaches, rights of entry for unions and the power for Health and Safety representatives to direct work to cease and issue Provisional Improvement Notices.
Victoria	April 2012 decision to remain with the state based system	
South Australia	The legislation passed through the lower house 29 <sup>th</sup> Nov 2011 and was defeated in the upper house in Feb 2012.	Argued to retain the state’s industrial magistrates, tripartite review committees and the Safe Work SA Advisory Committee.
Tasmania	April 2012 agreed to implement legislation Jan 2013	None

**2.1 The WHS Act on due diligence and communication**

In the analysis of the impact of implementing the model WHS Act, Access Economic (2011:18) reports that “for the most part, neither substantial changes, nor large costs or benefits are expected”. However, the interpretation of sections 19, 27(5), and 47 to 49 in relation to “ensuring health and safety” (the PCBU duty) and exercising ‘due diligence’ (the officer duty) and ‘consultation’ with workers has far reaching implications (Tooma, 2010). The due diligence clause in the WHS Act places personal liability for workplace safety on officers who include company directors, financial officers and persons who make or participate in making decisions that affect the whole or a substantial part of a business or undertaking (eg members of boards). The responsibility for company directors (or PCBUs) is clearly spelt out in the WHS Act as a positive duty where they can be deemed personally liable for breaches in their duty (Foster, 2012).

Section 27 of the WHS Act describes where this duty applies:

1. That there is a corporate “PCBU” which has a duty or obligation under the WHS Act;
2. That the accused individual is an “officer” of that PCBU;

3. That the accused has failed to exercise “due diligence” to ensure that the PCBU complies with that duty or obligation (Safework Australia, 2011).

Section 27 of the WHS Act seeks to encourage employers adherence to due diligence in business undertakings and reduce the blurring of responsibilities for breaches in their duty of care. Responsibility travels from the injured worker up to the company director and includes all managers in between. The requirements for this section have occurred in response to past examples where responsibility for health and safety has been devolved to third parties. For example, Mayhew and Quinlan (1997) noted in their research several cases of host organisations attempting to shift the management and supervision of contracted labour back to the third party firm rather than taking on the role themselves. Johnstone and Quinlan (2006) also noted this blurring of work health and safety responsibilities, employment conditions and the transfer of human resource management functions to labour agencies (Connell & Burgess, 2002). When employing contracted staff, James, Johnstone, Quinlan and Walters (2007) explained that in determining employer duties, including health and safety responsibilities, there was difficulty in distinguishing between self-employed workers and employees. In order to improve conditions, Deakin (2004) called for more ‘reflexive’ forms of regulation that were less prescriptive about duty of care, allowing for employer flexibility and the sharing of employer duties between employment agencies and host organisations. Finally, Johnstone, Mayhew and Quinlan (2005) argued that regulation of health and safety for contracted or outsourced labour was more difficult than for in-house labour. They maintained that their use “increases the likelihood of multi-employer worksites, corner-cutting, and dangerous forms of work disorganisation, as well as situations where the legal responsibilities of employers are more ambiguous and attenuated” (Johnstone, et al 2005:391).

Workers’ health and safety falls squarely on the shoulders of company directors under the WHS Act yet this is not the case in all states, especially where the legislation has not changed. For small, multi-jurisdictional firms this makes the situation complex.

## **2.2. Burdens on small firms**

We understand that the response of small firms to regulation and regulatory change of this type, depends on a complex interaction of cultural, contextual and economic factors in concert with owner-managers’ responses as well those of employees and other stakeholders (Barrett & Mayson 2008; Barrett & Rainnie, 2002; Mayson & Barrett, 2006; Wilkinson, 1999). Yet it is often stated that regulation is an unnecessary burden and/or “red tape” for small firms despite the contradictory evidence of this. According to Kitching (2006) regulation may constrain small firm activities through compliance, but regulation could also bring benefits or opportunities by making certain actions possible or by encouraging certain activity in others. In support of this, the conclusion from Anyadike-Danes, Athayde, Blackburn, Hart, Kitching, Smallbone and Wilson’s (2008: iii) study of 1205 smaller firms was that “knowledge of regulation, coupled with internal capacity to respond positively can and does enable business owners to adapt business practices and products to overcome some of the constraining influences of regulation”. However, findings from Fairman and Yapp’s (2005) work in small and medium enterprises in the UK found that many owners/managers of small firms were

unaware of their legal requirements and in not knowing how to meet their obligations, only took action when they were ordered to do so by a workplace inspector.

Regulation can be seen as ‘red tape’ because of small firms are generally resource poor and this gives rise to “structures of vulnerability” (Nichols, 1997: 161). With health and safety processes, poor performance has been shown to be “related more to the inadequate management of risk than to the absolute seriousness of the hazards faced” (Baldock James, Smallbone, & Vickers, 2006: 829). Documentation of risk is problematic (Eakin, Champoux & MacEachen, 2010) in small firms whose management systems generally lack formality, and as Barrett and Mayson (2008; Mayson & Barrett, 2006) have established, this is particularly so in regard to managing the employment relationship. Small firms are less likely to employ OHS practitioners (Pilkington, Graham, Cowie, Mulholland, Dempsey, Melrose, & Hutchinson, 2002) and they are less likely to be inspected by regulatory agents than larger firms. A lack of resources, expertise and formality may impact on their OHS performance. For example, worker participation is critical to improving health and safety outcomes and research shows a positive relationship between the presence of representative participation and improved management practices (Bohle & Quinlan, 2000; Quinlan & Johnson, 2009). Yet in small firms there is less likelihood that relevant infrastructure such as employee training and union organisation will exist to make participation effective (Bohle & Quinlan, 2000; Frick & Walters, 1998; Walters, 2001).

So when the WHS Act poses a requirement to communicate with workers on all matters concerning health and safety in the workplace (WHS Act 2011 Section 48: Safework Australia, 2011), there is likely to be a problem for small firms. The requirement to communicate and work with workers when developing and implementing safety systems is problematic in the face of informal management systems. A formal safety system may not exist and in the small firm it is unlikely a dedicated safety professional is employed to ensure the due diligence requirements of the WHS Act are met. A further complexity is that the requirement to communicate and work with workers on health and safety matters is not explicit in the state legislation of WA, SA and Victoria.

### **2.3. Small, multi-jurisdictional firms**

It is not uncommon for small firms to operate their business across state borders in a number of locations, particularly if they are located in towns and regions along the state borders (ABS, 2010). Small firms may have offices and shops situated in nearby towns that fall in different states because of their proximity to state boundaries. This is most likely to occur on the Queensland/NSW, Victoria/NSW and SA/Victoria state borders. For firms along the NSW and Victorian border and the SA and Victorian border, two OHS regulatory regimes remain in place with no benefits from harmonisation. Moreover there is a necessity to comply with new state-based legislation in those states that adopted new OHS legislation.

Sub-contractors (often smaller firms) will be especially affected as they are most likely to work across jurisdictions. In the resources sector the current demand for Australian minerals and the construction work underway, means sub-contractors may be working in several states in the same year as they contract for work. In these examples, firms are formally



regulated according to varying levels of health and safety compliance within the specific regulations as they cross state borders. We would assume that most small firms in this situation would informally operate under the lesser regulatory requirements or be unsure about operating under two or more sets of regulations. Hence there could be cases of different levels of communication, consultation and documentation between the business premises and where the work is located. We argue that this complexity is open to abuse and draw on Goldsmith's (2000: 139) work on regulation of the internet where he suggests "the true scope and power of a nation's regulation is measured by its enforcement jurisdiction, not its prescriptive jurisdiction". Incomplete harmonisation of the WHS Act in Australia increases complexity not only for the multi-jurisdictional small firm to comply with differing legislative requirements but also for the state regulators to enforce compliance.

In summary, while there is an implication that small firms view regulation as a burden, we note studies that suggest it can be an enabler and encourage positive change and growth in small firms. In Australia health and safety regulation is complex and complicated. For small firms conducting business across multiple jurisdictions there is added complexity and requirements. At least two sets of legislation will need to be understood, differing sets of documentation will need to be used, and fines at varying levels for any breaches that occur will apply. For these firms regulation may indeed be as onerous as it was pre-harmonisation. Complexity occurs through the unmet promise of a simpler unified regulatory system. For small, multi-jurisdictional firms there is a requirement to comply with at least two set of legislation.

### **3. Research design and methodology**

If we accept that firms operate in a complex reality then a critical realist perspective (Sayer, 1992; Archer, Bhaskar, Collier, Lawson & Norrie, 1998) may offer theoretical insights to inform this study. The "realist asserts that organisations are real. They have form, structures, boundaries, purposes and goals, resources, and members whose behaviours result from structured relations among them" (Dubin, 1982:372). Sayer (1992) defines organisational structures as sets of internally related objects and mechanisms as ways of acting. These objects are internally linked to the structure and their identity depends on their relationship with the other components of the structure. People are therefore co-creators of their reality and have some power to frame their experiences and understandings of their world. Human experience is viewed from this perspective as complex, and human behaviour is unpredictable, although generally explicable (Sayer, 1992; Archer, Bhaskar, Collier, Lawson & Norrie, 1998). The meanings, actions and processes of the other people with whom they interact, impact upon each individual's experience of everyday life (Clark, 2008). In organisations, structures exist which are beyond a person's control, impacting upon the capacity of individuals to construct their own sense of reality. However, individuals also make sense of their organisational reality. Behaviour is not totally determined by structure; there is agency – ie regulations can be ignored. They do not force behaviour unless there are immediate sanctions or as Kitching (2006) argues regulations are viewed as opportunities, highlighting how small business owners/subcontractors make sense of and act in response to regulation.

From this perspective OHS regulations operate as *structures* that shape behaviour; safe work practice is the *mechanism* and *action* of those structures in the workplace (Sayer, 1992). Actions are mediated by the structures of regulation, and by training and safety culture maturity (Dubin, 1982). Structures in organisations can be changed and are changed; however, whether these changes permeate to individuals to create a change in their behaviour is of interest to this study. The harmonisation of state-based OHS regimes in Australia has effectively lead to greater penalties for non-compliance and has produced a regulatory *structure* that will influence and mediate organisational decisions and managerial actions. Many organisations operating under new legislation are endeavouring to have in place processes to adhere to the new regulations (Access Economics, 2011).

The sample for the study consisted of eighteen semi-structured 30-60 minute interviews (Fontana & Frey, 2008) conducted with representatives from four registered training organisations (RTOs), five advisory and regulatory organisations, three unions, three universities, one TAFE and one Health and Safety Manager in a large Australian resources company, across WA, SA, NSW, Victoria and Queensland. Eight interviews were conducted face-to-face with a further ten interviews conducted by telephone. The interviews took place between October 2011 and April 2012. The interviews were audio recorded, fully transcribed and checked for errors and paralinguistic information. The data was analysed using a template approach (Miles & Huberman, 1994), which entails analysing the text through the use of a ‘guide’ consisting of a number of relevant themes supported by NVivo (Grbich, 2007). Verbatim quotes of individual participants are used in the paper as examples of these recurring themes. For this paper, we focus on the specific themes that emerged about small firms. Although the participants of the study were not in themselves small firm owner-managers they either provided training or advice to small firms across Australia or were able to identify the issues that the legislation may have for this cohort.

#### 4. Findings

Pre-harmonisation, nine different Acts existed with supporting Regulations. By October 2012, most states and all territories had introduced legislation to ‘mirror’ the model WHS Act. Victoria had kept its own legislation, Western Australia had the legislation under review, and South Australia’s legislation was in the Parliament. The aim of harmonisation was to reduce complexity but clearly this has not occurred as Table 1 indicates. As one respondent indicated:

*I will bet you in five years time they’ll still have confusion.* (Registered Training Organisation 3).

In the twelve months leading up to January 2012, Safe Work Australia canvassed key stakeholders in the form of a Regulatory Impact Statement to determine issues with the harmonised legislation. However, as the following quote attests, less than 1% of all Australian firms were consulted and the number of those that were small was unknown. Suspicion about the actions of the regulatory body, where Safe Work Australia was seen to be losing legitimacy due to its lack of consultation, was apparent in the following quote.

*They (Safe Work Australia) apparently went out to about four and half thousand businesses. I don’t know whether they did that electronically. I assume that was their*



*data base and they did that scatter approach. They had seventy-three responses and they used those responses to substantiate the findings. (Advisory Body 1).*

The model WHS Act endeavoured to incorporate many of the commonalities of the individual state legislation. But even in producing a national act changes were made. The WHS Act has a stronger focus on communication and consultation between employers and employees in the delivery of health and safety processes and practices in the workplace than the individual state acts. These two themes appear consistently throughout the legislation and have raised concerns by the governing, legislating and training professionals interviewed in regards to responsibility. As one respondent indicated, the implications of the Act's focus on consultation were wide-reaching in terms of firm-based communication.

*The Act can be summarised as two things. One it's got a mission and the mission is to have a safe and healthy work environment and two it's got a process of how we achieve that and the Act said it's a process of consultation, participation and involvement of work place parties and incentives and so I guess the consultation is more than just consultation it's actual participation. (Registered Training Organisation 2).*

The issue of operating businesses across state borders was raised. Managing multiple legislations has been identified as an issue across all sized firms and may impact on small firms in particular due to their lack of formalisation and resources. As one respondent pointed out:

*The Act focuses on consultation. The concern that I have around the consultation requirements is a bit like the piece of string. They're not fenced off so you really don't know where they end. I suspect what is a little bit clearer is the internal consultation, you know, talking to your workers, working down through safety reps, safety committees, other consultant mechanisms. The real problems lies on the multi-PCBU<sup>1</sup> sites, you know, who does what? How do you discharge a particular duty? Who's responsible for it? What are the agreements? (Advisory Body 2).*

Job titles were identified as problematic under the WHS Act in that responsibility for breaches continues up and down the line from injured worker to Director. This provision led to concern about where the responsibility for work health and safety rested.

*We've had advice from people from the West who tell us: "if you have the word 'manager' in your title, then you are deemed as being an officer of the company. And as an officer of the company, then those accountabilities that used to fit with directors now will trickle down to you". I'm a director and so I take on those responsibilities but I've got my own staff here scratching their heads going "I'm not sure I want to be called Safety Manager or I want to be called a Project Manager" because of the additional legislative burden it brings with it. (Manager 1).*

In states where the model WHS Act has been 'mirrored', several changes to health and safety documentation will be required. Much has been stated about the limited funds that are required to bring systems into line with the new legislation (Access Economics, 2011);

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<sup>1</sup> PCUB – persons conducting or undertaking a business

however there appears to be a general dissatisfaction among those sampled about the costs they expected to incur.

*Saying there is absolutely no change under new the WHS framework is not constructive and can in fact be a disservice. (Advisory Body 2).*

*Not only will companies need to work through their normal kind of training systems, general systems, they'll also be looking at their agreements and revising their agreements in line with the new requirements and that will take time, it's intensive. (Registered Training Organisation 3).*

*But when you get to the medium to small employers at what stage do they say too many costs, it's too hard? (Advisory Body 1).*

While the quotes above referred to regulatory changes more generally, small firms were most at risk as they do not have the services of dedicated safety professionals.

*What about small business and medium sized business who don't have dedicated safety professionals, who don't have things in place? They'll be totally lost. (Registered Training Organisation 4).*

*So some of the bigger firms are very pro-active in what they're doing about it and they're getting on top of everything but they've got safety professionals. Small businesses that don't have that that, you know, aren't getting things done because they don't know or understand it as much. (Advisory Body 2).*

*Business might need to have an understanding of ten or twelve of the Codes, and the Regulations and the overarching Act. So to get to grips with a seventy-page document and another seventy-page document and another seventy page document... is probably over the top for a small to medium enterprise. (Union 1).*

One participant argued that there was a large amount of unsubstantiated hype about the process and worried that, organisations particularly small firm owner-managers were attending repeated information sessions unnecessarily.

*I don't see that as being hugely dramatic. I'm actually staggered at the various conferences that we've run and people want to go along to the harmonisation sessions and they've heard it twenty-three times. (Advisory Body 1).*

However, repeat attendance at information sessions indicated that small firms did not understand the implications of changes or their obligations.

*The people doing their own work just don't know it, don't understand it and don't realise the importance of the legislation. (Advisory Body 2).*

Small firms generally rely on industry associations and employer groups for support in industrial relations, legislation compliance and legal advice (Bartram, 2005). Industry Association representatives who were interviewed raised a concern with their own workloads given small firms difficulty in understanding and applying the legislative requirements.

*They'll be lost. They will depend on organisations such as CCI<sup>2</sup> or other associations or other course providers to go along and at least learn the fundamentals, but their ability to sit down and look at the Act or the Code will end up with CCI codes of practice. (Advisory Body 1).*

*Many small businesses don't have anything to do with health and safety, they just get in and they do it. If you're just doing typing from home, you run your own business, you're self-employed; who are you going to consult with? You just do things. If you're a contract bricklayer you just go out. It might be even a labourer are you going to have a whole safety management system? (Registered Training Organisation 1).*

The model WHS Act did not alter the duty of care obligations of employers but instead extended the reach from employee to Company Director. This must be understood in small firms where business and personal assets are often intertwined. Impacts will be felt of this change when a breach occurs and becomes a court case.

*They need to understand whilst the duty...in some respects the duties haven't changed, those duties have always been there. But there's a greater transparency to those duties now. Which means if they haven't been fully on top of it previously they need to now be fully on top of it. Now the lawyers might come to work that out but certainly small business won't. (Advisory Body 1).*

*I think the bigger issue for small business is not so much the penalties it's the cost and the resource that's required to actually defend a case. The lawyers charge a lot of money, a lot of money and they're not insured for that. We do know there have been circumstances of small business gone to the wall because they go bankrupt. (Advisory Body 2).*

Support for small firms can occur through prescriptive and detailed Codes of Practice that support the WHS Act as well as from Industry Associations. Participants in the study explained the need for increased support for Industry Associations to assist small firms in their uptake of the health and safety legislation.

*Codes of Practice need to be focussed; they need to be short and sharp enough for a small to medium enterprise. (Advisory Body 1).*

*There is a network out there already what's needed is money to fund the employer associations to assist partner with government in getting to the SMEs and that's the level where the improvements need to be made. The big businesses often have the infrastructure to deal with a work health and safety issue or to adapt to any changes to the work health and safety legislation as well. (Advisory Body 2).*

## **5. Discussion**

The incomplete OHS harmonisation was seen as complex for small firms and for small, multi-jurisdictional firms. The lack of consultation with small firms prior to harmonisation was seen to cause distrust of regulatory change and the bodies driving it. The aim of harmonisation

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<sup>2</sup> CCI – Chamber of Commerce and Industry

was to reduce complexity; however, confusion reigns. Small firms are at risk of non-compliance as they generally do not have the expertise and resources, such as the services of dedicated safety professionals that can be used to help them navigate through their legislative requirements. Where small firms operate in multiple jurisdictions the risk of confusion and non-compliance is higher as these firms need to be conversant at least two sets of regulations.

The intent of the harmonisation of work health and safety legislation was to incorporate many of the commonalities of the individual state legislation into the one national Act. However, in producing a common national act some important changes have been made to the focus of the legislation. The new WHS Act has a stronger focus on communication between employers and workers in the delivery of health and safety processes and practices in the workplace than the individual state acts. These two themes appear consistently throughout the legislation and have raised concerns by governing, legislating and training professionals in regards to the responsibilities of business owners. It is when a safety breach occurs that is severe enough to be tried in court that the impact of the new regulations and responsibilities really come into play. Court rulings can be affected by the level of communication and consultation about health and safety in the workplace between employers and workers. Where this issue comes to the fore is in the case of small, multi-jurisdictional firms that work across state borders and in some jurisdictions may need to communicate, consult and document for very different regulatory requirements.

Furthermore, job titles have also been identified as problematic under the WHS Act: responsibility for breaches continues up the line from injured worker to Director with the result that some workers in companies may be reluctant to take on the title of 'manager' as they may fear the additional responsibilities. Finally, the WHS Act has not altered the duty of care obligations of employers as this has appeared consistently in state legislation. However, due to the 'officer' clause in the new legislation, the duty of care now has an extended reach from worker to Company Director. Small firms that have not engaged with the legislation in the past will need to ensure improved compliance under the WHS Act. Once again, this will have a significant impact if a breach occurs and results in a court case. This issue is further exacerbated given that the level of fines for breaches has significantly increased under the WHS Act and small firms are unlikely to have acquired sufficient insurance to cover such costs, exposing them financially. Small, multi-jurisdictional firms that are regulated under more than one set of legislation, have the added complexity of several levels of fines for breaches with very high fines occurring in states under the harmonised Act. So, in this case for a multi-jurisdictional firm if an accident is to occur it would be better in a workplace that is not regulated by the harmonised Act! However, this may confront more informed managers with considerable ethical dilemmas.

For organisations in Australian states that have mirrored the WHS Act, several changes to health and safety documentation will be required. Much has been stated about the limited funds that are required to bring systems into line with the new legislation (Access Economics, 2011); however there appears to be a general dissatisfaction among those sampled about the costs they expect to incur. This issue was pivotal in the Victorian Governments' decision

to remain with their state legislation (Baillieu & Rich-Phillips, 2012). For small, multi-jurisdictional firms systems will be needed to address the requirements of at least two sets of legislation. Although the requirement to address systems across borders already existed prior to harmonisation, the incomplete mirroring of the WHS Act has resulted in more paperwork and compliance for firms operating across state borders. For the small, multi-jurisdictional firm these requirements are simply an added burden. Indeed the complexity and confusion of the current situation may detract from the ability and resources of small firms addressing the very relevant intentions of the Act through improved communications and consultation. It is ironic that current dilemmas of small firms in regard to workplace health and safety have been exacerbated by the lack of consultation and communication in the political crafting of the new legislative environment.

There was evidence in the study that small firms were attending repeated information sessions on their compliance requirements to uptake the WHS Act. In addition, the Industry Associations interviewed raised the concern that due to small firms' difficulty in understanding and applying the legislative requirements a greater reliance on their services would be required. Small, multi-jurisdictional firms may be more inclined to call on their services. Participants in the study explained the need for increased support for Industry Associations to assist small firms in their efforts to comply.

## **6. Conclusion**

The harmonisation of state-based OHS regimes was designed to 'cut red tape' for Australian business. However, harmonisation is a goal unlikely to be reached with Victoria, Western Australia and South Australia currently retaining their legislation and Victoria likely to resist all efforts to encourage change. Firms, particularly small ones, were apparently ignored in the consultation process prior to the harmonisation of the WHS Act and this was a key reason why Victoria has retained its state legislation. A lack of consultation with small firms, despite the predominance of them in the business population threatens the legitimacy of the regulators in the eyes of the business community. Most importantly, though, the continued complex and large number of health and safety legislation acts and regulations in Australia has resulted in a lack of legislation unification. This is problematic for small firms who conduct business across multiple state jurisdictions.

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