



SUBMISSION

Prepared by South-East Monash Legal Service Inc. for the
Legislative Assembly Environment and Planning Committee
**Inquiry into employers and contractors who refuse to pay their
subcontractors for completed works**

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Our organisation

Established in 1973, South-East Monash Legal Service (**'SMLS'**) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community within the City of Greater Dandenong, the City of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and Victims of Crime Assistance Tribunal.

For most of the 50 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree.

SMLS has an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in.

SMLS also has a significant policy, advocacy, and law reform program, contributing to reforms in family violence laws and practices, access to civil procedure reforms, employment law, sexual assault and victims of crime, youth law, gambling and electronic gaming machines and other legal topics relevant to our service delivery and the needs of our community.

Acknowledgement of Country

SMLS wishes to acknowledge the traditional custodians of this lands upon which our office are located, the Wurundjeri and the Boon Wurrung peoples. We pay our respects to the Elders past, present and emerging.

We acknowledge the people, traditions, culture and strength of Aboriginal and Torres Strait Islander peoples, and the fight for survival, justice and country that has taken place across Victoria and Australia.

We sincerely thank the Traditional Custodians for caring for Country for thousands of generations. SMLS recognises the ongoing impact of colonisation, dispossession and racism experienced by Aboriginal peoples. As a Community Legal Centre, we acknowledge the violence of Australian law and its ongoing role in processes of colonisation. We recognise that sovereignty was never ceded, and that this always was and always will be Aboriginal land.

Acronyms

SMLS South-East Monash Legal Service Inc.

Endorsements

This submission is endorsed by [WEstjustice](#) Community Legal Centre and JobWatch Inc

SMLS and Employment Law

SMLS recognises that there is an ongoing need within our local community for free employment law assistance. The complexities and constantly shifting nature of employment law is often difficult for our clients to navigate, particularly those from culturally and linguistically diverse communities.

At SMLS we aim to empower clients to become better informed of their rights and of the legal avenues available to assert those rights.

We also understand that our clients may not always be able to self-help if, for example, a matter is complex or if a client is facing disadvantage due to factors such as limited English or disability. Some clients may feel intimidated by the employer and may not otherwise be comfortable asserting their rights in the absence of a legal advocate. We seek to redress these imbalances by providing ongoing assistance, which may include preparing applications to the Fair Work Commission and negotiating a settlement with employers.

Our employment law service may provide advice and assistance in relation to unfair treatment, unfair dismissal, discrimination, disputes regarding underpayment or unpaid wages, unpaid leave, redundancy, sham contracting and other entitlements.

In addition to our onsite employment law clinic, we offer assistance with the Workplace Advice Service through the Fair Work Commission. We co-deliver the International Students Accommodation and Employment Legal Service in partnership with JobWatch (Inc) and WEstjustice. We also provide advice and assistance to workers experiencing working sexual harassment and discrimination through our Advocacy Against Sexual Harassment program.

Introduction

We thank the Legislative Assembly Environment and Planning Committee for the opportunity to provide a submission in relation to non-payment of subcontractors for completed work.

Experiences of our clients

Our recommendations are based on our extensive work assisting the most disadvantaged workers in our community. Many of our clients who come to us for assistance are culturally and/or linguistically diverse, a recent migrant to Australia, clients on temporary visas (some with restrictions on their work rights) or experiencing prolonged unemployment and desperate to improve their financial situation. Our clients have often found it difficult to find work and so retaining a job is of paramount concern and they are not in a strong position to negotiate the terms of their engagement. Many of our clients also are not entitled to receive any Centrelink payments given their residency status so do not have the benefit of a safety net should they experience periods of joblessness. Many of our clients are also in precarious jobs working in low-paying industries, including (but not limited to) construction and building, commercial transport, cleaning, and factory work.

We acknowledge this inquiry is limited to the non-payment of invoices. We take this opportunity to highlight that the clients we see also experience a range of other problems including:

- Non-payment of invoices
- Sham contracting
- Unfair and unlawful termination
- Dispute over working conditions
- Non-payment of superannuation where otherwise entitled
- Other adverse action including dismissal without notice/right of reply/compensation.

We note that most clients we see who are facing these issues are from within the cleaning industry, construction industry (i.e., rendering, painting most commonly) or those working as a driver (both delivery and non-delivery drivers).

For many of our clients, they are not aware of the distinction between employees or independent contractors. We frequently see clients who are in sham contracting arrangements, working for rates that fall well below the statutory minimums that may otherwise apply to employees. We often see clients who speak English as a second language, often without a written contract, work to fixed schedules, wear a uniform

provided by the purported principal contractor, use materials and tools provided by the purported principal and exercise little to no control how, when and where they perform their work. It is the principal contractor who prompts our client to obtain an ABN (or in some cases, arranges an ABN for them). We have even observed instances where it is the principal who supplies our client with template invoices and the contract that labels them as an independent contractor.

We assist contractors engaged in many different industries who are subject to unfair contracts. Given that many of our clients are from culturally and linguistically diverse backgrounds, are low-income earners and have a limited understanding of their rights and protections, they are rarely, if ever, able to avail themselves of the protections against unfair contracts offered by the Independent Contractors Act 2006 or the Australian Consumer Law (ACL).

Case study - Sam: Sam is a recent migrant to Australia and speaks English as a second language. He is seeking approximately \$4000 in unpaid wages for work done as an independent contractor. Sam worked in a factory, and his boss did not pay their wages for 2-3 weeks. When Sam raised this with the boss, the boss became aggressive and threatening. There was no written agreement governing the working relationship, but a verbal representation that our client would be an independent contractor.

Issues with pursuing debt for unpaid work

Non-payment for completed works as a subcontractor is a recurring issue faced by our clients. In many situations, our clients enter verbal agreements for working arrangements, which creates evidentiary difficulties when deciding to pursue claims for unpaid work. Documenting their work is especially difficult for our clients who are non-English speakers, have low literacy levels or may not be computer savvy.

Clients may also practically be unable to commence legal proceedings as the clients may not know the identity of the principal contractor or have an address for service. This typically occurs where the client finds out about the work through digital platforms such as Facebook.

For many of our clients, the time, cost and effort associated with pursuing debts for unpaid work through court proceedings far outstrips the amount they are ultimately seeking to recover. Often, our client's claim for unpaid work may be as little as a few hundred dollars. The costs and risks of court proceedings may be prohibitive to the client where the quantum of the claim is relatively low.

VCAT may not necessarily offer a workable alternative option. According to the VCAT website, the expected wait times for a mediation or hearing may be between 30 to 58 weeks from the time an application is lodged. Given the protracted wait times for a hearing

at VCAT, VCAT proceedings may not be a feasible option particularly for clients who may be on temporary visas with approaching expiration dates.

Even for those clients who do take the step of VCAT proceedings and obtain an award in their favour, we see instances where the principal contractor appears to ignore the VCAT order – and our client remains unpaid. We see clients give up at this point as the cost, time and effort of enforcing the order through Magistrates Court proceedings far exceeds the sum they are seeking to recover. Clients are left disheartened, and we have concerns of the long-term impact on that client's confidence in the civil justice system.

The loss of this income however may have a significant impact on our clients given they are predominantly low-income earners and so cannot afford to simply write these losses off lightly.

Case study - Rob: Rob is on student visa, culturally and linguistically diverse and a recent migrant to Australia. He worked as a truck driver for the work provider. There was no written contract – just a verbal agreement that he would be paid via ABN. The verbal agreement also covered that our client would pay for fuel but would be reimbursed for this alongside his wages. The other party owned the truck. Rob is seeking approximately 23 weeks payment for work, as well as fuel reimbursement, which has been calculated at over \$40,000. When the Rob advised the work provider that he would be taking legal action, Rob was given some reimbursement, but is still over \$20,000 out of pocket.

Access to free legal assistance to workers experiencing disadvantage or vulnerability

Community legal centres address a critical service gap for workers who: are not yet in a union (or who do not make enough income for a union to be an economically viable option); cannot afford a private lawyer; and who are not able to understand or enforce their rights without support. Mainstream agencies are largely inaccessible to these types of workers and community organisations are underfunded and overloaded.

To this, we highlight the importance of access to legal advice and representation, particularly for those who may be culturally and linguistically diverse, or otherwise unable to self-represent. We propose a greater investment in CLCs to allow for community-based lawyers to provide greater assistance to clients who wish to engage with alternative dispute resolution, to encourage matters resolving outside of court.