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Are All Internships Created Equal?: Mapping the Internships Minefield from Different Perspectives

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'International Education: Global, Sustainable, Responsible'
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Experience or Exploitation?

- ❖ Report commissioned by the Fair Work Ombudsman
- ❖ Profs Andrew Stewart & Rosemary Owens
- ❖ Released in Feb 2013
- ❖ Available from <http://www.fairwork.gov.au/about-us/reports-and-submissions/research-reports>



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'Work Experience: Labour Law at the Intersection of Work and Education'

Anne Hewitt, Joanna Howe, Rosemary Owens, & Andrew Stewart – Adelaide Law School

The research questions/issues:

- How does the law conceptualize work experience?
- What role do universities play in relation to the regulation of work experience?
- How is work experience regulated elsewhere?

Context – Work

- Social and economic impacts of globalization
 - ❖ eg GFC and impacts on youth employment
- Pressures on industry
 - ❖ productivity and flexibility
- Transformation of work
 - ❖ rise of the service and technology sectors
 - ❖ transformation of agricultural production and manufacturing – advent of global supply chains
 - ❖ growth in non-standard, precarious work,
 - ❖ outsourcing – at both the local and global levels
- Risks of growth of the informal sector
 - ❖ outside, below the law

Context – Work/Employment

➤ *Australia: Employment Plan 2014*

prepared for the G20 Labour and Employment Ministerial Meeting, 10-11 Sept 2014

- ❖ ‘period of major transformation’
- ❖ ‘growth – below trend’
- ❖ ‘unemployment rising’
- ❖ ‘key challenges’ – include ‘youth employment’
 - labour market conditions for youth (15-24yrs) over the past two years have been ‘soft’
 - youth unemployment – 12% (in some areas >20%)
 - ‘those entering the workforce struggle to find jobs’

Context – Education

- Increased participation in formal education – more students and for longer periods
- What's next for higher education?
 - ❖ a more demand driven system, further de-regulation?
- Education services as part of a global competitive industry
 - ❖ regulatory changes – increased number of players both public and private
 - ❖ changes in technology – eg MOOCs
 - ❖ changes in funding arrangements
 - ❖ increased global movement of students
 - ❖ impact of changed requirements in other national/regional areas – eg, the 'Bologna 3+2 model' in Europe

Youth - Transitioning from Education to Work

- Post-secondary-education – a higher education/vocational education divide?
- Pressures for more ‘work integrated learning’ (‘WIL’)
 - ❖ young people spending longer in formal education
 - ❖ industry demanding ‘job ready’ graduates

Forms of Work Experience

- Growth of arrangements for work experience outside of formal education and training
 - ❖ often now performed by an ‘intern’
 - ‘a kind of smokescreen, more brand than job description, lumping together an explosion of intermittent and precarious roles we might otherwise call volunteer, temp, summer job, and so on’
(Ross Perlin, *Intern Nation*)
 - ❖ compare volunteering: unpaid work performed with the primary purpose of benefiting someone else or furthering a particular belief

Prevalence of Unpaid Experience

- No definitive statistics
- But evidence of
 - ❖ significant use of unpaid trials/training, especially in certain industries
 - ❖ use of unpaid interns to perform extracurricular work that could or would otherwise be done by paid employees
 - well established in some sectors
 - on the rise in many others
- Interns Australia survey – April 2014
 - ❖ 61% of university graduates had undertaken 2 or more internships with no formal contract arrangements

ACEN Survey

- 89 members – 29 institutions
- Strong awareness (60%) of unpaid work organised or facilitated through their institution that was not part of a course
- Proportion of students involved in this unpaid work?
 - ❖ approx one-third estimated >50%
 - ❖ estimated 2/3 doing work to benefit a business/organisation

Survey of Law Students in 2012

- Survey of final year law students at UA, QUT & UWS found
 - ❖ 50% had performed unpaid work (other than as a volunteer or as part of their own or a family member's business)
 - ❖ great majority not for credit towards degree
 - ❖ many more than once, duration often running into the months or even years
 - ❖ substantial number reported working for law firms or (to a lesser extent) barristers

Survey of Law Students in 2012

- Perceived benefits included improving employability, practising skills, better understanding of work environment
 - ❖ “almost necessary without the right contacts in the legal industry”
- Around a third reported getting an offer of paid employment
- But concern expressed too about cost and exploitation

International Context

- International Labour Conference June 2012, resolution concerning The Youth Employment Crisis: A Call for Action:
‘[A]pprenticeships, and other work experience schemes have increased as ways to obtain decent work. However, such mechanisms can run the risk, in some cases, of being used as a way of obtaining cheap labour or replacing existing workers.’

International Context

- ILO website article, August 2012
 - ❖ ‘internships have become increasingly common in developed economies, as has controversy over the practice’
 - ❖ warning of the dangers if internships become simply a ‘disguised form of employment’ and without any of the benefits they promise, such as real on the job training
- 2013 - ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted this risk in its *General Survey on Minimum Wages*

Legal Position in Australia

- *Fair Work Act 2009* (Cth) requires payment of a minimum wage and other entitlements if there is an ‘employment’ relationship
 - ❖ not defined, except to exclude unpaid ‘vocational placements’ under authorised education/training courses
 - ❖ therefore left to common law, which requires parties to have created an employment *contract*

Employment at Common Law

- Most cases concentrate on indicia of employment, to distinguish employees from contractors
- Common law requires a *contract*
 - ❖ see eg *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95
- Key elements
 - ❖ intention to create legal relations
 - ❖ consideration
 - ❖ mutuality of obligation

Employment at Common Law

- To be determined
 - ❖ objectively, not by reference to parties' 'uncommunicated subjective motives or intentions'
 - *Ermogenous* at [25]
 - ❖ according to the *reality* of the arrangement, not necessarily what's formally agreed
 - *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3

Unpaid Work Experience as Employment

- Limited and very mixed case law on the status of unpaid trials and work experience
- Some work experience arrangements found to lack intention to create legal relations and/or mutuality of obligation
 - ❖ eg *Dietrich v Dare* (1980) 54 ALJR 388
 - ❖ *Pacesetter Homes Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449

Unpaid Work Experience as Employment

- But in other cases, an employment relationship *has* been found
 - ❖ eg *Nominal Insurer v Cleanthous* [1987] NTSC 51
 - ❖ *Cossich v G Rossetto & Co Pty Ltd* [2001] SAIRC 37

Unpaid Work Experience as Employment

- Little attention in cases to the requirement of consideration
- But clear that consideration for an employment contract need not be wages
 - ❖ eg board and lodging
 - *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92
 - ❖ or just provision of experience
 - *Quashie v Stringfellows Restaurants Ltd* [2012] UKEAT 0289_11_7604 at [51]

Unpaid Work Experience as Employment

- On a broad view of *Fair Work Act 2009 (Cth)*, scope for identifying a contract where
 - ❖ there is a commitment to work in return for experience/opportunity
 - ❖ work is of value to the ‘employer’
- If the *Fair Work Act* applies, minimum wage must be paid, leave provided, records kept, etc

‘Vocational placement’ exception

- Even if an employee, there is the ‘vocational placement’ exception (FW Act s 12):
 - ❖ ‘a placement that is:
 - a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
 - b) undertaken as a requirement of an education or training course; and
 - c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.’

‘Vocational placement’ exception

- ‘A placement’
 - ❖ a process for placing?
 - what if student acts on their own initiative?
- ‘For which a person is not entitled to be paid any remuneration’
 - ❖ remuneration does not usually include reimbursement of costs
 - ❖ not a gratuity – because no entitlement

‘Vocational placement’ exception

- ‘Undertaken as a requirement of an education or training course’
 - ❖ is a ‘course’ a program qualification?
 - ❖ or does it also include a subject within a course?
 - ❖ is an elective subject a ‘requirement’ of a course or only ‘core’ subjects?
 - ❖ general opportunities for internships or work experience facilitated by educational institutions seem clearly not to be covered

‘Vocational placement’ exception

- ‘Authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory’
 - ❖ does the placement have to be specifically authorised?
 - ❖ or is it enough that the course/program is authorised?

‘Vocational placement’ exception

- If the exception doesn’t apply, but an institution organises/facilitates unpaid work experience
 - ❖ possible liability as an employer?
 - ❖ possible liability as an accessory?

The Role of Law Enforcement

- Australia – role of the Fair Work Ombudsman
 - ❖ A multi-level, approach – responsive & strategic
 - proactive identification of the problem
 - research
 - education
 - stakeholder engagement
 - young people, migrants, students, educational institutions, business, trade unions, civil society
 - assisting best practice – the development of model policies and procedures
 - ❖ Enforceable undertakings
 - 2014 - Architecture firm – repayment of \$7,000
 - ❖ Test cases
 - *FWO v Devine Marine Group Pty Ltd* (2014) FCA 1365
‘the true substance of the relationship’, statement of intentions notwithstanding, and no matter if some training provided
 - *FWO v Crocmedia Pty Ltd* (2015) FCCA 140
‘exploitative conduct’, ‘profiting from volunteers’

GLS v PLP [2013] VCAT 221

- Complainant undertaking GDLP placement
- Alleged 14 incidents of sexual harassment
- Sexual harassment in employment prohibited under *Equal Opportunity Act 1995 (Vic)*
 - ❖ s4 – definition of ‘employment’ excluded ‘work on a voluntary or unpaid basis’

GLS v PLP [2013] VCAT 221

- Justice Garde AO RFD held
 - ❖ complainant was an employee
 - GDLP placement usually unpaid, but complainant was paid for reasons ‘understandable and commercial’
 - indicia of employment relationship consistent with this
 - ❖ complaint proven in 11 of 14 incidents
 - ❖ damages awarded for loss, damage and injury - \$100,000

Other laws

- Application of other laws covered in more detail in 2013 report - but note
 - ❖ work health and safety laws will always apply
 - ❖ workplace bullying provisions adopt the definition of ‘worker’ in WHS laws
 - ❖ Australian Consumer Law may apply to misleading advice and ads for unpaid work

Migration laws

- *Migration Act 1958 (Cth) and Migration Regulations 1994 (Cth)*
 - ❖ ‘work’ - ‘any activity that normally attracts remuneration’
 - *Braun v Minister of Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 152
 - *Kim v Witton* (1995) 59 FCR 258
- Condition 8104 & 8105 – student visas
 - ❖ 40 hours per fortnight when course in session
 - *Education Services for Overseas Students Act 2000(Cth)*, s22
 - ❖ Exemption – ‘work specified as a requirement of the course when the course particulars were entered in CRICOS’
 - *Kamely v Minister for Immigration and Citizenship* [2011] FCA 1071
 - *Komiatis v Education training Employment Australia Pty Ltd* [2008] VMC 29

Migration legislation– international students

➤ Condition 8105

- ❖ except where work is ‘a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students’
- ❖ wording differs from vocational placement exception in the Fair Work Act

Risks for international students

- If internship or other work experience is
 - ❖ within the definition of ‘work’ in Migration legislation;
 - ❖ outside the exception in Condition 8105; and
 - ❖ they already are employed 40 hours per fortnight
- Then there is a risk that they are in breach of visa condition, as well as risk that rights under the Fair Work Act have been ignored

Our Recommendations to FWO

1. Articulate a clear view as to legitimacy of unpaid work experience, in order to inform education and operational decisions
2. Provide more detailed guidance, eg as to vocational placement exception
3. Institute one or more targeted campaigns
4. Consider instigating test cases
5. More effective liaison with other government agencies, such as (then) DIAC or ACCC
6. Engagement with stakeholders, eg to develop best practice approaches

Legal developments in other countries

➤ USA, UK, Canada

- ❖ all have versions of the vocational placement exception
- ❖ pressure in each country for interns to be paid/treated in accordance with ordinary workplace laws

Unpaid Work Experience as Employment – other jurisdictions

- Interesting examples from the legal profession
 - ❖ *Strachan v Moodie* [2012] NZ EmpC 95; [2012] NZCA 508
 - ❖ *Edmonds v Lawson* [2000] 2 WLR 1091
- Some examples concerning internships
 - ❖ *Vetta v London Dreams Motion Pictures* [2008] ET/2703377/08
 - ❖ *Hudson v TPG Web Publishing Ltd* [2011] ET/2200565/11
 - ❖ *Sarmiento v Gavin Wilding & Rampage Entertainment* [2008] CanLII BCPC 232

United Kingdom

- Public debate and action
 - ❖ involvement of all stakeholders
 - government, industry, trade union, education authorities and institutions, young people
 - ❖ concerns about equity, access and social mobility
 - ❖ ‘Gateway to the Professions’ initiative
 - ❖ 2011 ‘Common Best Practice Code for Higher Quality Internships’
 - ❖ adoption of industry specific initiatives/codes of practice
 - ❖ government leading by example



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Thank You

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