



Fair Work
OMBUDSMAN

Experience or Exploitation?



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A report commissioned by the Fair Work Ombudsman into the nature, prevalence and regulation of unpaid work experience, internships and trial periods in Australia.

Research completed in January 2013 by Adelaide Law School Professors, Andrew Stewart and Rosemary Owens.

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Report summary – Key findings

- The report examines three categories of unpaid work: unpaid trial work, unpaid internships and other forms of unpaid work experience. The report does not consider unpaid work performed at home within familial relations, in a family business, or volunteer work in the not-for-profit sector.
- The report also acknowledges the importance and legitimacy of unpaid work within formal vocational placements. The report does not intend to undermine the use of these legitimate arrangements.
- It is difficult to accurately quantify the number of workers undertaking unpaid work experience. But the report draws on a wide range of sources to conclude that such arrangements are a growing feature of the Australian labour market.
- In particular, it appears that a significant number of workers, particularly young workers, are asked or required to undertake unpaid job trials or unpaid training which go beyond what is reasonably required to assess an applicant's ability or suitability. Such arrangements effectively require the performance on an unpaid basis of work that would normally be undertaken by a paid employee.
- In addition to unpaid trials, the report identifies unpaid internships as a growth area both in Australia and internationally.
- The term 'internship' has a broad meaning, covering a wide spectrum of work experience arrangements. It may include everything from simple 'work shadowing' opportunities, through to 'work integrated learning' that sometimes (but not always) forms part of a formal vocational placement, through to the other extreme, to unpaid or paid entry level jobs.
- Unpaid internships are particularly popular in industries that are considered attractive to job-seekers or where there is an oversupply of qualified graduates.
- While unpaid internships are more prevalent in certain industries, the report concludes that the majority of professional industries are affected, including (but not limited to) print and broadcast media, legal services, advertising, marketing, PR and event management. Such arrangements are often considered a prelude to paid work.
- The report concludes that there is reason to suspect that a growing number of businesses are choosing to engage unpaid interns to perform work that might otherwise be done by paid employees.
- The report recommends that FWO focus on those businesses that are systematically using unpaid work arrangements to exploit workers, and gain competitive advantage over businesses complying with workplace laws.
- On the other hand, there is no evidence to suggest that work experience conducted under the aegis of secondary school programs involves the exploitation of young people.

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- Some workers, predominantly international students or graduates, are paying agencies to place them in unpaid internships. Migrant workers, particularly international students and those engaged on temporary working visas, are especially vulnerable to pressure to perform unpaid work because they have the urgency of seeking to maximise the possibility of securing access to permanent residency.
- Some of the views represented in the report express a belief that unpaid internships are mutually beneficial arrangements that should not be discouraged or suppressed.
- There also seems to be a misconception that, if a worker is undertaking some form of work integrated learning, then the worker would be exempt from the *Fair Work Act 2009* (the Act) and therefore can be unpaid.
- However, under provisions which were first introduced into federal law in 1996 through the *Workplace Relations Act 1996*, the only current exemption is for those who are engaged on a vocational placement which is a requirement of an education or training course and is authorised under a law or an administrative arrangement of the Commonwealth, a state or territory.
- If an unpaid work experience arrangement is not a formal vocational placement, and the person is actually an employee working under a contract of employment, then the person is entitled to the conditions and entitlements under the Act and Fair Work instruments – including a minimum wage.
- Whether a person performing work is doing so under a contract of employment requires a determination based on the circumstances of each particular case. As such, it is not possible to provide a simple or comprehensive analysis of the legal status of various forms of unpaid work.
- A contract of employment may exist even without any formal agreement to that effect. It is a question of determining whether the parties have entered into an arrangement that involves mutual commitments (for example, to perform work in return for the opportunity to gain experience).
- There are relatively few decided cases that explore the status of work experience arrangements. Some short-term trials have been found not to involve employment. But longer arrangements in particular have been more likely to be characterised as involving an employment relationship.
- There is a clear need for cases to be brought before the courts to test out the legality of arrangements that appear to undermine the standards established by the Act.
- The report extrapolates that, if the trend in unpaid internships is left unchecked, it is likely to gather pace as it has done in other countries like the United States, where employers are forced by their competitors into a ‘race to the bottom’. However, the report also notes that concern about unpaid work arrangements, especially as they impact on young people, has become a focus in other developed economies in recent years, especially since the Global Financial Crisis. In the United Kingdom, for instance, the present government has made a concerted effort in recent years to end any exploitation and to ensure fair access by all to the labour market.
- The report makes a series of recommendations as to how the Fair Work Ombudsman might improve education and compliance in this important area, in particular by working with stakeholders and encouraging greater community debate.

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Report recommendations and the Fair Work Ombudsman's proposed education and compliance response

1. Defining unpaid work experience

The report recommends that the Fair Work Ombudsman (FWO) determines the legality and legitimacy of unpaid work experience in order to inform its approach to education and its operational decisions regarding investigations, and potentially prosecutions, by assessing the seriousness of any unpaid work issues.

In particular, this requires the FWO to determine its view regarding each element of the 'vocational placement' exception in the *Fair Work Act 2009*.

The FWO intends to develop its position on what constitutes unlawful unpaid work arrangements, with particular attention to the 'vocational placement' exception under the *Fair Work Act 2009*. This position will inform the FWO's education and compliance initiatives.

2. Expanding guidance and education activities

The FWO should develop more detailed guidance on unpaid internships, including more information regarding the elements of the 'vocational placement' exception. It should also set out its general approach to these arrangements in a policy statement.

The FWO should consider providing specific information for particular types of work experience and industries.

Educating the Australian community about the legitimacy and legality of unpaid work arrangements will be a primary element of the FWO's response to the report. In particular, the FWO intends to:

- Review and expand the content relating to unpaid work arrangements published on www.fairwork.gov.au by July 2013.
- Develop industry-specific educative materials by June 2013 for key industries identified in the report: Hair and Beauty, Hospitality, Cafes and Restaurants and Professional Services (which includes media, legal, creative services).
- Deliver a handbook (including an e-book version) and appropriate templates addressing frequently asked questions, scenarios and practical assistance for employers and young workers applicable across all industry sectors by July 2013.
- Following consultation with industry, develop an e-learning module on the appropriate way to engage young people on work experience and developmental programs.

3. Proposed education and compliance activity concerning unpaid work

The FWO should institute one or more targeted campaigns (combining compliance and education activities) around extracurricular unpaid work, in industries where the practice is relevant.

It is recommended that at least one targeted campaign is undertaken in the hair and beauty, retail and hospitality industries.

It is also recommended that one or two further industries in which unpaid internships are prevalent outside the scope of an authorised education or training course are targeted. The print and/or broadcast media should be one of those industries, other options may include legal services, advertising, marketing or event management.

The FWO is concerned about the instances of unpaid work identified in the report, particularly as it relates to vulnerable workers.

The FWO will also assist employees who want to lodge complaints regarding unpaid work by establishing a special complaint handling procedure whereby workers who feel they have been denied their lawful entitlements can contact the FWO via a dedicated email address.

The FWO will increase levels of compliance through:

- Community awareness activities and engagement with key industry stakeholders and other government organisations.
- The development, distribution and delivery of specific education, social media and information products and services and the provision of specialised advice via the FWO advisory contact points such as the Fair Work Infoline.
- A targeted approach to compliance activity and building partnerships with employee and employer representative groups in the hairdressing and beauty, hospitality, retail and media sectors. The FWO will work with key employers and stakeholders in these sectors to ensure the boundaries of employment relationships are clarified, monitored and enforced.

In line with the report's recommendations, the FWO will also examine opportunities to commence compliance activities focusing on unpaid training and work experience in specific locations. Using recruitment advertising and the activities of placement intermediaries as a trigger for the identification of such matters, the FWO will engage with these industries and their representatives about the removal of problems. The FWO will also monitor online job advertisements and design strategic interventions to assist with ensuring compliance.

4. Commencing test cases

The FWO should consider instigating, where appropriate, test cases to help provide greater clarity and certainty in understanding the application of the legislation to unpaid work arrangements. This should include cases dealing with both relatively short periods of unpaid trial work and with lengthier internships that may have an element of training but mostly include productive work.

The FWO will give consideration to initiating proceedings in relation to relevant matters that involve exploitative unpaid work arrangements. Any decisions to initiate proceedings will be made in accordance with the Fair Work Ombudsman's Guidance Note 1 – Litigation Policy.

The FWO has initiated legal proceedings previously in relation to unpaid work trials. For example, in November 2012, the FWO commenced proceedings against two Melbourne IT companies, Konsulteq Pty Ltd and Konsulteq Upskilling & Training Services Pty Ltd, and their operator, Pradeep Gaur, for alleged breaches of workplace laws relating to sham contracting, unlawful termination, falsification of records and underpaying two foreign workers more than \$17,000. The FWO alleges that the two employees were not paid wages during a period of purported training over several months during 2010.

The report recommends that FWO focus on those businesses that are systematically using unpaid work arrangements to exploit workers, and gain competitive advantage

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The FWO will also continue to consider other compliance mechanisms as an alternative to litigation where appropriate. For example, the FWO entered into an enforceable undertaking with McDonald Real Estate, Dandenong, in December 2012, after the company admitted underpaying a salesman more than \$10,000 between October 2010 and February 2011. The salesman was unlawfully required to perform an initial four week period of unpaid work under a purported training program and was underpaid thereafter. Under the enforceable undertaking, the company was required to develop processes for ensuring future compliance with workplace laws, undertake professional audits and rectify any underpayments identified, provide professional workplace relations training for all managerial, human resources, recruitment and payroll staff and publish public notices detailing their contraventions of workplace laws.

5. Liaison with other government agencies

The FWO develop more effective liaison with other government agencies interested in or in a position to influence the conduct of unpaid work arrangements, including with the:

- Department of Immigration and Citizenship (DIAC), to alert visa holders of the potential illegality of unpaid work and
- Australian Competition and Consumer Commission (ACCC), to take a stronger position in relation to the advertisement of employment-like internships.

The FWO intends to liaise with government agencies that can influence the practice of unpaid work arrangements. The FWO will commence discussions with DIAC and ACCC and will liaise with the Australian Public Service Commission (APSC) to encourage the distribution of information to APS agencies about unpaid work arrangements and provide any assistance required by the APSC in developing tailored information for this purpose.

6. Stakeholder engagement

The FWO should engage with a broad range of stakeholders, including young people and migrant workers, educational institutions, and particular industry groups.

The FWO should provide an enabling capacity which assists compliance with the legislation within a context of developing best practice approaches to the issue of work experience.

The FWO will engage with a broad range of stakeholders in order to assist others to not only comply with their legal obligations, but to advocate for best practice business processes. Specifically, in addition to the sectors identified above, the FWO will:

- Provide a free and voluntary educative program to the higher education sector. This includes a review for compliance with the *Fair Work Act 2009*; the delivery of an educational seminar to relevant personnel; the provision of a self-audit tool that higher education providers can use and distribute to check the legitimacy of any unpaid arrangements; and the development of tailored information such as a fact sheet for the Higher Education sector addressing this issue. Collaboration with key stakeholders to develop the program will commence in April 2013 with a view to commence the program in July 2013.
- Invite employers in industries identified as commonly utilising unpaid work arrangements to participate in the FWO's National Employer Program throughout the second half of 2013. The FWO will engage with a number of stakeholders during the planning and execution of targeted education and compliance campaigns.

Fair Work Ombudsman case studies on unpaid work experiences

Unpaid trial in a real estate company

A worker applied for a position as a real estate agent at McDonald Real Estate Dandenong Pty Ltd. He was told by the company that he would only be employed if he attended a four-week 'bootcamp' training program. He undertook this program, under the terms of a 'training agreement' that stated, among other things, that neither he as the trainee, nor the company, must represent to the public that he was an employee or member of the company during the training period. He was provided with leaflets containing his details, a photograph and the company logo, together with company ties and a badge. He spent the four weeks attempting to gain listings, without any assistance from a trainer.

The worker was subsequently engaged under an 'employment contract'. He was paid on a commission-only basis, despite not meeting the requirements for such a payment arrangement under the *Real Estate Industry Award 2010*.

Following an investigation by the Fair Work Ombudsman (FWO), the firm agreed to pay the worker for his work in accordance with the Award, including for the four-week 'training' period. The company and two of its directors signed an enforceable undertaking with the FWO, agreeing among other things to publicise their contraventions, develop compliance programs for any agencies in which they might be involved, and donate \$1000 to a local Community Legal Centre.

Recruiting firm internship

A recruiting firm was investigated by the FWO following an advertisement that appeared on SEEK.com.au, seeking graduates to work on a voluntary basis for one day a week over a 6 month period. The placement (which was not linked to any education or training course) offered hands on experience with a potential for job opportunities.

The firm's HR manager explained that the internships were observational in nature, with no expectations of productive work. The interns, who would each sign agreements that detailed the training they would receive, would typically observe the firm's consultants undertaking candidate selection and screening, shortlisting and reference checks, and would also sit in interviews; but they would not undertake those activities themselves, other than on a 'dummy' or test basis.

This account was largely corroborated by evidence from two current and two past interns at the firm, who confirmed that most of what they had done was of the 'watch and learn' variety, though in a few cases they had done some 'hands on' work under supervision.

On the basis of the investigation, the FWO was satisfied there was neither significant benefit to the firm from the work, nor any expectation to perform productive work, and accordingly that there was no employment relationship.



Some short-term trials have been found not to involve employment

Unpaid trial in a law firm

J, a law graduate with a year's experience in legal practice, applied for what was clearly advertised as a paid position with a law firm. He was interviewed, along with two other candidates and was asked to complete various tests, including the preparation of a memorandum of advice on a given set of facts. On the evening of the day on which he was interviewed he received an e-mail advising him that he had been 'successful' and asking him if he was available to attend 'a week-long trial placement' starting the following day.

J arrived the following morning, a Thursday, to find that he was expected to work with another candidate, who appeared to be a competitor for the same position. They were set a number of tasks, the most significant of which involved researching a novel argument in a multi-million dollar matter being handled for a client by one of the directors of the firm. They were advised that they would receive little or no supervision, but would be expected to relate their findings to the director at the end of each day, usually after 7:00pm.

J put a great deal of time and effort into working on these tasks, including over the weekend. On the following Wednesday, their fifth day in the office, he and his colleague presented their memo on the major matter, to which they were asked to make some minor changes. Some 45 minutes later, the director came out for a cursory conversation, saying that he hoped J had enjoyed the week there. He explained that he didn't have time to talk, but asked J to email him a phone number so that he could call J and give him some feedback. From this, J inferred that he had not been successful. His colleague, it turned out, had not been offered a position in the office either, but had been told he was being 'put forward' for another job in an interstate office of the same firm. He was unsure whether this would involve an actual job, or another trial.

When J subsequently contacted the firm to clarify the terms of his 'employment' there, he was told that 'the week you worked with us is unpaid', and that 'the terms of the work experience placement was made clear to you during the interview'. J had no recollection of any conversation to that effect. Following an investigation by the FWO, the firm agreed to rectify what the FWO assessed as a contravention of the obligation to pay J in accordance with the Legal Services Award 2010. J was paid for his week's work and the FWO decided to take no further action.

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