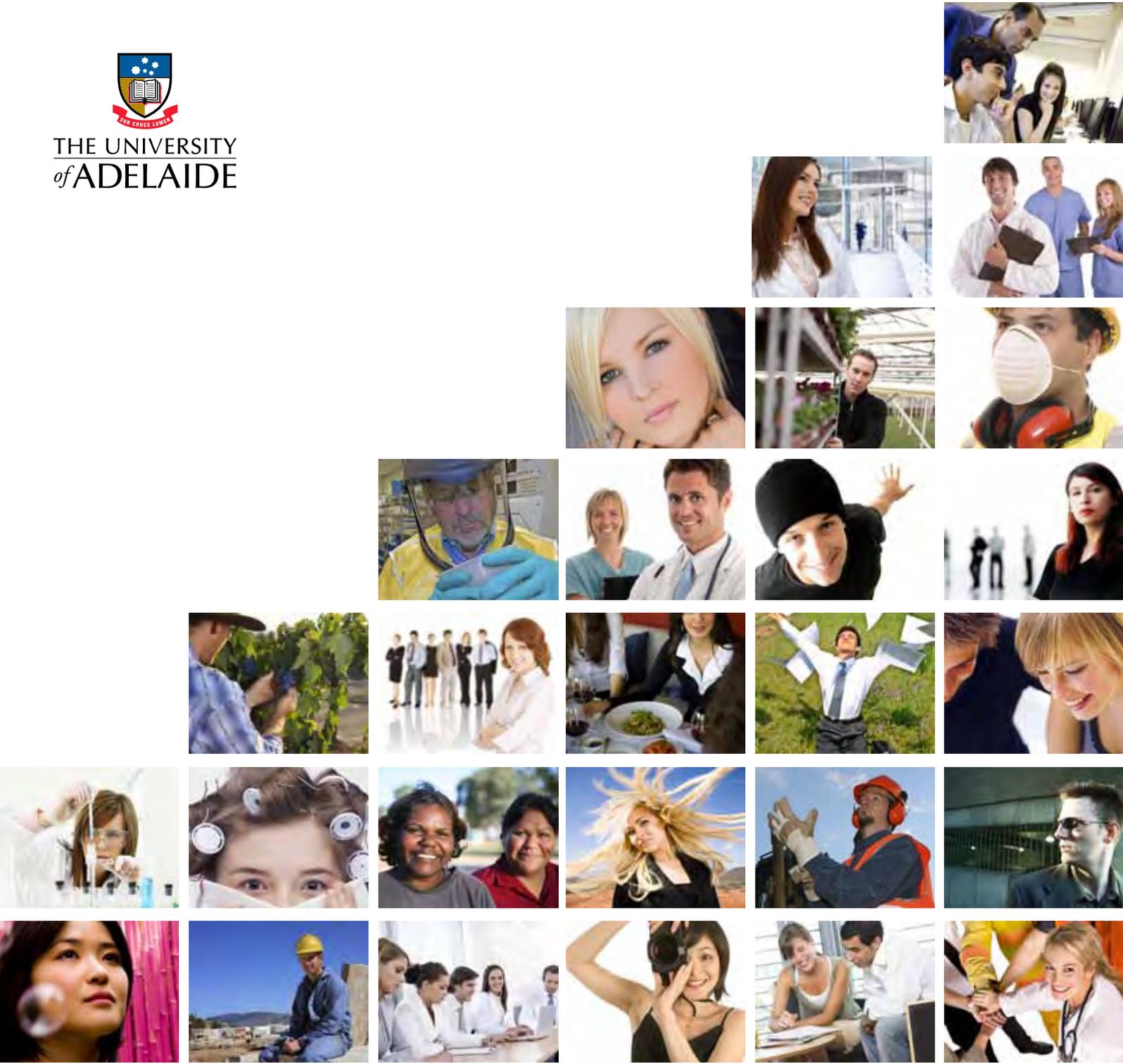




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The Nature, Prevalence and Regulation of Unpaid Work Experience,
Internships and Trial Periods in Australia

Experience or Exploitation?

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Report for the Fair Work Ombudsman
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Executive Summary

In mid-2011 the Office of the Fair Work Ombudsman (FWO) identified unpaid work in Australia as an emerging issue that warranted its attention. This was prompted in particular by a newspaper article advocating the value to businesses of the ‘free labour’ on offer from eager young interns. The FWO responded by developing additional educative materials on the topic and initiating contact and discussion with major stakeholders. But it also determined that further research would be of assistance in an area that raised complex legal issues, and in April 2012 commissioned us to undertake further research.

The report is organised into nine chapters, and the summary that follows outlines the findings and recommendations from our research by reference to that structure.

Introduction

As Chapter 1 explains, our report examines three types of unpaid work in Australia: unpaid work experience, unpaid trial work and unpaid internships. We do not consider unpaid work performed in a home within familial relations. Nor do we examine unpaid work performed in family businesses; baby-sitting, care work or other domestic work when performed by non-family members; spiritual work; or ‘volunteer’ work that is for the primary purpose of benefiting someone else or furthering a particular belief. Our focus is on work undertaken for *non-altruistic* purposes. Given too that the *Fair Work Act 2009* excludes those undertaking unpaid ‘vocational placements’ from being treated as employees, we have concentrated on *extracurricular* forms of unpaid work experience – that is, those undertaken other than for the purpose of a formal education or training course.

The research has consisted of two parallel processes. The first analyses the law relating to unpaid work. Its main attention is on the relevant law in Australia – both statutes, with a focus on the Fair Work Act as the foundation of the FWO’s powers and duties, and relevant decisions by courts and tribunals. But the report places this examination in the context of the international standards of the International Labour Organisation (ILO). It also provides an overview of relevant legal developments in four common law jurisdictions, namely Canada, New Zealand, the United Kingdom and the United States of America, which may be considered broadly comparable to Australia.

The report aims to present a picture of the range, nature and prevalence of unpaid work in Australia. Thus, the second strand of our research has involved examining policy materials and literature regarding unpaid work and labour market transitions, especially the transition between education and work for young people and migrant workers. There is no comprehensive statistical data on unpaid work experience in Australia. Nonetheless, the findings of the report are supported by a wide variety of other evidence: including unsolicited material from individuals who had direct experience of unpaid work and who responded to publicity generated about the research; interviews with FWO staff and material from FWO files; interviews with and material supplied by a variety of stakeholders, including trade unions, representatives of business organisations, representatives of those involved with work integrated learning in universities, and officers of government departments; and other publically available material, including advertisements. In addition, a number of surveys were undertaken with university students, and also with academics and other staff involved in work integrated learning. These were supplemented by another small scale survey prompted by this project and undertaken by the Young Workers Legal Service (YWLS) in South Australia.

From Education to Work: The Global and Local Contexts

This report is premised on the proposition that understanding the social and economic context in which unpaid work occurs, and especially the phenomenon of globalisation, is critical to developing an effective regulatory response. That context is addressed in Chapter 2.

The issue of unpaid work, particularly as a mechanism for facilitating transitions between education and work for young people, has become a topic of concern in developed economies around the world. This is especially so since the onset of the Global Financial Crisis (GFC). Concerns about unpaid work as a substitute for paid employment and its implications for social cohesion, especially equity of access to labour markets, have now been expressed around the developed world. These culminated in the adoption of a *Resolution concerning Youth Employment: A Call for Action* by the International Labour Conference in June 2012. The ILO has warned of the risks of this form of ‘disguised employment’ as a way of obtaining cheap labour or replacing existing workers.

The publication in 2011 of Ross Perlin’s book *Intern Nation* has also done much to draw attention not only to the growth of a particular form of unpaid work (internships) in the United States, but also to its development into a global phenomenon. Perlin’s work usefully highlights the complexity of the web of interests – employers, parents, educational

institutions, government agencies, interns themselves – invested in the phenomenon of internships. Perlin’s book concludes with the observation that the recent revolution in social media may mean that now is a particularly propitious moment for making a constructive intervention in relation to this form of unpaid work.

In the last two decades and more, globalisation has wrought an enormous transformation in the world of work and the way it is regulated. In part this has resulted in a challenge to the standard employment relationship and an increase in precarious forms of work. Internships and the other types of unpaid work examined in this report can be seen as a further example of this shift to precarious work. Where not regulated effectively, they become part of an informal economy where there is a heightened risk of social exclusion for those who cannot afford lengthy periods of unpaid work, or who do not have the contacts to obtain the ‘best’ internships.

While Australia fares generally well on social inclusion criteria, the challenge lies in ensuring that all people (and in particular, all young people) can successfully negotiate the major transitions relating to work (whether between education and work, or within the labour market, or from un- or under-employment to full participation). In particular, the intersection of education and labour market participation marks one of life’s critical transitions, as recognised in Australian government policies such as the ‘National Partnership on Youth Attainment and Transitions’. Although Australia has been less impacted than many other developed economies by the GFC, nonetheless here as elsewhere the GFC has impacted disproportionately on young people’s labour market participation. The GFC has also affected the desirability of Australia as a destination for overseas workers.

The Nature and Prevalence of Unpaid Work Experience

While definitive conclusions cannot be drawn in the absence of reliable statistics, the available evidence outlined in Chapter 3 indicates that unpaid work exists on a scale substantial enough to warrant attention as a serious legal, practical and policy challenge in Australia.

The report concludes that significant numbers of workers, especially younger workers, are asked to undertake unpaid trials. This conclusion is supported by recent research and studies by others, including the YWLS survey, anecdotal reports from individuals made in response to publicity about this project, information from FWO’s investigative files and also reported cases. The indications from the available evidence are that while unpaid trials may

be more common in some industries – such as hair and beauty, retail and hospitality – they are in fact to be found across a wide range of industries.

While work experience was reported as a fairly common feature of secondary school education in the 1990s (with 87% of students reported as participating in such programs), it seems to have been less emphasised in recent years as the number of young people with part-time or casual jobs has increased. Available evidence seems to suggest that where still undertaken, it is normally seen as a time-limited (generally from one to two weeks) opportunity to experience career sampling, mainly through work shadowing or the undertaking of a limited range of tasks under guidance, but in a wider range of industries than those in which young people typically hold casual or part-time jobs.

The real growth sector of unpaid work appears to be in the area of internships. In Australia as elsewhere, the term ‘internships’ is without fixed content. It has a broad and uncertain meaning covering everything from unpaid or paid entry level jobs to volunteer work in the not-for-profit sector.

The growth in internships has been fostered because various forms of work integrated learning have been enthusiastically embraced by post-secondary educational institutions, which in some cases are also responding to demand pressures from students. But the evidence shows that internships are by no means restricted to work opportunities integrated into specific learning connected to particular courses or subjects. The promotion of extracurricular internships or placements now appears to be common. While some educational institutions have adopted policies that take account of the Fair Work Act and seek to limit extracurricular work placements to arrangements that involve volunteering for non-profit organisations, others appear to be either unaware of the impact of the laws regulating work or confused as to their meaning for internships.

However, not all internships are conducted under the auspices of educational institutions. There has also developed a range of organisations whose business is the promotion and facilitation of such work opportunities, and some other businesses recruit interns directly through advertisements. The existence of agencies that broker unpaid internships and job placements has been especially common with international students or graduates in Australia on temporary visas.

In light of the evidence, it is concluded that a growing number of businesses are using unpaid interns to do work that, in many instances, would otherwise be performed by paid employees. Although it is not possible to say how many people are undertaking internships in Australia today, either paid or unpaid, a general picture of the phenomenon has emerged. While internships are more common in particular industries, such as the print and broadcast

media, there is scarcely an area of professional life that is untouched by them. Young people are the ones most often likely to be engaged in internships. But migrant workers, especially international students and those on temporary working visas, are also especially vulnerable to unpaid work, because they often have the additional urgency of seeking to maximise the possibility of securing access to permanent residency.

Regulation of Unpaid Work Experience: The Fair Work Act

The *Fair Work Act 2009* is the principal statute dealing with rights at work and, within relevant constitutional constraints, applies generally to ‘employers’ and ‘employees’ as understood at common law. Chapter 4 explains how it can or might apply to unpaid work experience.

As already mentioned, the Act provides an exception for those who are on a ‘vocational placement’. This covers a ‘placement’ that is undertaken as a ‘requirement’ of an ‘education or training course’ and ‘authorised’ under a law or an administrative arrangement of the Commonwealth, a State or a Territory, and under which they are ‘not entitled to be paid any remuneration’. Our analysis of these elements suggests that many are ambiguous, and the exception (which has been in place since 1996) is still awaiting authoritative interpretation from the courts. But it is clear at the very least that many internships or other work experience arrangements regularly advertised by businesses or promoted by tertiary educational institutions would not fall within the exception.

If a person undertaking work experience or an internship is in reality an employee working under a contract of service, and does not come within the exception, then the legal consequence is that the Fair Work Act applies to the work relationship. This means that the worker is entitled to the rights and benefits, including pay, established by any relevant award, enterprise agreement or minimum wage order, as well as the entitlements provided by the National Employment Standards. Various other protections and rights will also apply, including the Fair Work Act’s ‘general protections’ against discriminatory or other wrongful treatment. Employers will also be obliged to provide the worker with a Fair Work Information Statement and to keep appropriate records. Employers who are in breach of the legislation, and others knowingly involved in such contravention, risk incurring substantial penalties for any non-compliance.

In summary, the effect of the Fair Work Act is that if a person is engaged to work as an employee, it is necessarily unlawful not to pay them for that work.

Regulation of Unpaid Work Experience: Other Laws

A range of other legislation – including State industrial laws and legislation dealing with education and training, child employment, work safety, workers compensation, anti-discrimination and superannuation – may also be relevant to unpaid work arrangements, as outlined in Chapter 5. These laws (except in relation to superannuation) differ in detail as between the States and Territories and thus their specific provisions need to be examined, depending on where any particular arrangement is located. In most instances the protections of these laws extend to employees at common law, but often also go beyond them to a wider group of workers.

For instance, under Queensland legislation it is possible to seek orders in relation to persons on certain vocational placements who are not otherwise employees. South Australian industrial laws regulating trial work also allow for the possibility of making a special award for those who are not employees. While State and Territory education and training laws are generally concerned with apprenticeships and trainees and not more informal arrangements, in Victoria legislation regulates ‘structured workplace learning arrangements’ for secondary students which are part of a course; and similar legislation exists in Queensland and Tasmania. Two States, Victoria and Queensland, have laws for work experience other than placements. These impose compliance requirements that include a need for arrangements to be recorded in writing, limits on the time spent at work, and provision for minimal payment. Although there is considerable variation in child labour laws around the country, most States and Territories that seek to regulate the ‘employment’ of children and young people extend their regimes to cover unpaid as well as paid work. Western Australia is also proposing to prohibit unpaid trials for those under 18.

All work safety laws, including the new Model Work, Health and Safety legislation, likewise cover anyone carrying out work and so extend to protect those on work experience, those doing other forms of unpaid work, and also volunteers. In turn those workers also have obligations under the law. Workers compensation legislation typically covers employees, but casts the net wider (at least in some jurisdictions) to catch certain non-employees undertaking work experience or training. As human rights instruments, anti-discrimination laws generally also have a coverage that includes but goes beyond workers who are employees at common law. However, where an unpaid worker is not an employee, it is only in a limited number of jurisdictions that anti-discrimination legislation specifically covers unpaid work; though the draft Human Rights and Anti-Discrimination Bill recently released by the federal government would extend to ‘voluntary or unpaid work’.

By contrast, the *Superannuation Guarantee (Administration) Act 1992* only requires superannuation contributions to be made on behalf of employees or certain other workers paid for their labour. For a liability to be assessed in relation to a person undertaking unpaid work experience, it would need to be shown that they had an employment contract and were thus entitled to wages under an award, minimum wage order or enterprise agreement.

Finally, if misrepresentations are made in relation to unpaid work (for example, that a certain level of training will be delivered, or an unfulfilled promise of employment at the end of an internship or unpaid trial) the provisions in the Australian Consumer Law concerning misleading or deceptive conduct may provide a remedy. In a recent case in Victoria an agency was forced to reimburse fees paid to it for a job placement that did not lead to an offer of paid employment.

A Key Legal Issue: Is There an Employment Contract?

In determining the application of the Fair Work Act (and to a greater or lesser extent other relevant legislation) to the forms of unpaid work examined in this report, the key legal issue is whether the person performing the work is doing so as an employee. In the absence of statutory definitions, this must be determined by reference to a set of common law criteria. As Chapter 6 explains, these require both that there be a contract (that is, a legally enforceable agreement), and that the contract be one of employment.

As to whether an employment contract exists in relation to any unpaid work experience, the three issues most likely to be contested are: whether there is an intention by the parties to create legal relations; the existence of ‘consideration’ (that is, some form of agreed exchange); and whether there is ‘mutuality of obligation’, in the sense that the worker is obliged to work and the employer is obliged to provide something in return. In principle, there is no reason why these three criteria cannot be satisfied even when there is an understanding that the work will not be paid. The legal test to determine an intention to create legal relations is an objective one, and is not necessarily dependent on the subjective view of the parties. The requirement of valuable consideration does not mean that the payment of money is essential; indeed as several cases make clear, the provision of training or experience can be good consideration in the eyes of the law. As to ‘mutuality of obligation’, the Australian understanding of this has never been as rigid as that in the United Kingdom. There is also recent authority to suggest that in determining whether a worker is an employee, courts should focus on the ‘practical reality’ of the relationship, not necessarily any formal terms drafted by the employer.

Nonetheless, an examination of the relevant case law reveals the complexity of the issues relating to unpaid work. Under the common law the outcome of any particular case is always dependent on its particular facts, and therefore it is not possible to state a simple or comprehensive proposition which encapsulates definitively the legal status of the various forms of unpaid work.

The decided cases show that those who undertake an unpaid trial do not always come within the law's concept of an employee. This is principally because it may not be possible to demonstrate the requisite intention to create legal relations or, as was demonstrated by the High Court's 1980 decision in *Dietrich v Dare*, because the requisite mutuality of obligation cannot always be established. However, some cases point in the other direction, and certainly the longer such a relationship is in place the more difficult it may be to resist the conclusion that an employment relationship exists. Significantly, and consistent with the objective nature of the law's test of intention to create legal relations, a benevolent motive on the part of the employer will not necessarily be relevant.

Likewise work experience, including where labelled an 'internship', does not always, but may sometimes be found to, involve an employment relationship. The longer the period of work, and the less observational the role, the more likely it will be that there is an employment relationship, even where the work has been unpaid.

In Australia generally it has been difficult to perceive a strong policy approach to the interpretive task performed by courts (absent perhaps a reluctance to find employment relations in relation to charitable, religious, or sporting organisations). There has been comparatively little attention to the importance of statutory purpose(s) in articulating the concept of 'employee' when it occurs in a statute such as the Fair Work Act. However, when statutory objectives are considered, courts would be justified in leaning towards finding a contract of employment in order to fulfil those objectives. Given that Parliament has already chosen to exempt only certain types of vocational placements from the operation of the Fair Work Act, we consider that this suggests a strong argument that unpaid work experience which falls outside the exception can be brought within the protection of the statute.

A review of the Fact Sheet on 'Internships, Unpaid Work Experience and Vocational Placements' released in 2011 by the FWO, together with the more expansive treatment that now appears on the FWO's website, suggests that for the most part the agency is presenting a fair and balanced picture of the current legal position. At least three factors make it hard for the FWO to provide definitive advice: the complexity of the legal principles just described; the latitude those principles afford to courts and tribunals in relation to the identification of a contract of employment; and the absence of recent test cases on unpaid

work experience. But this is not to say more guidance could not be offered; and we also identify certain statements about the illegality of unpaid work trials that we believe may oversimplify the current position.

Unpaid Work and Migration Legislation

The available evidence, including from current investigations and prosecutions by FWO, suggests that migrant workers may well be some of the most vulnerable when it comes to unpaid work. The rights of those who are not Australian citizens or permanent residents to work in Australia are governed by the relevant provisions of the *Migration Act 1958* and the *Migration Regulations 1994*, including conditions attached to visas (for instance, restrictions on the type of work or the amount of work that can be undertaken, or the places in which work can be performed). These provisions are the subject of Chapter 7 of the report.

Work is defined in the Migration legislation as ‘any activity that normally attracts remuneration’. The decided cases clearly establish that this encompasses unpaid work, including where performed for benevolent, educational or community interests. However the Migration legislation also provides exemptions for undertaking certain work which has been specified as a requirement of a course when that course was registered. This wording differs slightly from the ‘vocational placement’ exception under the Fair Work Act. Because of this, and because the Migration legislation defines work in a way that includes both paid and unpaid forms, there is the real potential for migrant workers to be confused as to the legality of such arrangements, and especially their rights and entitlements under the Fair Work Act. The potential for confusion is compounded further by some of the information available on the Department of Immigration and Citizenship (DIAC) website.

Because the consequences of breach of work conditions attached to visas can be so drastic for some migrant workers, including most international students, the role of the FWO in ensuring compliance with the Fair Work legislation must place a strong emphasis on education. It should undertake its compliance activities in such a way as to instil a confidence in migrant workers that its focus is ensuring that workplace rights are respected.

International Perspectives

Chapter 8 examines unpaid internships in international organisations and in four common law countries, viz Canada, New Zealand, the United Kingdom and the United States of America. It focuses on their prevalence and legal status, and policy initiatives in relation to them.

Internships at international tribunals or organisations, including those affiliated with the United Nations, are amongst the most prestigious and because of that no doubt exercise a normative power over current understandings of such work. A survey of such internships reveals that their expected duration varies from 2 to 12 months, and that they are offered in various places around the world, including some of the poorest or developing countries as well as some of the most expensive cities. Strikingly, it is rare for such internships to be remunerated, although the ILO and Red Cross International pay what may be described as a basic subsistence stipend, and in some others there is some reimbursement of costs. Generally, however, interns are expected to be able to support themselves, as well as pay for travel and medical insurance costs. Although very positive overall, a 2009 review of UN internships noted access and equity problems, but surprisingly did not recommend remuneration.

In Canada internships have been described as ‘the new normal’ in young people’s lives. Like other developed economies, young people in Canada have been heavily impacted by the GFC. In addition, the extension of formal education for many young people, coupled with the demands of employers for workers with experience and the desire of educational institutions to enhance their students’ chances in the labour market, has spurred a recent growth in internships. While those in the public sphere appear often to be offered through transparent recruitment practices and with wages in line with minimum standards, the same cannot always be said of those in the private sector. In response to the growing phenomenon of unpaid internships, a campaign against them has been initiated, using social media, by groups such as the Canadian Intern Association.

Work is largely regulated by provincial law in Canada and there is thus no uniform national regulatory approach to internships. This report examines the law of two of the most populous provinces, British Columbia and Ontario. In both provinces the legislation establishing basic employment standards explicitly extends coverage beyond the common law employee.

In British Columbia the *Employment Standards Act* applies to ‘employees’ and ‘work’, and extends to those performing work ‘normally performed by an employee’ and also those ‘trained by an employer for the employer’s business’. Guidelines helpfully indicate the differences between a ‘practicum’ and an ‘internship’ and what training must be remunerated. There are, nonetheless, sometimes difficult cases: for example a 2008 case in which the court did not accept that an intern in the film industry had a contract of employment.

In Ontario the legislation extends the concept of employee to cover those who receive training in skills used by other employees in the business. An exception is provided in the legislation, so that it does not apply to trainees when six conditions are met: viz, the training is similar to that provided in a vocational school; it is for the benefit of the individual; the person providing the training derives little benefit from it; the individual does not displace any employees; the individual has no right to become an employee; and the individual has been advised they receive no remuneration for the training. These six conditions have been adopted from a 1947 US Supreme Court decision, *Walling v Portland Terminal Co.* The legislation also excepts work performed under either a work experience program authorised by a school board or a program approved by a college of applied arts and technology or a university. Some lawyers have expressed dissatisfaction with the six criteria and argued that they do not provide clear guidance. However, the leading case on the six criteria, *Girex Bancorp Inc v Hsieh and Sip*, demonstrates just how difficult it is to exclude someone undertaking an internship from the protection of the statute. Other cases reveal that those required to undertake general on the job training, or an unpaid trial, are also likely to receive protection under the legislation.

In New Zealand there are the same combinations of youth unemployment and oversupply of graduates that have seen unpaid internships flourish, although not as yet quite the same level of public debate on the topic. The most important New Zealand statute regulating work, the *Employment Relations Act 2000*, generally extends protection to employees, while at the same time provides an exemption for volunteers. Only a couple of cases have explored unpaid work experience, and in them it appears to have been assumed that an agreement to work for no pay indicates that there was no employment relationship. Some of the other statutes in New Zealand, such as the *Health and Safety in Employment Act 1992* and the *Human Rights Act 1993*, expressly extend to cover those doing unpaid work or on the job training or work experience.

In the United Kingdom, the situation of young people has been particularly difficult since the onset of the GFC. This economic context has provided fertile ground for a dramatic growth in internships. However, what is notable about the United Kingdom is that there has been a concerted effort from activists, using the internet and social media, to raise awareness about and campaign against the exploitative aspects of internships. This has coincided with much greater awareness and attention to the issue from trade unions, with the Trades Union Congress setting up its own 'Rights for Interns' website.

There has also been a very important focus on the issue of internships, especially unpaid internships, by the Low Pay Commission, the body responsible for formulating Britain's minimum wage and monitoring its impact. Since 2010 the government has specifically asked

the Commission to attend to the labour market position of young people, including internships and traineeships. The Commission has been instrumental in gathering extensive data on the scale of internships in the United Kingdom and information about the industries in which they are more common. After considering evidence and submissions, the Commission rejected an argument for a special wage for interns. It took the view that interns were clearly entitled to the minimum wage, and recommended to government that it take a more proactive approach to raise awareness about the rights of interns under National Minimum Wage legislation and improve the guidance available in relation to those rights. Revised guidance has been now launched and Her Majesty's Revenue and Customs (HMRC), the body responsible for enforcement of the national minimum wage legislation, has begun to target some industries where internships are common, prosecute breaches and publicise outcomes through a naming and shaming approach.

While recognising some of the positive aspects of internships, the public debate in the United Kingdom has also been very alert to the damaging impact of the present system of unpaid internships on equity and access, and social mobility. The previous Labour Government had established a 'Gateways to the Professions' initiative to try to encourage talented students from low incomes to enter the professions. In mid 2011 the *Common Best Practice Code for High Quality Internships* was released. Amongst other things, the Code makes clear the duty to comply with national minimum wage and employment standards unless the work falls within the specific exemptions mentioned below. Subsequently, specific sectors where internships are more common have developed their own codes of practice. Importantly, the British government has also adopted a 'lead by example' approach, and has abolished informal internships at Whitehall.

The common law concept of 'employee' in the UK is not dissimilar to that in Australia. The Supreme Court's recent decision in *Autoclenz v Belcher* has made it clear that it is the reality of a work relationship that will be determinative, rather than (say) the express words incorporated in a written contract. However, under UK statute law the definitions of those who are entitled to benefit from some of the basic employment standards are wider than the common law concept. Thus the provisions of the *National Minimum Wage Act 1998* extend to a worker who personally performs work under a contract for someone who is not a client or customer. Specifically exempted, however, are statutorily defined 'voluntary workers' who are engaged by a charity, voluntary organisation, or an association or statutory body as defined. Regulations under the legislation also exempt those who participate in a scheme to provide training or work experience, or to assist in attaining employment, established by arrangements made by the British Government or the European Union. Also exempted are those undertaking work experience for up to a year as part of a first degree or teacher training course.

While the greater definitional specificity in the statutes has not removed all uncertainty, there have recently been several cases where interns have been recognised as coming within the definition of ‘worker’ for the National Minimum Wage legislation. These workers have been awarded back pay, comprising the minimum wage for work performed and accrued annual leave pay. While these cases have been only at tribunal level, there is no reason at present to think that the higher courts would take a different approach.

The United States of America has become, in the words of the title to Ross Perlin’s 2011 book, an ‘Intern Nation’, with an estimated 75% of college students undertaking at least one internship. Surprisingly for a nation with a reputation for reluctance about workplace reform and regulation, the US Department of Labor has developed a six point test (essentially the same as that adopted in Ontario and noted above) for determining whether an intern is entitled to the protection of the *Federal Labour Standards Act* (FLSA). It has developed Fact Sheet #71, which elaborates on these criteria in some detail and indicates that all six criteria must be met for exemption from the legislation. While this indicates a quite strict approach that would see most interns covered by this legislation, cases litigated under anti-discrimination legislation have shown that the failure to be remunerated has presented a barrier to interns receiving protection from harassment at work.

While the six point criteria under the FLSA appears to be quite stringent, in fact in a number of cases courts have adopted a more lenient balancing approach rather than requiring strict proof of all criteria. This has left some uncertainty as to the application of the law. However, at the time that this report was being prepared several key class action cases have been initiated in the US and the outcome of these is likely to be highly significant. Already a defendant in one of these cases, Twentieth Century Fox, has announced that it has changed its guidelines for the engagement of interns and now requires that they be paid.

Clarifying the Legality of Unpaid Work Experience

In Chapter 9, we summarise some of the key conclusions of the report:

- significant numbers of workers are being asked to undertake unpaid job trials;
- unpaid internships and other forms of work experience are not confined to authorised education or training courses, or to ‘volunteering’ arrangements;
- in some industries, such as the print and broadcast media, such arrangements are a common prelude to paid work;

- some workers (predominantly international students or graduates) are paying agencies to place them in unpaid internships; and
- 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.

We do not want to overstate the scale of these practices. It is probable that they involve relatively small numbers of organisations and individuals at this stage. But if overseas experience is any guide, especially the United States, we can expect these arrangements to become more common, as competitive pressures force even unwilling organisations to go down this path. We recommend that further research is required to better document the phenomenon of unpaid work experience in Australia, and its intersection with other types of unpaid work.

We also note the uncertainty regarding the legality of unpaid work arrangements in Australia. In the first place, for those that might potentially come within the vocational placement exception originally introduced as part of the *Workplace Relations Act 1996*, and retained in the Fair Work Act, there is the problem that the exception is not clearly drafted. Unless and until some of the issues we have identified are properly addressed by a court or tribunal, it may be difficult to be sure whether a particular arrangement is or is not covered. This may create risks not just for an organisation that ‘hosts’ a person undertaking unpaid work experience, but for an educational or training institution, private agency or government body that has facilitated the arrangement.

Secondly, where the vocational placement exception either does not or may not apply, it is necessary to consider whether the common law requirements for the formation of a contract have been satisfied. We explain that an employment contract may be found where a reasonable person would conclude that an arrangement was intended to be legally binding; where each party has agreed to provide valuable consideration, which may be a commitment to offer training or useful experience to an intern; and where the requirement of mutuality of obligation is satisfied through a commitment by the worker to perform work in return for the benefits offered by the employer. As some of the cases discussed in Chapter 6 demonstrate, it is possible for workers who are undertaking unpaid trial work or work experience to be regarded as employees. But courts have also found otherwise, albeit often in rather unusual circumstances, or without extensive consideration of the policy issues involved.

On the basis of our findings, we make the following recommendations to FWO:

1. The FWO needs to determine the 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.

This requires a view to be formed about each element of the ‘vocational placement’ exception in the Fair Work Act. In our view, the purpose of the exception is to ensure that where students in an authorised education or training course are placed with a host to undertake unpaid work that will satisfy an element of that course, or be credited towards that course, the relationship between the student and the host is not to be regarded as one of employment.

In any case falling outside the exception, the determination of whether there is a contract of employment is likely to be difficult. In some cases, perhaps even the majority, courts have simply assumed that the lack of remuneration indicates a lack of consideration and that absent a formal requirement to attend work, the requisite mutuality will not be found. However, we conclude that in many instances a contract of employment *can* be found. Indeed where a person is performing productive work for an organisation, under an arrangement whereby they will either gain experience or be considered for an ongoing job, it is appropriate to assume that they are doing so under an employment contract – unless there is clear evidence to the contrary. Such an approach is consistent with the purposes and policy of the Fair Work Act.

Where organisations are systematically using unpaid interns or unpaid job applicants, there is clearly a greater threat to the integrity of the Fair Work legislation. This should be treated as a significant factor in any decision as to whether to investigate a particular matter, or to take action. It is also important to recall that while those who are undertaking unpaid work experience are often amongst the most vulnerable workers, it may be important to pursue investigations even where a person has made a free and informed choice to accept unpaid work to secure greater opportunities in the labour market. The point of enforcing labour laws in this setting is not just to protect the individuals involved. It is to assert a principle – a fair day’s pay for a fair day’s work – that underpins our system of minimum labour standards. It is also to promote the goal of ‘social inclusion’ that is expressly made part of the objects of the Fair Work Act.

2. In relation to education and information, we applaud the FWO for the steps it has already undertaken to increase awareness about the issue of unpaid work. However, we recommend that the FWO go further and develop more detailed guidance on this

matter. This includes more detailed information regarding the elements of the ‘vocational placement’ exception. We also suggest that developing specific information targeted at particular industries would be valuable.

3. As a development of the last point, we recommend that the FWO institute one or more targeted campaigns or other compliance activities around extracurricular unpaid work. This is especially important, given the low rate of complaints that can be expected in this area. These campaigns or activities should include compliance audits, and involve contact not just with employers, but with individuals who either have been involved in work experience arrangements or may do so in the future.

Based on our findings about the apparent prevalence of unpaid trials in the hair and beauty, retail and hospitality industries, we would recommend selecting at least one of those sectors for special attention. The purpose would be to uncover the use of such trials and assess whether they involve contraventions of the Fair Work Act, as well as to educate businesses about the issues involved.

We also recommend choosing one or two further industries in which it appears to be commonplace for unpaid internships to be undertaken outside the scope of an authorised education or training course. The print and/or broadcast media should be one of those industries. A second might be legal services, or perhaps advertising, marketing or event management.

4. We suggest that the FWO consider instigating, where appropriate, test cases to assist in providing greater clarity and certainty in understanding the application of the legislation to unpaid work arrangements. This should include cases dealing both with relatively short periods of unpaid trial work, and (at the other end of the spectrum) with lengthier internships that may have an element of training but mostly involve productive work.
5. We recommend that the FWO develop more effective liaison with other government agencies interested in or in a position to influence the conduct of unpaid work arrangements. This includes encouraging DIAC to ensure that information provided to migrant workers does not confuse them in relation to unpaid work; and working with the Australian Competition and Consumer Commission (ACCC) to take a stronger position in relation to the advertisement of employment-like internships.
6. The experience overseas, especially in the United Kingdom, demonstrates the importance of engagement with a broad range of stakeholders, including young people and migrant workers themselves, educational institutions, and particular

industry groups. Such engagement should involve more than a minimal conception of ensuring compliance with legislative obligations. A more effective approach would be for the FWO to see itself as providing an enabling capacity, which assists others (be they individuals, groups or institutions) to comply with the legislation within a context of developing best practice approaches to the issue of work experience.

We conclude the report by commenting on the need for legislative reform to identify more clearly the type of workers and work covered by Fair Work legislation and the scope of any exclusions. Many organisations are unable to be sure whether it is lawful to adopt arrangements (whether connected to an education or training course or not) that they regard as unexceptionable. It is also possible that certain types of work experience that we would regard as highly questionable, especially in terms of maintaining the integrity of the labour standards established by the Fair Work Act, may turn out to be lawful if managed in a certain way. We hope that in any debate prompted by this or other research, consideration is given to laying down much clearer ground rules as to the distinction between experience and exploitation at work.

1

Introduction

The Origins of the Project

- 1.1 In August 2011, an article appeared in the *Sydney Morning Herald* under the title ‘Eager workers can be free and easy’.¹ It began:

Imagine running your business with an endless supply of free labour – people who turn up at your office keen to learn, who are excited to contribute and enthusiastic about getting experience in your industry. They work in your business and when pay day rolls around ... they don't expect a cheque.

Sound like small-business utopia or an impossible fantasy? Not so. In fact, savvy business owners are tapping into a skilled and eager workforce – interns.

The writer went on explain the benefits of engaging keen young people who are prepared to work for free, instancing a small business owner who was using a ‘regular stream’ of unpaid interns, most working for three months at a time. Occasionally, the business owner would reward their ‘value and passion for the business’ by offering them paid employment.

- 1.2 The article prompted a swift response from the Office of the Fair Work Ombudsman (FWO),² the agency responsible for administering Australia’s main labour statute, the *Fair Work Act 2009* (Cth).³ The Act, as explained in more detail in Chapter 4, entitles anyone working as an employee for a ‘national system employer’ to various benefits and protections, including a minimum wage. The FWO’s Director of Education, Anthony Fogarty, wrote a follow-up piece for the *Herald* that appeared a week later,

¹ V Khoo, ‘Eager workers can be free and easy’, *Sydney Morning Herald*, 13 August 2011. The same article appeared on the same day in *The Age*, under the title ‘How to get Free Labour’.

² Note that when we use the term ‘FWO’ in this report, we are referring to the agency as a whole. When speaking of the person appointed to fill the statutory office of Fair Work Ombudsman, Nicholas Wilson, we will generally use his name or call him ‘the Ombudsman’.

³ For convenience, we generally omit the suffix ‘(Cth)’ throughout the report when referring to this or other federal statutes. State or Territory laws and statutes from other jurisdictions, by contrast, are generally given the appropriate suffix to denote their origin.

warning employers that ‘generally, when a person performs work for a business, they are legally entitled to be paid for it’.⁴

- 1.3 As explained in the FWO’s *Annual Report 2011–12*,⁵ this was by no means the only occasion on which the issue of unpaid work had come to the attention of the agency. It was aware from anecdotal evidence that practices such as unpaid internships and work trials were becoming more common in the community. As the *Annual Report* noted (at p 23), there appeared to be a degree of confusion around the legitimacy of these unpaid work practices, especially given the wide range of forms they might take (including as part of a recognised course of study), and the complexity of the legal issues surrounding them. But while the FWO acknowledged that there might be a ‘fine line between experience and exploitation’, it was the newspaper article just mentioned that goaded it to further action.
- 1.4 In October 2011, following extensive consultation with stakeholders and academics, the FWO released a Fact Sheet on ‘Internships, Unpaid Work Experience and Vocational Placements’, which is reproduced in Appendix A to this report. A dedicated section on ‘Student placements & unpaid work’ was subsequently launched on the agency’s website.⁶ In some instances, briefings were held to alert organisations to their potential legal obligations in relation to unpaid work. This occurred in the higher education sector, for example, where the focus was on the scope and significance of provisions in the Fair Work Act that exclude persons undertaking certain unpaid ‘vocational placements’ from being treated as ‘employees’.
- 1.5 Despite these educational initiatives, FWO staff members continued to encounter examples of practices that they considered to be dubious or inappropriate. Sometimes inspectors came across or heard about arrangements at a particular organisation, or in a specific industry, while conducting audits or investigating complaints about other issues. Other instances came to their attention through advertisements for unpaid positions that looked very much like employment arrangements. It was rare for formal complaints to be lodged by the workers concerned: in some instances because they were willing participants, in others

⁴ ‘Free not so easy’, *Sydney Morning Herald*, 20 August 2011.

⁵ Available at <http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2011-12.pdf> (accessed 12 November 2012).

⁶ See <http://www.fairwork.gov.au/pay/student-placement-and-unpaid-work/pages/default.aspx> (accessed 12 November 2012). For further discussion of the Fact Sheet and the website material, see 6.84–6.93.

because they were concerned about the consequences of pursuing a claim, or simply could not be identified. Nevertheless, a number of matters were investigated, often being finalised with cautions to the organisations concerned. In at least one case, formal proceedings have been instituted: see 3.85. As a result of these investigations and the internal discussions they provoked, as well as the feedback received during the consultations over the Fact Sheet, the FWO determined that it needed to know more about what was happening, and to take a closer look at the legal issues involved.

- 1.6 Following informal discussions in late 2011 and early 2012, it was agreed that we would be commissioned to prepare this report. A media release on 10 April 2012 announced the project:⁷

University of Adelaide Law School academics Andrew Stewart and Rosemary Owens will undertake a research project into unpaid work arrangements, focusing on internships, work experience and trial work.

Both are leading researchers in the field of labour law.

The academics will investigate the range, nature and prevalence of unpaid work arrangements in Australia and will examine international best practice for dealing with these arrangements.

The academics will interview various key stakeholders including industry groups, unions, government and non-government bodies, universities and schools.

Fair Work Ombudsman Nicholas Wilson says the project will help to inform his Agency's education and compliance processes in relation to the issue of unpaid work arrangements.

'We want to make sure we are doing everything within our power to ensure the relevant workplace participants are aware of laws relating to unpaid work arrangements,' he said.

'A basic principle of workplace laws that business operators can overlook when considering taking on an unpaid intern is that generally when a person performs work for a business, they are lawfully entitled to be paid for it.

'While there are some legitimate internship arrangements available, business operators who view unpaid interns as a source of free labour are at the greatest risk of breaching workplace laws.'

⁷ 'Academics to research unpaid work practices', Media Release, 10 April 2012, available at <http://www.fairwork.gov.au/media-centre/media-releases/2012/04/pages/20120410-unpaid-work-research-project.aspx> (accessed 18 November 2012).

The project was further explained in the *Annual Report 2011–12* (at p 23) in these terms:

The purpose of the initiative is to assist the Fair Work Ombudsman in understanding current practices and identifying the legitimacy of different unpaid work arrangements. This will enable the Fair Work Ombudsman to develop evidence based education and compliance strategies to ensure that workers have the ability to gain experience in a workplace setting and are not subject to exploitation.

The Focus of the Project

- 1.7 As explained then, this research project is concerned with certain specific types of arrangement for unpaid work – unpaid work experience, unpaid trial work, and unpaid internships. Unpaid work is here understood to mean work for which no formal wage or remuneration is paid, even if the person is reimbursed for some of their expenses (for travel, meals, accommodation, equipment etc), or is given a small allowance to cover such expenses.
- 1.8 Some unpaid work arrangements are – at least on conventional legal understandings – far removed from the employment relationships governed by statutes such as the Fair Work Act: for example, ‘reproductive labour’ (such as child rearing, care for family members and domestic work) performed in the home within familial relations. However, many other unpaid work arrangements appear closer to employment relations, in terms of form and/or function. Examples of such work might include a range of other work relations: for example, situations where someone helps out in a family business; babysitting, care work or other domestic work when performed by non-family members; spiritual work; and charitable or volunteer work. While some of the research undertaken in this project might have some relevance to some of these other unpaid work arrangements, this project is not concerned directly with them. Rather it is confined to unpaid work experience, unpaid trial work, and unpaid internships.
- 1.9 It is particularly important to emphasise that we are not concerned here with what might broadly be termed *volunteering*. According to the ‘Definition and Principles of Volunteering’ adopted by Volunteering Australia:⁸

⁸ http://www.volunteeringaustralia.org/files/0WQ1A2EUTZ/Def_and Princ_English.pdf (accessed 29 November 2012).

Formal volunteering is an activity which takes place through not for profit organisations or projects and is undertaken:

- to be of benefit to the community and the volunteer;
- of the volunteer's own free will and without coercion;
- for no financial payment; and
- in designated volunteer positions only.

Volunteering Australia's foundational principles include that volunteering 'is not a substitute for paid work', and that volunteers 'do not replace paid workers nor constitute a threat to the job security of paid workers'.

- 1.10 For our purposes, we take volunteering to mean unpaid work that is performed with the *primary purpose of benefiting someone else or furthering a particular belief*, rather than gaining experience or contacts that may enhance employability. Such work is the lifeblood of many charities, churches, sporting clubs and other community organisations. There are times, we accept, when the line can become blurred – such as law students working at a community legal service, both to help out those in need and to gain useful experience. Nevertheless, our focus here is on *non-altruistic* forms of unpaid work.⁹
- 1.11 As the project evolved, it also became apparent that we should be concentrating on *extracurricular* forms of unpaid work experience – that is, those undertaken other than for the purpose of a formal education or training course. This is because, as already mentioned, the Fair Work Act has provisions that exclude unpaid work performed as part of a 'vocational placement' from being subject to the various minimum standards and protections that the Act otherwise creates for the benefit of employees. The purpose of our research is not to question whether that exclusion should exist, or to challenge the value of what (as we explain in Chapter 3) is often now called 'work integrated learning'. But at the same time, we do explore both the boundaries of the vocational placement exception and the extent to which educational institutions may be facilitating work experience arrangements that fall outside its protection.
- 1.12 A final point to note about the scope of our research is that the FWO has a specific role to play in protecting the rights of vulnerable workers, such as young people and

⁹ Compare the more nuanced distinction drawn by Jill Murray between 'genuine' and 'precarious' volunteer work: see J Murray, 'The Legal Regulation of Volunteer Work' in C Arup et al (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006, p 696 at pp 697–8.

migrants.¹⁰ The forms of unpaid work examined in this research project are not by any means the exclusive domain of such groups. But since by their very nature these types of work are generally encountered prior to, or at the point of, entry to the labour market, or transitions within the labour market, young people and migrants are likely to be amongst those more frequently exposed to such arrangements.

Preparing the Report

- 1.13 The research for this report involved two parallel processes. The more straightforward involved the legal dimensions of the subject. Commencing with Australia, we looked for both legislative provisions and case law dealing with unpaid work experience. A valuable starting point in this regard was a 2006 essay by Jill Murray on volunteer labour.¹¹ Although not directed specifically to unpaid work experience, this was the only substantial treatment we could find of the relevant legal issues in this country.¹² Our primary focus was to determine which arrangements fall within the Fair Work Act, but we also reviewed a range of other statutory regimes, as outlined in Chapter 5. We also broadened our research to include international and comparative materials, concentrating on the International Labour Organisation (ILO) and on four other countries – Canada, New Zealand, the United Kingdom, and the United States of America – that have a similar common law heritage to Australia.
- 1.14 The other and far more challenging task was to look for information that might help us develop an understanding of the range, nature and prevalence of unpaid work experience arrangements in Australia. We ended up relying for this purpose on five general sources of information.

¹⁰ See eg *Annual Report 2011–12*, p 33. The FWO defines the term ‘vulnerable worker’ to include ‘young people, trainees, apprentices, people with a physical or mental disability or literacy difficulties, recent immigrants and people from non-English speaking backgrounds, the long-term unemployed and those re-entering the workforce, outworkers, people with carer responsibilities, indigenous Australians, employees in precarious employment (e.g. casual employees) and people residing in regions with limited employment opportunities and/or with financial and social restraints on their ability to relocate to places where there might be greater job opportunities’: see ‘Litigation Policy of the Office of the Fair Work Ombudsman’, Guidance Note 1, 2nd ed, July 2011, p 11 (fn 15), available at <http://www.fairwork.gov.au/fwoguidancenotes/GN-1-FWO-Litigation-Policy.pdf> (accessed 29 November 2012).

¹¹ ‘The Legal Regulation of Volunteer Work’, above.

¹² There is also a briefer discussion in B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, pp 175–6, 213, 217–18.

- 1.15 First, we conducted searches of publicly available material, including from bodies such as the Australian Bureau of Statistics and the National Centre for Vocational Education Research, as well as of relevant academic literature. While we found a great deal of material dealing generally with the links and transitions between work and education or training, there were very few Australian accounts that looked specifically at extracurricular work experience. By contrast, we encountered a richer – though still limited – literature on the subject in other countries. This includes a particularly useful and influential book, *Intern Nation*, by the American writer Ross Perlin, to which we devote some attention in Chapter 2.
- 1.16 As it happened, the amount of publicly available information and commentary about the experiences of Australians performing unpaid work increased dramatically after April 2012, as a direct result of our project being announced. We say more about this below.
- 1.17 Secondly, we had the benefit of speaking to various FWO staff members, who relayed to us the impressions and insights gained by both them and their colleagues (in particular, fair work inspectors) in encountering, hearing about or looking into various kinds of unpaid work arrangements. We were also given access, on a strictly confidential basis, to FWO files (including summaries, analysis and recommendations) concerning a number of formal investigations conducted by the Office. We found this particularly useful, and in a number of instances in this report we present summaries of these investigations as case studies, though being careful not to identify any of the participants.
- 1.18 Thirdly, and as indicated by the FWO in announcing our project, we approached a number of external bodies or agencies that we considered would or might have an interest in the subject. Our aim was both to apprise them of our work, as well as to seek any information or perspectives they might have. In the initial phase, we arranged discussions with three major peak bodies, the Australian Council of Trade Unions (ACTU), the Australian Industry Group (AiG) and the Australian Chamber of Commerce and Industry (ACCI), as well as officials in the Vulnerable Workers Section of the Workplace Relations Policy Group in the federal Department of Education, Employment and Workplace Relations (DEEWR). Later, we endeavoured to speak to officials in the Skilled Migration Policy Branch of the Migration and Visa Policy Division in the Department of Immigration and Citizenship (DIAC), but encountered difficulties in making the necessary arrangements. We were eventually referred by an external source to DIAC's Director of Student Visa Policy, who kindly agreed to speak to us. At a local level, we contacted the Young Workers Legal Service (YWLS),

an advisory service established in Adelaide by SA Unions, which decided to conduct a survey of its clients about the issues we were investigating.

1.19 We had originally intended to contact a wider range of organisations, but changed those plans after details of our project were publicly announced on 10 April 2012.¹³ This was partly because the publicity helped to do the work for us – some of the organisations we had already identified took the initiative to contact us first. But it was also because of the sheer volume of information and approaches we received. These gave us much of what we would have been seeking from a more systematic process of consultation, but also left us with less time than we had planned for that part of the project.

1.20 That brings us then, fourthly, to unsolicited contacts. These fell into three broad categories: organisations, individuals and the media. Organisations that approached us directly or were referred to us by others, and to whom we spoke, included the following:

- Australian Collaborative Education Network (ACEN);
- Australian Internships Industry Association (AIIA);
- Business/Higher Education Round Table;
- Construction, Forestry, Mining and Energy Union;
- Departments of Premier and Cabinet, and of Further Education, Employment, Science and Technology (South Australia);
- National Association of Graduate Careers Advisory Services;
- Shop, Distributive and Allied Employees Association;
- Unions NSW.

A number of trade unions and other organisations supplied us with information through some of the organisations listed above. We were also contacted by a university, which we will not name because it chose to share with us, on a

¹³ Besides the FWO media release quoted earlier, the University of Adelaide issued its own media release: 'Adelaide Law School experts to examine unpaid work', 10 April 2012, <http://www.adelaide.edu.au/news/news51901.html> (accessed 30 November 2012).

confidential basis, the results of an audit it had undertaken of vocational placements and other forms of work experience organised within the institution.

- 1.21 There were a number of individuals who got in touch with us when they heard about the project. Many had themselves undertaken unpaid work, but sometimes we were contacted by members of their families who were concerned at their situation. In a number of cases we asked these correspondents both for further information, and to confirm that we could use their stories in our final report, on the strict understanding that they would not be identified and that we would check any material with them before publication of the report. In a few cases we referred the individuals, with their consent, to the FWO for investigation of their treatment. In the result, we have ended up including only one of these stories as case studies in the report. But even those we did not use were of considerable assistance in helping us to understand what is going on in the labour market at present.
- 1.22 The media interest in our project exceeded any expectations we might have had. Within a day of the initial media releases, we had appeared on national television, been interviewed by both ABC and commercial radio stations in every State, and been quoted in just about every major newspaper in the country. In the weeks and months that followed we continued to receive regular inquiries about our work. Now in itself, this helped to reinforce our view that the issue we are investigating is an important one that is of interest to the community. But more importantly, as we explain in more detail in Chapter 3, the media reporting and commentary generated a great deal of source material for us. Several of the case studies we quote come directly from investigations conducted by journalists, or from personal accounts posted online either as opinion pieces or as responses to the views or stories of others.
- 1.23 Fifthly, after our initial round of discussions with stakeholders, we decided that it would be useful to conduct some small-scale surveys in the higher education sector to determine the extent to which students were undertaking unpaid placements or internships other than for credit towards a formal course of study – and therefore outside the ‘vocational placement’ exception in the Fair Work Act. In the result, we prepared two survey instruments. One was developed with the assistance of ACEN and distributed by that body to its many members throughout the sector, asking them about their experiences and views concerning extracurricular forms of unpaid work experience. The second was a variant of the first, but directed to students themselves. It was administered in class to law students at our own institution, the University of Adelaide, and at two other universities, Queensland University of

Technology (QUT) and the University of Western Sydney (UWS). These were chosen not just because of their location in different States, but because of likely differences in the demographic profiles of those attending each institution. We had also hoped to survey Business or Commerce students at each of the three universities, but were unable to make the necessary arrangements in time. The student survey did also go out from the QUT Careers Office, but only to a small group of students who had elected to take advantage of an insurance scheme for work experience operated by that Office. We had a slightly better response to the same survey, when distributed by UTS lecturer Jenna Price to her final year Journalism students.

- 1.24 Copies of the two survey instruments are attached to the report in Appendix B, together with the instructions given to those responding. We deal with the results of the various surveys in Chapter 3, but for now it may be noted that the surveys were conducted in accordance with the NHMRC National Statement on Ethical Conduct in Human Research. Approval to conduct both the survey and formal interviews for the project was granted by the University of Adelaide's Human Research Ethics Committee.¹⁴
- 1.25 The final phase of our work involved writing the present report. Drafts of each chapter were shown to the FWO and comments invited. In some instances changes were made in response to the feedback we received, though these generally involved matters of detail or emphasis. We stress that we retain responsibility for what appears in this report, and that it expresses our own views and analysis, not those of the Ombudsman or his staff. Drafts were not shown to other stakeholders or interested parties, with one limited exception. Where we proposed to use information supplied to us on a confidential basis, or at least not publically available, we did show the persons or organisations concerned an extract of the relevant section of the report and confirmed that what had been written fairly reflected what we had been told. Again though, we take full responsibility for the final text.

Structure of the Report

- 1.26 This report is organised in nine chapters. The first three chapters set the scene regarding unpaid work and this project. After this introductory chapter, we commence in Chapter 2 by locating the debate about unpaid work experience within the context of both global and Australian developments concerning youth employment and the transition from education to work. In particular, we highlight

¹⁴ Unpaid Work Arrangements, Approval no HP-2012-018 (on file with the authors).

the fact that concerns about the growth of unpaid internships as a substitute for paid employment are being expressed around the developed world. The next chapter, Chapter 3, provides an account of the evidence we have been able to identify or gather regarding the nature and prevalence in Australia of unpaid work experience arrangements. Our evidence is drawn from a wide variety of sources, although we emphasise that there is a need for more work in this area.

- 1.27 The next four chapters provide an analysis of Australian law which is relevant to unpaid work experience. Chapter 4 commences with an examination of the Fair Work Act, the legislation which, as already mentioned, is the main labour statute in Australia, and indeed the source of the FWO's functions and powers. In Chapter 5 we examine a range of other laws which also impact upon the unpaid work examined in this report. Importantly, laws dealing with education and training are considered. We also look at various Commonwealth and State laws regulating different aspects or areas of work, such as child employment, work safety, workers compensation, discrimination and superannuation. We also briefly examine certain provisions in the Australian Consumer Law. At the heart of the legal analysis is Chapter 6, which examines the key question of how to identify the existence of a contract of employment. As well as considering core elements of contract law, such as the requirements of intention to create legal relations, consideration and mutuality of obligation, we analyse the limited body of cases which have dealt with unpaid work trials, work experience, and work placements. Chapter 7 deals with unpaid work and migration legislation, because the evidence suggests that there are some particular issues that arise in relation to unpaid work for certain classes of migrant workers.
- 1.28 Chapter 8 builds upon Chapter 2 by offering an international perspective on this issue. First, it examines the nature of internships at international government agencies and also at international non-government organisations, and notes the growing trend of offering international internships in commercial enterprises. It then considers developments in law, policy and practice relating to unpaid work experience in four other common law countries – Canada, New Zealand, the United Kingdom and the United States of America. The final chapter of this report, Chapter 9, makes some recommendations to the FWO regarding the way forward in relation to unpaid work experience, trial work, and internships.
- 1.29 There are a number of appendices attached to this report which, besides the material already mentioned, contain a compilation of the results from some of our surveys, some material received from stakeholders, sample advertisements for internships, and a summary of internships at international organisations.

Thanks and Acknowledgements

- 1.30 We would like to thank all those people and organisations who contributed to this research project and without whose assistance we would have been unable to undertake and complete it.
- 1.31 First, we would like to express our gratitude to the many individuals and organisations to whom we spoke, or who contacted us about the project. We are especially grateful to the YWLS and AIIA for providing us with the material reproduced in Appendices F and G to this report; to DEEWR and the ACTU for the substantial collections of material they made available; to the unnamed university that shared such useful information with us about their internships and placements; to the executive of ACEN for helping to develop and distribute the survey of their members; and to the various university staff members and students who otherwise facilitated or participated in our surveys.
- 1.32 Secondly, we would like to thank the staff of the FWO who provided support to this project, through a generous giving of their time and the provision of access to files. We are especially grateful for the strong degree of encouragement and support provided by senior staff such as Tom O’Shea, Anthony Fogarty and Steve Ronson, not to mention the Ombudsman himself, Nicholas Wilson. The enthusiasm displayed both publically and privately for this project has been overwhelming, and we have been left in no doubt of the FWO’s commitment to tackling what all of us regard as a social and regulatory issue of growing importance.
- 1.33 Thirdly, at Adelaide Law School we owe a debt of gratitude to Rachael White for her extensive research assistance and to Sharon Kildare for her very able and efficient administrative support. We would also like to thank Associate Professor Alex Reilly for sharing his expertise on the Migration Act and assisting us to better understand work-related issues for international students; and the staff at Adelaide Research and Innovation who facilitated the contractual arrangements with the FWO. More generally we express our thanks to our Dean, Professor John Williams, and to all our colleagues at Adelaide Law School for providing a congenial and supportive environment for our research. Finally, we thank our respective families, without whose love, interest and support none of this would be possible.

2

From Education to Work: The Global and Local Contexts

The ILO's Perspective

- 2.1 In seeking to understand the emergence of unpaid work experience, trial work and internships as a contemporary issue in Australia, we have found an examination of the global context to be especially helpful. The issue of youth employment, and also internships, has certainly been high on the agenda of the International Labour Organization (ILO) in recent times.
- 2.2 In 2005 the International Labour Conference (ILC) of the ILO, after discussion of Report VI on *Youth: Pathways to Decent Work*, adopted a *Resolution concerning Youth Employment*, which noted the many global challenges facing young people and the quest to ensure that they had access to decent work.¹ In this context it was observed (at [7]) that in developed economies the challenges are often linked to 'slow economic and employment growth, the transition into employment, discrimination, social disadvantage, cyclical trends and a number of structural factors'.
- 2.3 In June 2012 the ILC once again considered the issue of young people at work, now in the context of the aftermath of the global financial crisis (GFC) and the continuing call for austerity in many European countries. The ILC discussed Report V, *The Youth Employment Crisis: Time for Action*, following which it adopted a *Resolution concerning The Youth Employment Crisis: A Call for Action*.² The *Resolution* painted a grim picture of the impact of the GFC on youth employment around the world and the long lasting effects this situation is likely to have unless drastic action is taken. It was also mindful (at [6]) that while 'the youth employment crisis is a global challenge ... its social and economic characteristics vary considerably in size and nature, within and among countries and regions'. The *Resolution* noted that transitions (from

¹ All ILO materials are available on its website, www.ilo.org. The full text of the resolution is available at <http://www.ilo.org/public/english/standards/reim/ilc/ilc93/pdf/resolutions.pdf> (accessed 24 October 2012).

² Available at http://www.ilo.org/ilc/ILCSessions/101stSession/texts-adopted/WCMS_185950/lang-en/index.htm (accessed 24 October 2012).

education to the labour market, within the labour market, and from unemployment into the labour market) can be especially precarious times, especially for those lacking work experience, and continued (at [24]):

In this context, internships, apprenticeships, 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.

- 2.4 In marking out the way forward, the *Resolution* invited governments and the social partners (trade unions and business) to undertake a range of actions to alleviate the current crisis. Amongst these, it was suggested to governments (at [26]) that they seriously consider improving the links between education, training and the world of work through a variety of means, including work experience and work-based learning; and to the social partners (at [27]) that they raise awareness about the labour rights of young workers, including interns.
- 2.5 Since the 2012 Conference, the ILO has published an article on its website entitled ‘Internships: Head Start or Labour Trap?’.³ This notes that ‘internships have become increasingly common in developed economies, as has controversy over the practice’. It recognises the awkward ‘catch 22’ for young people who cannot enter the labour market without work experience, and who cannot get work experience without some access to a job. But the co-ordinator of the ILO’s Youth Employment Programme, Gianni Rosas, is quoted as 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.
- 2.6 In the current context, in the wake of the GFC, this is a very real threat. In developed economies, youth unemployment has been at its highest levels for decades. In 2012, the ILO noted in a report, entitled *Global Employment Outlook: Bleak Labour Market Prospects for Youth*, that the situation was likely to improve in the coming years, with youth unemployment in such countries expected to drop from 17.5% in 2012 to 15.6% in 2017. Nevertheless, this was still a long way above the level of 12.5% that it had been in 2007 before the onset of the crisis.⁴

³ Available at http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_187693/lang--en/index.htm (accessed 24 October 2012).

⁴ The report is available at http://www.ilo.org/global/research/global-reports/global-employment-trends/2012/WCMS_188810/lang--en/index.htm (accessed 24 October 2012).

2.7 In this context, the regulation of internships for decent work is at the heart of the ILO's concerns. Yet as the ILO article observes, the legal situation of interns differs between countries. France provides a recent example of changes to laws regulating internships to stop potential abuse. The so-called Cherpion Law was adopted by the French Parliament on 13 July 2011, with the aim of providing a stronger regulatory framework for the operation of internships, understood as a component of a student's educational program. This law mandates that internships:

cannot consist of tasks that could be undertaken by a worker in a permanent position within the organisation; must be established through a tri-partite contract signed by the employer, the intern and their educational institution; and must offer training to individuals and be integrated into the intern's degree or other training.⁵

The new law also limits the duration of internships to 6 months, restricts an organisation from introducing a new intern into the same position or role until after a break lasting at least a third of the time of the previous internship, and mandates a bonus payment (though not a wage) to interns after two months. Where an organisation has fewer than 300 employees, the number of interns must be reported in the annual report and likewise, including details of their work, on a quarterly basis to the relevant works council where it exists. Where an intern is subsequently employed by an organisation, their period of probation must be reduced by the period of the internship.⁶ Indeed, of such concern is the issue of unpaid work experience (often referred to as traineeships) and youth employment in Europe that the European Commission has undertaken a major study of the matter in anticipation of developing a framework agreement on the topic. In December 2012 it proposed a package of measures in relation to youth employment, including a *Proposal for a Council Recommendation on establishing a Youth Guarantee*.⁷

2.8 Encouraging good internships – that is, those where skills are enhanced and which lead to employment – must be the central concern. In this respect, payment to interns appears to be critical, with the ILO citing a recent survey by the US National Association of Colleges and Employers (NACE). This reported that 60% of those who had undertaken an internship were offered a position, compared with 36% who had

⁵ See an account of the detail of the *Cherpion Law* provided by eironline (The European Industrial Relations Observatory Online) available at <http://www.eurofound.europa.eu/eiro/2011/11/articles/FR11110111.htm> (accessed 24 October 2012).

⁶ Ibid.

⁷ See European Commission, Directorate-General for Employment, Social Affairs and Social Inclusion, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States, First Synthesis Report*, May 2012; European Commission, *Proposal for a Council Recommendation on Establishing a Youth Guarantee*, Brussels, 5.12.12 COM(2012) 729 final, 2012/0351(NLE).

no internship experience. Importantly however, the indication was that only when the internship was paid did it provide any advantage – only 37% of unpaid internships led on to a job.⁸

2.9 Underpinning the call to action of the 2012 ILC *Resolution* are the core values of the ILO and its documents concerning recent strategies for responding to the challenges of globalisation. These include: the ILO *Declaration of Philadelphia* (1944), the ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-up* (1998), the *Decent Work Agenda* (1999), the *Global Employment Agenda* (2003), the *Conclusions concerning the promotion of sustainable enterprises* (2007), the ILO *Declaration on Social Justice for a Fair Globalization* (2008), the *Global Jobs Pact* (2009), the ILC conclusions concerning the recurrent discussion on employment (2010), and the body of international labour standards (Conventions and Recommendations) relevant to work and young persons.⁹

2.10 In relation to the types of unpaid work examined in this report, internships are governed by the ordinary principles established in these labour standards. However, in relation to children under 18 years of age, it is important to note that the ILO's *Convention No 138 concerning the Minimum Age for Admission to Employment* (1976) is one of the eight conventions underpinning the *Declaration of Fundamental Principles and Rights at Work*. As such, 164 member states have ratified it, although Australia is not yet one of those to do so. Article 6 of the *Minimum Age Convention* exempts from its provisions certain work experience and work related to training, as follows:

This Convention does not apply to work done by children and young persons in schools for general, vocational or technical education or in other training institutions, or to work done by persons at least 14 years of age in undertakings, where such work is carried out in accordance with conditions prescribed by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist, and is an integral part of–

(a) a course of education or training for which a school or training institution is primarily responsible;

(b) a programme of training mainly or entirely in an undertaking, which programme has been approved by the competent authority; or

⁸ See http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_187693/lang-en/index.htm (accessed 24 October 2012).

⁹ Ibid [8].

(c) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.

This then represents the international standard for the exemption of work experience and other training programs for children.

Intern Nation

- 2.11 The publication in 2011 of Ross Perlin's book, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*,¹⁰ did much to highlight the issue of unpaid internships not just in the United States of America, which was the focus of the book, but more broadly in developed economies. Perlin shone a critical spotlight on a phenomenon that had been growing at a staggering pace in the US since the 1970s. There internships were originally an aspect of medical education, but later expanded into the government and political arena. However, over the four decades since 1970, there has scarcely been a professional or commercial business that has not offered internships in the US. In short, internships have become ubiquitous there.
- 2.12 The explanation for this appears to be that internships are considered to offer much to those who are seeking professional or white collar work in a highly competitive labour market. Even in the US, it is difficult to know whether such arrangements have delivered real benefits for job-seekers, for there has simply been no wide scale empirical evaluation of them. It may be true, for example, that 90% of those gaining entry level employment at Goldman Sachs in 2009 were previously interns at the firm. However, as Perlin observes (at pp 91–2), that is not the same as saying that 90% of those doing an internship got a job there. The allure of the internship lies, as Perlin argues (at p 23), in a certain 'ambiguity': it suggests variously that the intern has a 'foot in the door', or is enabled to 'make contacts', or that the internship helps to 'build your resumé'. Internships are supposed to signal something about the employability of those who have undertaken them. They have come to be understood as a bridge leading away from blue collar work to white collar or professional work, and so young people have become convinced that it is preferable to work for free in a profession than at a lower status, 'dead-end' job. Internships thus offer hope.

¹⁰ Verso, London and New York, 2011. Quotations in this report are taken from the revised edition published in 2012.

- 2.13 The fact that internships in the US are (often) unpaid may be taken to indicate a certain selflessness and sacrifice on the part of the intern, an extreme willingness to put work (or the needs of the organisation for which the work is done) above self, and a competitive hunger to achieve one's goals – all qualities which are often deemed to be vital in the global workplace. So now, as Perlin says (at p 127), giving something for free has somehow been recognised as 'part of a brave new economy of intense competition and altered expectations'. Certainly, as Perlin shows, a number of corporate giants, like the Disney Corporation, have developed their internship programs into a high art form which offer a heady mix of aspiration and claimed educational benefits, alongside undertaking quite a lot of work that in reality is classified as low skilled. But it is not just the giant businesses of the US that have recognised the benefits of internships. The business of offering internships has become, as Perlin's final chapter demonstrates, a global phenomenon. An example of the sophisticated marketing that is used to package internships worldwide can be seen on the website of Dream Careers Inc (formerly the 'University of Dreams').¹¹ Operating on a global scale, it offers internships in exotic locations. But aside from promises of assistance in preparing resumés, there is not very much detail as to what the internships actually involve. The playful images of young interns featured on the website of Dream Careers Inc suggests more that they are on holiday, rather than being at work or being educated.
- 2.14 One of the powerful drivers of internships in the US has been educational institutions. At one level this is not surprising, given the origins of internships in medical faculties. However, with the increasing number of young people who now complete not only high school but also some form of tertiary education, there has been a concomitant increase in the number of those who aspire to a professional career. Young people spend more time in educational institutions, but at the same time employers are demanding a set of skills that are not always provided in formal education. Work experience and internships have been presented as a way to fill that gap by the 'cheerleaders on campus' (to quote the title of Perlin's chapter 5). Rather than applaud efforts of educational institutions to provide academic credit for internships, Perlin is sceptical, concerned that in very many cases there is no real, or at best only minimal, academic control and supervision offered in such courses. In fact they can become an easy option for educational institutions, which are themselves so often under competitive and fiscal pressures. Thus additional teaching resources are garnered for nothing from the workplace where the student/intern is

¹¹ See <http://www.summerinternships.com/> (accessed 24 October 2012).

allocated, and the student/intern still pays fees to enrol for often minimal or non-existent academic supervision (and to work for a business for nothing). If the state pays an allowance to the student then possibly everyone is seen to be a winner! In addition, Perlin argues that the claims that many businesses make to be 'educating' their interns are simply unfounded, for there is either nothing that is really educative that is offered, or nothing different from that which might ordinarily be necessitated as part of any general 'on the job training'. Little wonder Perlin is scathing in his critique of the way in which the boundary between work and education is being blurred in the US.

- 2.15 The provocative sub-title of Perlin's work suggests a dark side to the world of internships: either that their promises are not likely to be fulfilled; or, even where they are, that their costs are too high (if not for the successful individual who gets the internship and perhaps a longer term job, then certainly for the community which tolerates them). Furthermore, the enormous scale of the use of interns by many businesses, as well as governmental and charity organisations, must mean that often they take jobs that would otherwise be done by conventional employees. Responsibility for this situation, Perlin asserts (at p xv), belongs to a wide range of actors:

All of us – employers, parents, schools, government agencies, and interns themselves – are complicit in the devaluing of work, the exacerbation of social inequality, and the disillusionment of young people in the workplace that are emerging as a result of the intern boon.

- 2.16 Globalisation has witnessed a proliferation of various forms of non-standard employment relationships around the world.¹² Some of these are now so familiar – for example, dependent contractors, casual workers, part-timers, labour hire workers, temporary contract workers, outworkers, and more – that they scarcely merit the description 'non-standard' any more. As Perlin astutely observes (at p 36), internships are really another example of this phenomenon:

Post-industrial, networked capitalism has provided the ideal petri dish for the growth of internships, which are only one of many forms of nonstandard or contingent labor that have mushroomed since the 1970s.

¹² For a recent examination of this, see L Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment*, OUP, Oxford, 2010.

A defining feature of many of the non-standard forms of employment is that they are 'precarious'.¹³ It is not just that these jobs are not secure in the traditional sense. More often than not, they represent a shift of the risks of doing business onto the worker and have been forged under the competitive pressures of the global economy, through attempts by business either to evade what are perceived to be the strictures of the law preventing access to a certain kind of flexibility, or to escape the reach of labour law altogether. In Perlin's view the law in the US (which is discussed later in this report in Chapter 8) has failed to keep pace with the new form of working through internships. He notes, for instance, that despite internships being a widely recognised phenomenon, the word 'intern' is hardly ever used in US statutes. Rather the law struggles to fit this new concept into existing categories such as 'employee', or 'trainee', or 'volunteer' or 'apprentice'. In many cases American law has not lived up to the challenge of protecting interns, who find themselves, as Perlin says at p 82, 'caught in a frightening legal limbo'.

- 2.17 One of the most important critiques of unpaid internships is addressed by Perlin in his ninth chapter, entitled 'What about everybody else?'. If internships really do deliver the benefits that are claimed for them, including the development of employability skills and privileged entrée into the world of work, then the issue of equity and access becomes an especially critical one. Taking up an unpaid internship assumes that the intern can otherwise support themselves: that is, that the intern is already affluent enough to do so, or that they can hold down another (generally low status) job on top of the hours they devote to the internship, or that someone else (family, friend or government) will support them. Whichever way financial support is garnered, this means that, from the outset, some just cannot even entertain the idea of becoming an intern. And often it is not just the ordinary costs of living – food, accommodation, and basic services like power and water – that are required to enable access to an internship. Many internships, and not just the highly prestigious ones, also require travel to another city or country. There are even examples where prospective interns must pay money to agencies or educational institutions in order to access an internship. Little wonder, as Perlin observes (at p 62), that internships frequently become the preserve of the 'upper-middle class and the super-rich'.

¹³ See J Fudge and R Owens (eds), *Prekarious Work, Women, and the New Economy, The Challenge to Legal Norms*, Hart Publishing, Oxford, 2006; G Standing, *The Precariat: The New Dangerous Class*, Bloomsbury Academic, London and New York, 2011.

2.18 Perlin's work is particularly good at delineating the features of internships around the world as a vast and ever expanding network reflecting the very nature of the modern global society. He sums it up in this way (at pp 185–6):

There is no single body of experts, no famed multinational corporation, no particular institution or government that is pushing the relentless global expansion of internships – a process occurring so rapidly, and at the instigation of so many different actors, that its contours seem almost impossible to gauge. The dynamics vary substantially from country to country, with particular labor laws, different industries and specific values surrounding work all coming into play, but the overall direction is clear: internships are pushing into the workplaces of middle- and high-income nations the world over. What took four decades to materialize in the U.S. has rapidly become a global fact of life: internships are at once a significant source of cheap, flexible white-collar labor and a major steppingstone to affluence and professional success. They grant access to those who can afford them, and block further progress for those who cannot.

2.19 However, at the end of Perlin's book there is a sense that by accessing and using the tools of the internet and social media, more and more young people are becoming aware of the exploitative aspects of such work arrangements and hostile towards the situation in which they have been placed. Crucially, the world is a different place now from what it was in those four decades after 1970 which saw the rise and rise of unpaid internships in the US. Already there appear to be as many websites questioning the benefits of internships as there are promoting them. And reflecting another modern American tradition, a number of lawsuits are currently in train to demand compensation (in some instances amounting to millions of dollars) for groups of unpaid interns. The title to Perlin's penultimate chapter, 'The rise and rebellion of the global intern', suggests there is nothing inevitable about the path which will be taken in the future in relation to unpaid internships.

The Australian Context

2.20 Many of the issues already evident elsewhere in the world in relation to unpaid work, and in particular young people (as noted by the ILO and illustrated in *Intern Nation*), have an obvious resonance with developments in Australia. In part this is because of the challenges that globalisation has presented to work and law around the world, and the impact of the global economy on young people in particular.

The challenges of globalisation

- 2.21 Much has been written in recent years regarding the challenges posed by globalisation to the world of work and the law regulating it.¹⁴ Australia has not been immune to the transformations that are being wrought through this process. The old industrial model of work and work relations has been disintegrating with the emergence of new industries and a greater focus than ever before on the provision of services. The global world of commerce is a highly competitive one, making the demands for productivity and flexibility in production more and more urgent. Technological change has driven, and continues to drive, much of this change, by enabling the creation of a global marketplace and also a global labour market. The labour market itself has undergone huge changes, not the least of which has been its feminisation. And it will continue to change in the future. For example, trends for longer periods of formal education for young people and longer life expectancy are starting to transform the way in which both young and old participate in the labour market.
- 2.22 Another important change has been the challenge to what was once the standard employment relationship: that is, the male breadwinner model of lifelong, full-time employment. As noted above, the developed world has witnessed a proliferation of various forms of non-standard employment relationships. This has also been true in Australia. While these relationships may once have been described as ‘atypical’, that has not been an accurate description for a long time. However, it continues to be the case that precarity is a hallmark of such arrangements.¹⁵ In November 2011, only 62% of employed persons in Australia were employees with paid leave entitlements, and they tended to be in full-time employment, with less than half (46%) of those working part-time enjoying paid leave entitlements. Approximately one in five Australians were employed on a casual basis.¹⁶ While many forms of non-standard work are acknowledged as involving ‘employment’ in the conventional sense, a perhaps even greater challenge has come when work falls, or is claimed to fall, outside that category.¹⁷ In the new world of work, the language that was once

¹⁴ For a summary of the relationship between globalisation, work and law, see R Owens, J Riley, and J Murray, *The Law of Work*, 2nd ed, OUP, 2011, ch 2.

¹⁵ See also B Howe et al, *Lives on Hold: Unlocking the Potential of Australia’s Workforce*, ACTU, Melbourne, 2012.

¹⁶ Australian Bureau of Statistics, *Forms of Employment, Australia, November 2011*, Cat No 6359.0, ABS, Canberra, 2012.

¹⁷ See eg C Roles and A Stewart, ‘The Reach of Labour Regulation: Tackling Sham Contracting’ (2012) 25 *Australian Journal of Labour Law* 258. The adoption by the ILO of the *Employment Relationship Recommendation No 198* in 2006 recognised this as a problem around the world.

reserved for businesses as market players is often now applied to workers. Many are described as powerful ‘knowledge’ workers, persons who are independent risk takers, who invest in themselves, in their own skills, and who are responsible for developing their own ‘human capital’. Frequently, this modern worker is reinvented in conceptual terms as an independent contractor, one who resides beyond employment at the intersection of work and commerce.¹⁸ However, with some of the forms of unpaid work examined in this report the worker is portrayed as being in a slightly different position, as one not yet fully formed for the workplace, someone who is at the intersection of education, training and work but not yet the kind of worker with whom the law is concerned. But all forms of work relationship are intimately connected with law. The proliferation of many of the non-standard forms of work reflects an effort to escape law’s regulation of work, and so in that sense they are shaped indirectly by law. Law then often takes time to recognise a new form of non-standard work and respond effectively to it. When there is a gap between the reality of the world of work and the law regulating work, then the growth of an informal economy (an economy in which work relationships operate outside of or beyond the law) is fostered.

- 2.23 This brief summary of the impacts of globalisation alludes to two of the main policy pressure points in relation to the regulation of the Australian labour market – productivity and fairness. These policy concerns are reflected in the main title of the recent review of the Fair Work Act, *Towards More Productive and Equitable Workplaces*.¹⁹ However, this *Review* did not raise, let alone deal with, the issues that are central to the regulation of the forms of unpaid work which are the subject of the present report. In the global era, regulating unpaid work is likely to be controversial. Despite the consequences of lack of regulation in the financial and economic arena evidenced by the GFC, there continues to be pressure from some quarters for further deregulatory reform of the labour market, and a resistance to any suggestion of tackling the issue of insecure or precarious work arrangements.²⁰ At the same time, however, the benefits of regulating work are also being more

¹⁸ For a recent discussion of many of these issues in Australia, see R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012.

¹⁹ See J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, 2012.

²⁰ See eg Australian Mines and Metals Association, ‘Soaring costs and poor productivity – time to get real Fair Work reform back on track’, media release, 15 November 2012, available at <http://amma.org.au/newsroom/media-releases/415-soaring-costs-and-poor-productivity-time-to-get-real-fair-work-reform-back-on-track>; I Willox, ‘Flexibility, Insecure Work and Productivity’, 11th Annual Workforce Conference, Melbourne, 16 November 2012, available at <http://www.aigroup.com.au/policy/speeches> (both accessed 29 November 2012).

clearly demonstrated, not least in securing decent work for all, but also in advancing the social values of protecting those who are most vulnerable in the labour market.²¹

Young Australians, work and education

- 2.24 Young people are more likely than any other group to encounter the types of unpaid work which are the subject of this research project. At the national level there has already been a significant focus in recent years on the importance, and the intersection, of education and labour market participation for young people in particular and for the community in general. The ‘Learning or Earning Compact with Young Australians’ expressed the Labor Government’s commitment to provide opportunities for all young people to participate in work or education. In April 2009 the Council of Australian Governments joined in the ‘Compact with Young Australians’. This then formed the basis of the ‘National Partnership on Youth Attainment and Transitions’, with a national youth participation requirement, entitling young people to government subsidised education and training. The program seeks, amongst other things, to improve transitions for young Australians to further education, training and employment. It focuses on those between 15 and 24 years of age, young people at risk, and the educational attainment and engagement of indigenous young Australians, and links the payments of Youth Allowance to participation.²²
- 2.25 The most recent, comprehensive study of young people in Australia is the fifth report of the Foundation for Young Australians, *How Young People Are Faring: The National Report on Earning and Learning of Young Australians* (HYPAF(5)), released in September 2012.²³ Using data from the Australian Bureau of Statistics,²⁴ HYPAF(5) examines the juncture of education and work, prompted in part by the debate in this area arising from changes to the funding of vocational education. In particular, it focuses on the changing nature of education and work for young people.

²¹ See S Lee and D McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation*, Palgrave Macmillan/International Labour Office, 2011.

²² For a report on the program to date, see dandolpartners, *Interim Evaluation of the National Partnership on Youth Attainment and Transitions: A Report for the Department of Education, Employment and Workplace Relations*, April 2012, available at www.deewr.gov.au/Youth/YouthAttainmentandTransitions/Documents/InterimEvaluationReport_accessible.pdf (accessed 12 November 2012).

²³ Available at www.fya.org.au (accessed 10 November 2012).

²⁴ HYPAF relies especially on ABS data from the *Labour Force Survey*, the *Survey of Education and Work*, the *Longitudinal Survey of Australian Youth*, and the *General Social Survey* – all available from www.abs.gov.au.

- 2.26 Amongst the key findings of HYPAF(5) is that the trend has been for a long term decline in full-time employment for young people. About 85% of teenagers are in full-time education or full-time work. As to be expected, as the level of participation in full-time education has risen, so too the level of full-time work has fallen. But nearly one in three school leavers, and one in four young people between the ages of 20 and 24 years, are not in full-time study or full-time work. Importantly, as this report also notes, the recent GFC has had a disproportionate impact on young people. Unemployment among teenagers not in education remains roughly three times as high as it is for adults (over the period of HYPAF(5), 15.6%, which is lower than the peak of 18% in 2009, but is still not back to the level of 12–13% which prevailed prior to the GFC); and opportunities for training in the workplace through apprenticeships are fewer than ever before. In February 2012, 19% of teenagers (aged 15–19 years) and 9.5% of young people (aged 20–24 years) were unemployed, compared to 5.9% of the general adult population.²⁵ And the proportion of young people unemployed for over a year doubled between 2009 and 2011, so that those between 15 and 24 years old comprised a quarter of all the long term unemployed in Australia.²⁶
- 2.27 Most young people who work do so on a part-time basis. However, their foothold in the labour market is precarious. Many are underemployed and want more work. In the 1980s the rate of underemployment for those aged 15–24 years was 5%, but by 2011 this proportion had increased to 13%. Job mobility is particularly high among young people, indicating the precariousness of the transition from education and training to work.²⁷ In particular, having a part-time job does not seem to be a clear gateway to full-time employment.
- 2.28 Of course, many young people who work on a part-time basis are doing so in conjunction with study (and often full-time study). In November 2009 the House of Representatives Standing Committee on Education and Training released *Adolescent Overload? The Report of the Inquiry into Combining School and Work: Supporting Successful Youth Transitions*.²⁸ This report noted that well over a quarter of a million young Australians combine school and work. While observing that a range of benefits were derived from this, including the acquisition of general employability

²⁵ See Australian Social Inclusion Board, *Social Inclusion in Australia: How Australia is Faring*, 2nd ed, June 2012, 'Feature article – youth unemployment', p 8, available at www.socialinclusion.gov.au (accessed 10 November 2012).

²⁶ Ibid.

²⁷ Ibid.

²⁸ Available at www.aph.gov.au (accessed 10 November 2012).

skills, it also commented that these skills were generally not formally recorded. One of the recommendations was that a 'national generic skills passport for secondary school children' be developed which might recognise skills acquired outside of work programs that were also formally part of education programs. Other recommendations, especially that regarding the development of a National Toolkit for Young Workers, recognised the importance of the protection of young people at work.²⁹ As well as hearing from young people, the Committee had considered evidence cited (at [5.34]) from the *You're Gold ...if you're 15 years old* report,³⁰ which showed that some students 'are willing to turn a blind eye to abusive practices for the opportunity to make money and to gain work experience'. Still other recommendations of *Adolescent Overload?* indicated the need for greater research and statistical tracking in the area of work, work experience and training, and education. The importance of education to young people's chances in life is quite evident from the data.

- 2.29 For the purposes of this research project, the critical contextual point to note here is that the transition out of education for most young people marks a point which is not for them the time of their first of entry into the labour market. Rather it is a point where they might reasonably expect to make a transition to full-time employment, either from study or more usually from the combination of study and part-time work. The expectation or aspiration is not that they would continue to work in some form of precarious work, as they often did while studying.
- 2.30 HYPAF(5) highlights the precariousness of the transitions between school/education and work. The numbers who are at special risk depends on the way they are identified and defined (p 16). If defined as those who are not in full time education or full-time work, this group in Australia comprises about 25% of young people between 20 and 24 years old. In overseas research, those who fall into the category of 'not in education, employment, or training' (NEET) are considered the most vulnerable. In Australia, the size of the NEET group for 15–24 year olds is comparatively small, based on OECD figures of 10%. Those in the NEET category are predominantly young people who are from disadvantaged backgrounds – including indigenous young people, those from low socio-economic status backgrounds, those who performed poorly at school, and those from some rural and regional areas.

²⁹ The Young Worker Toolkit is now available at <http://youngworkertoolkit.youth.gov.au/> (accessed 13 November 2012).

³⁰ *You're Gold ... if You're 15 Years Old: The Perceived Impact of WorkChoices on Youth Employment and Education in New South Wales*, Report for NSW Teachers Federation, Sydney, 2007.

Whichever way those who are most vulnerable are defined, the risk for them is that social exclusion will be, as Dr Lucas Walsh's foreword to HYPAF(5) puts it, 'not a stage of life but a way of life'. As the Australian Social Inclusion Board's second report, *Social Inclusion in Australia: How Australia is Faring*, shows, Australia is performing quite well in a general sense in relation to social inclusion criteria. Participation in the labour market and getting a good education are critical indicators and in global terms Australia is also doing well generally in these areas. However, income inequality remains higher than it was in the decade of the 1990s.³¹

- 2.31 The critical challenge then is to enable all young people, including those from disadvantaged backgrounds, to be able to access and participate in the full range of educational opportunities to give them the best chance of entry into and success in the new world of work. It is for this reason that the equity and access critique of some forms of unpaid work experience and internships deserves such close attention. Given all the evidence from Australia, HYPAF(5) emphasises the importance of education both in and beyond the classroom, and adds its voice to the call for 'a re-imagined career development strategy'. It is in this context too that the workplace rights provided by Australian law must be examined.

³¹ Australian Social Inclusion Board, above.

The Nature and Prevalence of Unpaid Work Experience

Introduction: A Dearth of Official Data

- 3.1 One of the central objectives for this project was to develop a better understanding of the range, nature and prevalence in Australia of arrangements for unpaid work experience.
- 3.2 We should say right away that we have found very few sources of comprehensive and reliable statistical data. The Australian Bureau of Statistics (ABS), for example, has from time to time investigated the value of 'unpaid work' in the Australian economy, concluding for instance in 1997 that it was equivalent to almost half of Australia's GDP. But studies such as this were concerned primarily with 'services produced by households for their own consumption (e.g. meal preparation, child care) and volunteer and community work (e.g. care of aged relatives) provided free of charge to others'.¹ They did not seek to measure the value of unpaid work undertaken for businesses. Similarly, while the 2006 and 2011 Censuses have contained questions relating to unpaid work, these were limited to asking about unpaid domestic work or care for others, and about 'unpaid voluntary work through an organisation or group'. The Census Guide for this last category explained that it could include 'assisting at organised events and with sports organisations; helping with organised school events and activities; assisting in churches, hospitals, nursing homes and charities; and other kinds of volunteer work (e.g. emergency services, serving on a committee for a club, etc.)'.²
- 3.3 The ABS has also investigated rates of participation in voluntary work, the characteristics of people who volunteer, and the types of work they undertake. But 'voluntary work' is defined for this purpose to mean 'the provision of unpaid help willingly undertaken in the form of time, service or skills, to an organisation or group'. It specifically excludes work experience, unpaid work trials and student

¹ *Unpaid Work and the Australian Economy, 1997*, Cat no 5240.0, ABS, Canberra, 2000, p iii.

² ABS, 'Measures of Unpaid Work', <http://abs.gov.au/websitedbs/censushome.nsf/home/factsheetsmuw?opendocument&navpos=450> (accessed 11 November 2012).

placements.³ For reasons explained in Chapter 1, the wider area of voluntary work is outside the scope of our research.

- 3.4 Similarly, while the National Centre for Vocational Education Research (NCVER) collects and reports a great deal of information about training and apprenticeships, its focus is predominantly on formal training contracts registered under State and Territory training legislation, and/or courses undertaken with vocational education and training providers.⁴ Although we briefly explain the nature and role of training legislation in Chapter 5, we are predominantly interested – once again, for reasons explained earlier – in work experience undertaken *outside* the requirements of these arrangements. NCVER has, however, published some useful research about work experience undertaken by secondary school students. This is outlined later in the chapter.
- 3.5 For the most part, therefore, we have had to rely on more anecdotal information. Fortunately, there has been a great deal of this – especially since this research project was publicly announced in April 2012. In the mainstream media alone, that month saw 31 print articles, over 16 hours of radio coverage and over eight hours of television coverage devoted to the issue of unpaid work.⁵ Many people rang into radio stations or posted comments online to tell their own stories about unpaid work. There were similar reactions in the same month to various follow-up articles. These included one in an advertising industry magazine;⁶ another by ABC producer Rebecca Armitage, discussing her own experience with internships;⁷ and also one by the Ombudsman himself, explaining the reasons for the FWO taking an interest in the subject.⁸ A more recent investigation by Fenella Souter, published in the *Good*

³ *Voluntary Work, Australia, 2010*, Cat no 4441..0, ABS, Canberra, 2011, p 63.

⁴ See NCVER, *Australian Vocational Education and Training Statistics Explained*, July 2011, <http://www.ncver.edu.au/publications/1967.html> (accessed 11 November 2012).

⁵ The statistics are taken from Fair Work Ombudsman, *Annual Report 2011–2012*, p 75.

⁶ J Kennedy, 'Does ad land exploit its interns?', *B&T*, 12 April 2012, <http://www.bandt.com.au/news/advertising/does-ad-land-exploit-its-interns> (accessed 11 November 2012).

⁷ 'Interns toil for free, but they shouldn't toil in vain', *The Drum*, 17 April 2012, <http://www.abc.net.au/news/2012-04-17/armitage-the-fierce-world-of-washington-interns/3953404> (accessed 11 November 2012): see 3.60.

⁸ N Wilson, 'Experience and exploitation: defining internships', *The Drum*, 19 April 2012, <http://www.abc.net.au/unleashed/3960252.html> (accessed 10 November 2012): see 6.92.

Weekend magazine, contained a number of stories – some of which are reproduced later in this chapter – and prompted a further round of comments and debate.⁹

- 3.6 Quite apart from fielding a constant stream of inquiries from journalists about our work (and in the process learning from them about what goes on in their own industry, as explored later in the chapter), we have also had many unsolicited contacts from individuals eager to tell us about their own experiences. In some instances, we have sought and obtained permission to pass some of those stories on, where we considered them to be especially revealing or noteworthy. Certain information too is publicly available, such as the advertisements for unpaid internships highlighted later in this chapter, or information about government programs.
- 3.7 We have also been able to obtain helpful information and perspectives from a number of the organisations that we contacted, as detailed in Chapter 1, or that took the initiative to get in touch with us. In some cases these organisations have been willing to pass on results of their own investigations, or to give us estimates as to the prevalence of certain arrangements. A particularly important source of information has been the FWO itself, which as explained in Chapter 1 allowed us to interview some of its staff and afforded us confidential access to the results of various investigations.
- 3.8 Finally, and again as already mentioned in Chapter 1, we conducted a number of small-scale surveys of our own, to gain an understanding of what is going in parts at least of the higher education sector. As will be explained, some of these surveys threw up some striking results.
- 3.9 In order to discuss what we have found, we have broken up the remainder of the chapter, to deal with first, what is in a sense the simplest situation, the ‘unpaid trial’. After briefly looking at certain types of government assistance program, we then move on to examine the use and encouragement of various kinds of work experience in the education sector, with particular attention to the extent to which such arrangements are becoming common both as part of, and beyond the requirements of, education and training courses. With that done, we go on to examine what kinds of internships and other forms of experience can be identified in a range of different

⁹ ‘All work and no pay’, *Good Weekend* (Sydney Morning Herald/The Age), 13 October 2012, <http://www.theage.com.au/small-business/managing/all-work-and-no-pay-20121015-27luu.html> (accessed 11 November 2012).

industries and sectors. We say something about the significance of the issue for non-residents working in Australia under various kinds of visas. Finally, we draw what conclusions we can from the data available to us.

Unpaid Trials

- 3.10 There is nothing new in the concept of an employer seeking to engage a worker on a ‘trial’ basis, giving them work to do in order to see whether their skills are up to the task, and/or how they fit into a particular environment.¹⁰ Historically, employers could hire workers on a ‘probationary’ basis, so that they could be dismissed without redress if they were considered not to meet the requirements of the job. When unfair dismissal laws were introduced, this was recognised by the creation of an exception for employees serving a reasonable probationary period;¹¹ and under the current provisions in Part 3-2 of the *Fair Work Act 2009*, employers have up to six months (or 12 months in the case of a small business with fewer than 15 employees) before a dismissed employee can challenge their termination as being harsh, unjust or unreasonable.¹²
- 3.11 These practices and provisions assume, however, that the worker is an *employee* and being remunerated for their efforts. In recent times, concern has grown about the practice of employers allowing, asking or even requiring those who are interested in gaining a job to perform work that would ordinarily be done by employees, but on an *unpaid* basis, while the employer determines their suitability. As the FWO notes on its website, job seekers may undertake unpaid work trials for one or more of the following reasons:¹³
- they assume that they will be paid for any work carried out
 - the employer has led them to believe that they will be offered the job after the trial period

¹⁰ See eg the comments by Justice Murphy in *Dietrich v Dare* (1980) 54 ALJR 388 at 391 (see 6.53).

¹¹ See A Stewart, ‘And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal’ (2005) 1 *Flinders Journal of Law Reform* 85 at 100.

¹² See B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, pp 633–5. Workers who have not served the qualifying period can, however, still challenge their dismissal as being for a reason that is unlawful under the ‘general protections’ in Part 3-1 (see 4.42–4.44), or in breach of other anti-discrimination laws (see 5.50–5.55).

¹³ <http://www.fairwork.gov.au/pay/student-placement-and-unpaid-work/pages/unpaid-trials.aspx> (accessed 9 November 2012).

- they believe that an employer is legally entitled to ask applicants to work for a trial period without pay
- they are desperate to do anything which could lead to a job, even if the chance of getting work is small.

It is indeed open to an employer to arrange for a series of willing (or at least compliant) applicants to perform unpaid work, without ever giving any of them the 'job' for which they are supposedly being trialled.

Concerns and examples

- 3.12 There are a number of instances in which concerns have been publicly expressed about the use of unpaid trials. In November 2004, independent South Australian MP Dr Bob Such successfully moved to have inserted into the *Fair Work Act 1994 (SA)* a provision that would permit the Industrial Relations Commission of South Australia to regulate trial work arrangements, where it was apparent they were being 'abused'. For reasons explained in Chapter 5, this provision has not subsequently been used. But it is nonetheless worth reviewing the reasons for its introduction. According to Dr Such:

This issue has come to my attention over several years. As I have said on many occasions, the overwhelming majority of employers do the right thing. However, in some industries more than others—the beauty industry (using a generic term), the hospitality industry and other industries on a more infrequent basis—young people, in particular, are taken on and a carrot is dangled in front of them. They say, 'You work for us and there will be something for you down the track.' Quite often there is not.

I cite some real world examples. A nephew of mine at the age of 18 did 10 weeks of unpaid work on the basis of a carrot being dangled: you will get an apprenticeship, something will happen. A niece who worked in a hospitality area was told: 'You need to come in tomorrow'; 'The boss isn't able to see you today'; 'Come in the next day'—and so it goes on.¹⁴

- 3.13 The South Australian Minister for Industrial Relations supported the amendment, indicating that the government considered it to be a sensible way of addressing a 'genuine issue of concern in the community'.¹⁵ Although objecting to the proposal,

¹⁴ South Australia, *Hansard*, House of Assembly, 23 November 2004, pp 1011–12.

¹⁵ *Ibid*, p 1012.

the Liberal Opposition did not deny that the practice of unpaid trials existed. Rather their spokesman, Iain Evans, insisted that in seeking to deal with ‘the occasional bad employer’, the amendment was

trying to solve a problem that affects 1 or 2 per cent of the people involved in doing trial work, but it will ultimately penalise the 98 per cent who are happy to do it and who make their own judgment about whether they will work one day or one week in relation to trial work.¹⁶

- 3.14 Concern about unpaid trials was also raised by the Western Australian Fair Employment Advocate in 2008, in a report dealing with the treatment of young workers:

Some studies indicate that an expectation of unpaid trial work or training is widespread. One study found that employers in the retail, hospitality and hairdressing sectors in both SA and NSW relied heavily on the ‘wage-free’ workforce by operating a regular turnover of young workers on trial.

A DOCEP and UWA research project found that students (37 per cent) were subjected to inappropriate working conditions such as extensive trial periods (up to two months).¹⁷

The report offered the following example, from a call received by the Advocate:

A young person seeking an apprenticeship in hairdressing undertook a one day unpaid trial with a hairdressing company. After the trial, she was asked to return to complete a further one week unpaid trial. The young person said that 25 other young girls had undertaken a one day unpaid trial, and from that group, five girls were each doing a further one week unpaid trial. This equated to ten weeks of unpaid labour.

- 3.15 In 2010, the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR) received a report by market research firm Instinct and Reason that was designed to assist it in preparing the Young Worker Toolkit, to which reference was made in Chapter 2. A draft of the toolkit was tested on 16 focus groups of workers aged from 15–25 years. It was reported, among other things, that:

¹⁶ Ibid

¹⁷ *Vulnerable Workers: Young People*, Fair Employment Discussion Paper 3, Perth, 2008, p 12, citing *Workplace Intelligence* (October 2005) *Exploited youth: no signs of improvement* and DOCEP & UWA Research Project (2007) *High school students at work: What are their working conditions?* unpublished.

Unpaid trials were widely experienced and reported in the groups by young workers and parents. Both young workers and parents assume these unpaid trials were necessary to get a job, whatever the legal situation. The employer was perceived to *'hold all the cards at this stage'*.¹⁸

Tellingly, the report also observed that:

Most young workers involved in the study seemed simply glad to have a job and they tended to accept whatever the employer provided. It was only as workforce experience, familiarity and confidence grew that workplace issues became more front of mind ... Their knowledge about workplace relations, their rights and obligations at work and how they should be treated is very low.¹⁹

This underscores the particular vulnerability that young people may have when presented with the 'option' of an unpaid trial.

3.16 JobWatch, an employment rights legal centre in Victoria, is another organisation that has persistently reported complaints about unpaid trials. Its website reports a survey which 'showed that in only 13% of cases was a paid position offered after the completion of an unpaid trial'.²⁰ JobWatch's executive director recently spoke to journalist Fenella Souter about the issue:

Zana Bytheway ... says her organisation averages a call a week about unpaid trials (it's generally outraged parents who do the calling, says Bytheway, because young people are too scared to complain, can't be bothered or don't know they should). Bytheway flicks through JobWatch's records as we talk.

'Look, here's one caller who said a hair salon in South Yarra had admitted they had 30 trial workers in one day,' she says, echoing what another hairdresser tells me – that her boss regularly takes juniors on for four-hour free trials. 'Another reports that a well-known takeaway chicken franchise had not paid her for two weeks of trial work.' The list goes on: young people doing restaurant shifts for nothing; the applicant who was offered a job in a tanning salon that was yet to open and told she'd have to do 20 hours of unpaid work; a young fencing assembler who was required to work for three days unpaid; a young woman who worked as a receptionist for a small business for three months without any pay. Then there was the case of the paralegal who did three weeks of unpaid work, followed by eight

¹⁸ D Donnelly, R Mercer, C Oehme and A Marshall, *Young Workers Toolkit Market Research Report*, Instinct and Reason, Sydney, 2010, p 14.

¹⁹ *Ibid*, p 4.

²⁰ http://www.jobwatch.org.au/images/stories/pdf/unpaid_trial_work_updated_July_2009.pdf (accessed 12 November 2012).

weeks of unpaid training, before finally getting a casual job with the firm at \$10 an hour.²¹

According to information supplied to us by the ACTU, it too regularly logs complaints or inquiries from workers who have undergone unpaid trials or ‘unpaid training’.

3.17 Souter herself investigated the following story:

Case study 1: Trial work in a shoe shop

Two years ago, Helen Davis, now 24 and living in England, applied for a sales job with Paul Dane, a family-run Sydney shoe-and-accessory chain. Davis, then 22, already had sales experience, but that wasn’t enough. After an interview at head office, she was told she would need to go to a store within the hour and work a four- or five-hour ‘trial’ shift.

After the first hour, she says she was told to aim for a target: to sell around \$400 worth of goods. Competing with three other employees eager for their commissions, she didn’t reach it. ‘At the end it was like, “Did you manage to sell anything? OK, thanks, bye.” I never heard anything more from them.’ She wasn’t paid for her time.

A manager at the store confirms this is usual procedure, but when I call Paul Dane’s HR manager, Alex Isaac (the bosses’ daughter), and ask if unpaid trials are their policy, she says she’d like to ‘get her head around my question’ and call me back. On her return call - having meanwhile rung the Fair Work Ombudsman to clarify the legal position - Isaac agrees that the firm has indeed ‘previously offered an opportunity to get an insight into the Paul Dane workplace by offering a voluntary trial’. Paul Dane’s understanding, based on information from the Australian Retailers Association, was that these trials were legitimate if ‘they were voluntary and not a requirement to getting the job’. Following Good Weekend’s call, however - ‘for which we’re really appreciative’, Isaac says; ‘you’ve done us a favour by pointing this out’ - Paul Dane has now decided to drop the practice. She offers to pay Davis for her time.

Source: Fenella Souter, ‘All work and no pay’, Good Weekend, 13 October 2012

This example is consistent with other similar stories we have heard or read about during our research. It also occurred in the retail industry, which along with hospitality and hairdressing seems to be the most common part of the job market in which workers are ‘offered’ unpaid trials. But as JobWatch note on their website, it does seem to be a practice that can be found ‘in most industries and occupations’.

²¹ Souter, above.

The Young Workers Legal Service survey

- 3.18 During the period in which this report was being prepared, the Adelaide-based Young Workers Legal Service (YWLS) conducted a survey about unpaid work. A report on the survey is reproduced in Appendix F, with kind permission of the YWLS. Although it received only a limited number of responses, many of those who answered gave details about their experiences with unpaid trials, for durations that ranged from two hours to two weeks. Half of the examples came from the ‘hospitality, accommodation, cafes and restaurants industry’. Many felt that they had been ‘forced’ to accept unpaid work and –perhaps unsurprisingly – there was a strong degree of resentment at the way they had been ‘exploited’.

FWO investigations

- 3.19 A final couple of examples of unpaid trial work comes from matters investigated by the FWO. In the second of these cases we have removed the references to any names or details that might identify the parties.

Case study 2: 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 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.²²

Source: FWO

Case study 3: 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.

²² For details of the undertaking, see 'Real estate company back-pays Dandenong salesman \$10,000', Media Release, 14 January 2013, <http://www.fairwork.gov.au/media-centre/media-releases/2013/01/Pages/20130114-mcdonald-real-estate-eu.aspx> (accessed 16 January 2013). As to the nature and purpose of enforceable undertakings under section 715 of the Fair Work Act, see Creighton and Stewart, above, pp 516–7, and R Owens, J Riley and J Murray, *The Law of Work*, 2nd ed, OUP, Melbourne, 2011, pp 635–6.

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.

Source: FWO

- 3.20 As these examples confirm, unpaid trial arrangements can potentially be a feature of work in any industry or occupation, including professional services.

Government Assistance Programs

- 3.21 There are a number of instances in which the federal, State or Territory governments or their agencies either facilitate or encourage some form of work experience as part of a program to assist unemployed or injured workers. Given that these are likely to be lawful, either because they fall within the 'vocational placement' exception in the federal Fair Work Act (see 4.10 – 4.29), or because they do not in any event involve an employment contract (as discussed in Chapter 6), we will touch only briefly on a couple of examples.
- 3.22 According to Job Services Australia (JSA), the federal government's national employment services system, job seekers can participate in work experience activities at any time, with the assistance of their JSA 'provider'. The JSA website specifically mentions the option of undertaking unpaid work experience, by way of a 'voluntary placement with a Host Organisation'.²³ The 'key benefits' of doing this are said to be:

Unpaid work experience placement activities may provide you with opportunities to gain work experience and vocational skills in an industry or workplace you have a particular interest or established skills in.

Unpaid work experience placement activities provide you the opportunity to demonstrate directly to a prospective employer that you have skills the employer is looking for.

²³ For this and the following quotes, see <http://www.deewr.gov.au/Employment/JSA/EmploymentServices/WorkExperience/Pages/UnpaidWEP.aspx> (accessed 13 November 2012).

Unpaid work experience placement activities may provide you:

- work experience that will enhance your employment prospects and encourage more active and effective participation in the workplace;
- work experience that will develop or enhance your ability to work as part of a team, take directions from a supervisor, work independently, and communicate effectively;
- an opportunity to demonstrate to the Host Organisation your capacity to perform productive work; and
- flexible work experience opportunities where you may undertake a variety of relevant work tasks.

It is emphasised, however, that such activities ‘can only be undertaken by you on a voluntary basis’, and are limited to job seekers aged 18 or over.

3.23 A separate fact sheet on the JSA website contains similar information, but adds that unpaid work experience ‘can provide a placement in a specific industry or organisation that might not otherwise be available through other types of Work Experience Activities, such as Work for the Dole’, and that placements ‘may take place for up to four weeks’. It also makes the point that if such activities are included in a job seeker’s Employment Pathway Plan, as negotiated with their JSA provider, failure to undertake them may affect their income support payments.²⁴ However, as Section 3.2.10.30 of the federal government’s online *Guide to Social Security Law* explains:

An unpaid work experience placement cannot on its own meet a job seeker’s work experience activity requirement. Unpaid work experience placement activities are available to job seekers 18 years and over and can be between a minimum of 8 hours per week and a maximum of 50 hours per fortnight. Placements can range between 5 days (minimum) and 4 weeks (maximum).²⁵

3.24 A second and rather different example is provided by the ‘work trial’ scheme operated by the WorkCover Authority of New South Wales.²⁶ It involves injured workers being placed for short periods of time with a ‘host’ employer, with the

²⁴ <http://www.deewr.gov.au/Employment/JSA/Resources/Documents/WEUnpaidWork.pdf> (accessed 13 November 2012).

²⁵ http://guidesacts.fahcsia.gov.au/guides_acts/ssg/ssguide-3/ssguide-3.2/ssguide-3.2.10/ssguide-3.2.10.30.html (accessed 13 November 2012).

²⁶ See <http://www.workcover.nsw.gov.au/injuriesclaims/injurymanagement/Returntowork/Vocationalrehabilitationprograms/Pages/Worktrials.aspx> (accessed 13 November 2012).

formal agreement of the host, WorkCover and the worker's rehabilitation provider. The purpose is to 'provide a suitable work environment to either increase the injured worker's ... capacity to return to their pre-injury job, or [give them] transferable skills to gain a different job with either the pre-injury employer or a new employer'. The 'trainee' is not paid for their work, but continues to receive their statutory workers compensation entitlement. According to WorkCover they are not considered to be the host's employee, so that any new injury they sustain will not result in a claim against the host's workers compensation insurance. Instead, WorkCover itself maintains the necessary insurance, while also paying for fares to and from the workplace and meeting the cost of any essential equipment. The host must provide suitable work to perform, as well as any training required under the trainee's return to work plan. If at the conclusion of the trial the host has a suitable job to offer to the trainee, the host may be eligible for incentives available under the JobCover Placement Program.

Unpaid Work Experience in Education

The embrace of work integrated learning

- 3.25 There is nothing new in the idea of combining work and education. The traditional model of apprenticeship was (and still is) premised on the idea of learning a particular trade or craft, while performing work to practise what has been learnt and to hone the skills involved. Apprenticeships now tend to involve a combination of on-the-job instruction and time release to attend classes at an educational institution. But while apprentices are treated as employees and must be paid for their work (see 4.36 and 4.39), a broader array of training programs today may provide for unpaid work experience. Hence many programs in what is often now called the vocational education and training (VET) sector involve unpaid 'job placements' or less structured requirements to spend a certain amount of time working (whether with or without pay) in a particular field.²⁷
- 3.26 At the same time, work experience has become an 'almost universal experience' for secondary school students.²⁸ In universities too, there have been significant moves

²⁷ See further E Smith and R Harris, *Work Placements in Vocational Education and Training Courses: Evidence from the Cross-Sectoral Literature*, NCVET, Adelaide, 2000.

²⁸ E Smith and A Green, *School Students' Learning from Their Paid and Unpaid Work*, NCVET, Adelaide, 2001, p 12.

to embrace the concept of what is often now referred to as 'work integrated learning' (WIL). As a recent study for the Australian Learning and Teaching Council notes, WIL is 'a chameleon term with a problem of definition'. Nevertheless:

Its most common use is to describe programs where students engage with workplaces and communities as a formal part of their studies. Terms such as practicum, field-work, internships, cooperative education and clinical placement describe these programs. A commonly expected outcome of these student WIL experiences is gaining new knowledge, understandings and capabilities, and mastering skills considered essential to particular workplace practices. The underlying assumption is that students cannot learn these skills and knowledge in formal classrooms.²⁹

3.27 The impetus for the embrace of WIL is explained in a 2008 study:

The Australian higher education sector generally is under growing pressure from government, industry and the community to demonstrate its ability to respond to skill shortages, the requirements of a professionalised workforce and the demand for work-ready graduates. Increasingly, universities are required to show how theory and practice combine in undergraduate and postgraduate degrees to generate graduates who are work-ready. Therefore, contemporary Australian universities need to develop highly informed and skilled graduates whose capacities extend to their own active generation of occupationally related knowledge, and also 'prepare a highly productive, professional labour force ... including the preparation of graduates in relevant fields for professional practice'.

... This demand for well prepared graduates coincides with changes to the Higher Education Support Act 2003 that have made demands on universities wishing to access funding through the Commonwealth Grants Scheme. These demands include student work experience programs that contribute to producing the type of graduates demanded by employers and the professions.

In response to industry demands ... many institutions have increased the emphasis on WIL curriculum with the inclusion of WIL goals in institutional strategic directions and the provision of internal structures and support that value WIL as 'a teaching and learning approach which has the potential to provide a rich, active and contextualised learning experience for students which contributes to their engagement in learning'. The growth and enhancement of WIL in universities is supported at the corporate strategic level, from within disciplines and from careers

²⁹ J Orrell, *Good Practice Report: Work-integrated Learning*, Australian Learning and Teaching Council, Sydney, 2011, p 5 (references omitted).

and employment elements. Industry is also increasingly prepared, as a response to skill shortages, to offer a variety of WIL experiences in an effort to access future employees prior to graduation.³⁰

3.28 In the sections that follow, we look more closely at the nature and prevalence of work experience programs for secondary school students and, more particularly, for university students. Given the limited time and resources available to us, we have not been able to look in any detail at what is happening in the VET sector (or at least that part that does not overlap with the university sector). In any event, while we did encounter complaints and problems with work experience in VET, the information supplied to us tended to suggest that the programs in question would generally qualify as ‘vocational placements’ for the purpose of the Fair Work Act, thus excluding any possibility of the ‘employer’ having to comply with the minimum standards laid down by that Act (see 4.10 – 4.11). As we will explain, this is clearly not the case with all work experience arrangements for university students.

Work experience for secondary school students

3.29 According to a 2001 report prepared by the NCVET:

Traditional ‘work experience’ is a common feature for Australian children during Years 10 or 11 of school. Generally, students attend a workplace of their choice for one week’s experience of working life ...

Normally, work experience programs are seen as an opportunity to learn workplace habits, to investigate how workplaces operate, and sometimes to learn about a specific occupational area which may be a career possibility for the young person....

Programs are generally supported by documentation for the employer and for the young person. The latter documentation normally covers legal matters and, also, some guidance relating to expected learning.³¹

A survey of over 400 students in New South Wales and South Australia revealed that 87% of Year 11 and 12 students had participated in a work experience program, while 18% had undertaken a ‘vocational placement’ (generally as part an in-school VET program).³² Unlike the part-time employment undertaken by those surveyed,

³⁰ C J Patrick et al, *The WIL Report: Work Integrated Learning, A National Scoping Study*, QUT, Brisbane, 2008, p 3 (references omitted).

³¹ Smith and Green, *School Students’ Learning from Their Paid and Unpaid Work*, above, p 18.

³² *Ibid*, p 10.

which was generally concentrated in retail or fast food, cafés and restaurants, work experience programs were found in a wide range of industries or occupations, including “‘career’-type industries such as education or health, personal and community services’”.³³

- 3.30 Work experience was generally viewed by those in the study ‘as a process of career sampling and of familiarisation with work habits’. But some employers were ‘not sure how to handle work experience students’ and did not give them as much training as paid workers.³⁴ Interestingly, only 4.5% of work experience students reported being allowed to do no more than ‘observe’. 61% indicated that they were given ‘a bit’ of responsibility and 27% ‘a lot’. 85% spent most of their time working with adults.³⁵ A follow-up study by the same authors reported that work experience was generally considered to be ‘of value’ to those undertaking it, ‘in both selecting and rejecting career options’. This was despite the fact that it was often criticised ‘for its brevity and the nature of the experiences’.³⁶
- 3.31 Although the last of these reports was published in 2005 there has not, to our knowledge, been any fundamental change since then in the nature of school-based work experience programs. The reports appear to confirm that these arrangements generally involve short periods of ‘sampling’ activities. Despite the fact that it appears that purely observational arrangements may be the exception rather than the rule, there is nothing to suggest that employers are using these programs as a source of ‘free labour’, or indeed that school students’ work experience typically involves some form of ‘disguised’ employment.

Work experience for university students

- 3.32 In universities, requirements or opportunities for students to undertake work experience can take many different forms. Some degrees, especially those with a vocational focus, make it compulsory to spend a period time completing an internship or placement in a particular industry or occupation. But it is also not unknown now for students to be able to undertake a placement or internship as an

³³ Ibid, p 50.

³⁴ Ibid, pp 10–11.

³⁵ Ibid, p 51.

³⁶ E Smith and A Green, *How Workplace Experiences While at School Affect Career Pathways*, NCVER, Adelaide, 2005, p 10.

elective in a degree that otherwise imposes no such general requirement. In many law schools for instance, including our own, opportunities are given to selected students to go and work in government agencies or non-government organisations, completing supervised and formally assessed research projects both for credit in the student's degree and also (potentially) for the benefit of the agency or organisation concerned.

- 3.33 The nature and scope of work experience arrangements varies widely across the higher education sector. But a recent audit at one institution, a report on which was very kindly supplied to us on a confidential basis, revealed a total of 139 arrangements for students to be placed with external organisations, spread across all Faculties. These were undertaken by over 9000 students in the year of the audit. 121 of the external placements were embedded within course subjects, around 80% of which were compulsory in the degree in question. Only four involved payment for any work performed. Of the remaining 18 placements, which were not connected to a particular course or program, ten were unpaid and two provided both paid and unpaid work. Both course-based and extracurricular placements were undertaken at a mixture of for-profit and non-profit hosts or partners. The university provided insurance for the vast majority of the course-based placements, and for some but not all of the others.
- 3.34 In addition, the audit revealed a further 53 internal placements. 40 of these were reserved for students of this university, while the rest could be undertaken by students from another institution. Only 6 of these placements were paid. In contrast with the external arrangements, all but seven were unconnected with course subjects at the university. Many of the internal placements involved either student volunteering at Open Day or similar events, or laboratory experience.
- 3.35 The reason that the audit was undertaken in the first place is worth noting. It was, we were told, a direct result of a series of briefings by FWO staff that highlighted the possibility that unpaid work placements could be in breach of the Fair Work Act, if they fell outside the 'vocational placement' exception to which reference has already been made. Many universities, we understand, were similarly prompted to look at their practices in this area. There was indeed a rumour – which we heard repeated from a number of sources, both before and after commencing this project – that the Fair Work Act had somehow made work experience illegal. In fact, as we explain in Chapter 4, nothing changed when the Fair Work Act took effect in 2009. It simply maintains a provision introduced in 1996 which ensures that those doing unpaid

placements in 'authorised' education and training courses are not to be considered as 'employees' for the purpose of the main federal labour statute.

- 3.36 From discussions we have had with a variety of people and organisations within the sector, we understand that there is often a lot of pressure from students themselves to gain access to work placements or internships. This is often born of a belief that the experience and/or contacts gained will improve their employability. But in the case of international students, it can also reflect a desire to perform work that can, even if unpaid, help them to gain permanent residence – a point to which we return later in the chapter. Because of such student demand, but also because of the enthusiastic support of many educators for the concept of WIL, it appears that many institutions have chosen – despite the risks highlighted by the FWO briefings – to maintain placement or internship programs that operate outside formal courses and that are not credited towards a student's degree.
- 3.37 To take just one example, Curtin University's Careers Centre offers assistance to students who are looking for work experience 'as a requirement for your degree, to get hands on experience or to research your job options'.³⁷ This includes access to a Work Experience Workbook,³⁸ which includes the following statements:

There are many opportunities employers offer students to gain hands on experience such as vacation work, internships, cadetships and scholarships. However, these opportunities are paid and are often competitive. In some cases, the structure of these programs may not fit in to your study timetable and life commitments.

The Curtin Careers Centre defines work experience is [sic] a voluntary work placement, which differs from those programs mentioned above, in that it's unpaid. Work experience provides opportunities to gain hands on technical experience. Work experience can, in some cases, lead to future employment with the company, can help you to meet people in your industry and can increase your marketability by expanding on your resume.

The Workbook does have a section on 'The Fair Work Act', which states the following:

³⁷ http://unilife.curtin.edu.au/finding_work_experience.htm (accessed 13 November 2012).

³⁸ http://unilife.curtin.edu.au/UL_CC_IB_WorkExperienceWorkbook.pdf (accessed 13 November 2012).

The Fair Work Act is the federal legislation that ensures that individuals participating in unpaid work have a set of terms and conditions, rights and abilities to enforce any misuse of service.

The following are a set of guidelines a work experience placement must be conducted:

- The student is not paid
- The student's duties and responsibilities during the placement contribute to the development of their specific technical knowledge and development
- The student cannot be the 'expert', utilised for their knowledge and understanding gained during their [sic] studies
- Must be supervised by a professional with the appropriate qualifications and / or experience

It is unclear what is meant here by the ability to 'enforce any misuse of service', or how (if at all) the 'guidelines' are related to the requirements of the Fair Work Act.

- 3.38 At any event, the Curtin Careers Centre specifically offers free personal accident insurance cover to students for any unpaid placement in Australia that is for 75 hours or less. It must be related to the student's course of study, but *not* taken for course credit.³⁹ Curtin is by no means the only university to do this. Similar schemes operate at Queensland University of Technology (QUT),⁴⁰ and also at the University of Sydney's Business School,⁴¹ to take just two other examples.
- 3.39 Other institutions have become more cautious. A careers manager at one university told us that the kind of approach just mentioned 'appears to be in the grey area', and that 'rather than take a risk, many (the majority) universities that would like to be able to support limited work experience ... do not facilitate unpaid work unless it is at a Not for Profit organisation'.⁴²
- 3.40 The University of Melbourne provides an example of an institution that has adopted policies that explicitly take account of the Fair Work Act and its requirements. Clause

³⁹ <http://careers.curtin.edu.au/insurance.html> (accessed 13 November 2012).

⁴⁰ <http://www.careers.qut.edu.au/student/insurance.jsp> (accessed 13 November 2012). We did in fact undertake a survey of students using this insurance service, with the assistance of the QUT careers office, but received too few responses to be worth reporting in full. In general, however, the results were consistent with those obtained from the other student surveys described in more detail later in the chapter.

⁴¹ <http://sydney.edu.au/business/careers/students/insurance> (accessed 13 November 2012).

⁴² E-mail correspondence on file with the authors.

1.2 of its Professional Placements Policy specifically refers to the need to ensure that any unpaid activities facilitated by or offered at the University comply with the Act.⁴³ More detailed guidance is provided by a set of Guidelines for Professional Placements, which include the following warnings:

The *Fair Work Act 2009* (the Act) requires that students are paid at least the minimum wage for work experience undertaken within organisations unless the work is undertaken as a professional placement or is classified as a volunteer activity. For a placement to meet the requirements of a professional placement, it must be undertaken as a (compulsory or elective) component of a subject or a course. If an unpaid placement or internship does not meet this stipulation, to avoid the creation of an employment relationship and be in breach of the Act it needs to be classified as a volunteer activity ...

The main purpose of the placement should be to provide work experience to the student. The benefit received by the host is secondary to the benefit received by the student. The student may be engaged in observational work, or productive activities, but there should be no expectation or requirement that the student be obliged to assist the host to generate revenue.⁴⁴

3.41 Under this policy then, extracurricular placements are only to be allowed if they involve 'volunteering'. A separate set of Guidelines for Student Volunteering offer some guidance as to how to determine whether an activity falls into this category. It is suggested that a student is only likely to be a volunteer if (among other things) the following conditions are satisfied:

- the student does not expect to be paid and is not offered any financial incentives to induce them to participate;
- the activity is not one that would normally be performed by staff members;
- the activity involves a minimal time commitment, or otherwise the student has flexibility negotiating their own hours;
- there is neither an obligation to achieve a particular work output, nor any threat of discipline if they under-perform;

⁴³ <http://policy.unimelb.edu.au/MPF1011> (accessed 13 November 2012).

⁴⁴ http://msl.unimelb.edu.au/_data/assets/pdf_file/0011/518771/Professional_Placements_Guidelines.pdf (accessed 13 November 2012).

- the activity is beneficial either to (a) the student through personal development (but confers no immediate advantage to the host organisation) or (b) to the broader community; and
- the activity will not necessarily lead to employment.⁴⁵

The University also has detailed procedures for both professional placements and student volunteering that include the need for formal participation agreements that are designed to address and manage various legal risks.

3.42 In order to gain a broader understanding about the prevalence of extracurricular work experience arrangements in higher education, we surveyed members of the Australian Collaborative Education Network (ACEN), with the kind support of that organisation. ACEN is the national association for practitioners and researchers, both from the higher education sector and beyond, who are involved in WIL.⁴⁶ Among other things, it hosts the National WIL Portal, which allows the exchange of information and resources, including details of ‘all types of work integrated learning opportunities including placements, internships, projects and co-operative education’.⁴⁷

3.43 The survey elicited responses from 89 ACEN members, spread across 29 different institutions and from a wide range of different programs. Their roles within their institutions also varied considerably. A summary of the results is reproduced as Appendix C. It will be seen that over 60% reported an awareness of students undertaking unpaid work that was organised, facilitated or encouraged by their institution, but not undertaken for credit towards, or as a required element of, a particular subject or course. The proportion of students known to be doing this was generally reported as being at the lower end, but in around a third of cases the proportion exceeded 50%. Almost two-thirds of students undertaking unpaid work of this kind were believed to perform tasks that were of direct and immediate benefit to the business or organisation either often or always. The most common advantages or benefits perceived for students from such arrangements were: a

⁴⁵ http://msl.unimelb.edu.au/_data/assets/pdf_file/0004/518782/Student_Volunteering_Guidelines.pdf (accessed 13 November 2012).

⁴⁶ ACEN is also affiliated with WACE, the World Association for Cooperative & Work-Integrated Education: see <http://www.waceinc.org/> (accessed 13 December 2012).

⁴⁷ http://acen.edu.au/wilportal/?page_id=110 (accessed 13 November 2012). On the Portal’s ‘Help and Resources’ page, there is a succinct but accurate summary of the vocational placement exception in the ‘Fair Work Australia Act’ [sic].

chance to acquire, practise or improve particular skills; to gain a better understanding of a particular industry, business or occupation; to improve their employability; or to make useful contacts. Interestingly, despite the arrangements *not* being taken for course credit, in over 70% of cases institutions were reported as having formal agreements with the host organisations, while written guidelines applied in 64% of cases.

- 3.44 The survey certainly seems to confirm the prevalence of unpaid placements or internships undertaken other than for course credit, but nonetheless facilitated, encouraged or even regulated by universities – despite the FWO’s warnings about the legality of such arrangements. Clearly, if one of these arrangements did turn out to involve an employment relationship, under the principles discussed in Chapter 6, it is unlikely the university itself would be the employer – at least where the placement was with an external organisation.⁴⁸ But at the very least, it is possible that the university could, for instance, be considered to be ‘knowingly involved’ in any contravention of the Fair Work Act by the actual employer (see 4.45).
- 3.45 One other thing the survey of ACEN members reveals is a marked disparity in attitudes to the practice of extracurricular unpaid work experience. It will be seen that some of the comments made in response to the final question laud the benefits of these arrangements and decry any suggestion of exploitation. Here are three separate examples:

More and more today employers are demanding graduates have already had practical experience creating a large gap between employer expectations and graduate capabilities. Work Experience programs are one way in which we can provide a win / win for both the student and the employer. As long as the program is monitored, and that benefit is evenly weighed in regards to benefit.

... Some students may choose to undertake unpaid work in the interests of building extended experience. I do not know of any who have been exploited – i.e. undertaken unpaid work not by their free choice

... Very worthwhile for all concerned – engages community, enhances students employability, creates networks for [my university].

⁴⁸ Having said that, if the university were receiving a fee from a ‘host’ organisation to place a student with it, the university might conceivably be regarded as playing an analogous role to a labour hire agency. Such agencies can (and often do) employ the workers whose services they supply to clients: see Creighton and Stewart, pp 206–11; Owens, Riley and Murray, pp 171–7.

Others, however, identify problems, including the need for greater monitoring or regulation. For instance:

I have no problem with WIL so long as it involves the institution in a monitoring and quality assurance role, I can find little reason to support unpaid work without academic supervision. There are two problems with this. 1. No one knows what is happening in the workplace. 2. Unpaid work is slavery and I thought we had abolished that some time ago.

... I believe there are benefits but to avoid exploitation it should be limited to perhaps one/two weeks per year of study as long as employer ensures student is covered for insurance and out of pocket expenses.

... I'm all for students getting work experience (credit or no credit), but not being paid can cause serious hardship for students and their families. more work should be done to create 'shell-type' units of study that turn the 'not for credit WIL' into 'WIL for credit' – where all work experience is captured, valued and reflected upon. where students add value to host organisations, some payment should be made

A number of comments also highlight uncertainty about the impact of the Fair Work Act.

- 3.46 On this last point, ACEN is one of a number of organisations that have called for greater clarification and/or expansion of the 'vocational placement' exception in the Fair Work Act.⁴⁹ In October 2011 ACEN National Director Judie Kay wrote to the federal Minister for Workplace Relations,⁵⁰ highlighting the fact that employers are often 'willing to provide unpaid work experience and supervision to students for a limited period, which is of benefit to the students despite not being a course requirement'. This was considered to be especially beneficial to students from 'equity groups ...who are eager to gain work experience, showcase their ability and enhance their resume before applying for a graduate position'. The letter proposed an expansion to the exception that would 'permit higher education students to undertake a limited period of unpaid work experience of up to 30 working days (or 225 hours) when it is formally approved by the institution at which they are studying', even if such experience does not fall within the existing definition.

⁴⁹ See also the requests made by the Australian Internship Industry Association for greater 'clarity' on the scope of the exception, in a submission made on 14 September 2011 in response to a draft Fact Sheet (see 6.84) issued by the FWO. A copy of the submission is on file with the authors.

⁵⁰ Copy on file with the authors.

- 3.47 A more recent paper delivered by Craig Cameron calls for a different approach. It advocates narrowing the exception to require that any placement involve work that is conducted in connection with learning objectives and supervision arrangements agreed in advance between the institution and the host. It also calls for greater definition of the type of work arrangements covered by the Fair Work Act, and penalties for employers engaging in ‘sham’ work experience arrangements.⁵¹
- 3.48 For the moment at least, there is no prospect of any reconsideration of the Fair Work Act’s vocational placement exception. It is not an issue that was dealt with in the review of the Act completed in 2012.⁵² Nevertheless, we see merit in providing greater guidance to the education sector as to what the current exception does and does not cover. To that end, we dissect the various elements of the exception in Chapter 4, and in Chapter 9 we make some recommendations as to how the FWO might offer such guidance.

The Wider Use of Unpaid ‘Internships’

What are internships?

- 3.49 In what seems to have been a remarkably short time, the term ‘internship’ has crept into the Australian lexicon. It is, as Fenella Souter memorably puts it, a name ‘crisp with American vigour’ which endows certain work arrangements ‘with a kind of professional sheen’.⁵³ Once generally confined to medical graduates gaining supervised (and generally *paid*) practical experience before gaining their licence to practise, the term has come, as in the United States, to refer to a wide range of arrangements for the performance of either paid or unpaid work for businesses, non-profit organisations and government agencies. Ross Perlin’s observation about the ambiguity of the term seem to us to be just as true in Australia as it is in his native USA: that ‘what defines an internship depends largely on who’s doing the defining’.⁵⁴ As he notes:

⁵¹ ‘The Vulnerable Worker? A Labour Law Challenge to WIL and Work Experience’, ACEN Conference, Deakin University, 2 November 2012 (copy on file with the authors).

⁵² See J Edwards, R McCallum and M Moore, *Towards More Productive Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, 2012.

⁵³ Souter, above.

⁵⁴ *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*, rev ed, Verso, London & New York, 2012, pp 25–6.

the word *intern* is 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.⁵⁵

3.50 During the course of our research, we have certainly encountered more narrow or specific definitions. An official at one employer association insisted to us that with the possible exception of ‘political’ interns, the term both was and should be confined to tripartite arrangements between educational institutions, students and ‘host’ organisations for the undertaking of course-related WIL. By contrast, the Australian Internship Industry Association (AIIA), a body which ‘brings together organisations active in the domestic and international internship industry in Australia’, defines an internship somewhat more broadly as any ‘pre-professional learning experience that provides students, recent graduates, and those seeking to change careers with the opportunity to gain training in a particular career field’. It distinguishes between ‘academic internships’ for students or recent graduates, ‘professional internships’ that provide ‘career development’ for existing workers, and ‘remunerated internships’ which ‘provide a cultural and linguistic experience in a non-professional and environment [sic] for those who want to speak better English and/or gain international experience for their CV’.⁵⁶

3.51 Something of the uncertain scope of the term is conveyed by the following description, in a 2008 report prepared by the NCVET for the Australian Industry Group:

Internships

Commonly used for associate professional and professional occupations, such programs *often (but not always)* apply to individuals who have already commenced a program of formal study, and must support this theory and knowledge training with a period of supervised, practical work-based training. Although an internship is a mandatory component particularly intended for those preparing to be medical practitioners, such programs *may also be used* by different businesses and organisations to recruit and develop required skills and knowledge.⁵⁷

3.52 Our experience suggests that, far from being confined to medical practice, political offices or educational programs, the term ‘internship’ now has a broad and

⁵⁵ Ibid, p xi (emphasis in original).

⁵⁶ <http://aiia.org.au/internships.htm> (accessed 14 November 2012).

⁵⁷ J Misko, *Combining Formal, Non-formal and Informal Learning for Workforce Skill Development*, Australian Industry Group, 2008, pp 20–1 (emphasis added).

uncertain meaning in Australia that allows it to be applied to everything from paid entry-level jobs⁵⁸ to voluntary work for charitable or community organisations. For present purposes, however, what we are interested in is the prevalence of extracurricular internships that effectively involve some form of unpaid work experience. To that end, we turn now to the evidence of such arrangements.

How widespread are internships?

- 3.53 According to some very helpful information supplied to us by the AIIA, and which is reproduced in Appendix G, its member organisations reported a total of over 2,000 internships over the preceding 12 months. The great majority of these, reflecting the international focus of the AIIA's members, involved applications that originated overseas, with applicants using a range of different visas to come to Australia in order to complete an internship. But some also involved 'domestic, on-shore, applications (from local international students/graduates)'. Placements ranged from 6 to 26 weeks, with an average somewhere around 12 weeks, and most were undertaken by tertiary students or recent graduates aged between 19 and 24. The placements were generally unpaid but, in accordance with the AIIA's standards, were subject to strict requirements as to monitoring, supervision and the provision of agreed training. Fields covered varied widely, but most involved professional services of one type or another.
- 3.54 We are not certain about what percentage of the arrangements covered by these statistics would fall within the Fair Work Act's vocational placement exception, on the basis of being undertaken as a required part of an authorised education or training course. In any event, it is clear to us that the AIIA's snapshot captures just one part of a larger picture.
- 3.55 That unpaid internships and other forms of work experience exist outside of the kind of programs described by the AIIA is apparent from a number of sources. One is the plethora of advertisements that now can now be found, especially online, for unpaid interns. For example, a search of the SEEK.com.au website on 14 November 2012, for job advertisements mentioning the word 'intern' and paying less than \$30,000 per year, returned 16 entries. The majority of these explicitly or apparently involved unpaid positions in areas such as sales, marketing, HR, video production,

⁵⁸ To take just one example, see Latrobe City Council's advertisement for a 'Building Surveyor Intern' at <http://www.seek.com.au/Job/building-surveyor-intern/in/traralgon-la-trobe-valley-traralgon-la-trobe-valley/23516723> (accessed 14 November 2012).

recruitment, accounting and fashion. A further search on the pedestrian.tv website on 29 November 2012 revealed over 60 entries in the internships/work experience section.⁵⁹ Again, these were either explicitly or implicitly unpaid ‘opportunities’. The most common positions were in PR or marketing, the fashion industry, events management, film or video production, and online magazines or blogs.

- 3.56 Some of these advertisements, together with others obtained from previous searches, are reproduced in Appendix H. What is notable about many of them is how similar they are to what might be expected from an advertisement for a paid entry-level position. They give every impression of involving employment without the pay, sometimes (though not always) to be offset by vague promises of ‘training’ or of consideration for a paid job.
- 3.57 Further information about the prevalence of unpaid internships can be found in the personal stories recounted in published articles or conveyed directly to us. We refer to a number of those stories in the sections that follow, which are divided up by reference to particular industries or sectors. We also make reference, as we did earlier in the chapter in relation to the issue of unpaid trials, to a number of investigations conducted by the FWO. Finally, we report the results of a number of small-scale surveys of university students that we conducted, simply to get an idea of how common such arrangements might be with certain groups.

Unpaid internships or work experience in the print and broadcast media

- 3.58 Of all the industries or sectors that we have had occasion during this study to read or hear about, in terms of unpaid work experience, the one that came up most often by far was the media. This was partly a reflection of the strong degree of media interest in the project itself. As we were being interviewed at various points, or contacted to check on our progress, we made a point of asking about what was going on in that industry. Virtually every journalist, announcer, host, producer, researcher or (in one case) make-up artist that we spoke to told the same story. Either they themselves – and this was the great majority – had spent time doing unpaid work experience before scoring a paid job, or at the very least they knew of others in their organisation doing exactly the same thing right now. The practice of spending what may be quite lengthy periods of time waiting for a ‘break’ appears to be endemic at newspapers, magazines, television and radio stations, and indeed it seems to have

⁵⁹ See <http://www.pedestrian.tv/jobs/work-experience-internships/> (accessed 29 November 2012).

been that way for many years. It appears to be accepted that with so many people desperate to work in what is still seen – despite recent downsizing – as a ‘glamour’ industry, a demand fed in some cases by an oversupply of university graduates,⁶⁰ the way to build a career is to spend weeks or months undertaking unpaid work in the hope of impressing the right person.

- 3.59 With the kind assistance of University of Technology Sydney (UTS) lecturer Jenna Price, we surveyed her final year Journalism students about their experiences. The results of the survey are summarised in Appendix D. All these students are required, as part of their degree, to complete two periods of work experience. But each respondent reported having undertaken unpaid work – generally with a newspaper, magazine or TV or radio station – that was *not* credited towards, or a required element of, any degree or educational qualification. In most cases this had happened three or more times, with periods generally being measured in months, or in a couple of cases a year or more. Overwhelmingly, the work being performed was not just observational, but directly benefited the organisations concerned. The perceived advantages were similar to those reported by respondents to the ACEN survey (see 3.43), and the arrangements led in many cases (though by no means all) to an offer of paid employment. Once again, overall perceptions were mixed. Some students stressed how essential they believed it was to undertake this kind of work, with one saying:

I wouldn't be where I am today (in an industry I love, working for one of the most respected companies in the field) without having interned first. People with a sense of entitlement underestimate how necessary work experience is in this job market.

But others saw the downside. For example:

They can vary from being a waste of time for all concerned (where the organisation/business has nothing practical for the student to do other than watch other people work) to being entirely hands-on and slightly exploitative.

While this was only a very small survey, we have no doubt that it paints a fairly representative picture of the realities of breaking into the job market in the print and

⁶⁰ See eg N Christensen, ‘Journalism schools churn out too many’, *The Australian*, 18 April 2012,

broadcast media, and probably also other 'creative' industries such as film production and fashion.⁶¹

3.60 Here is one final example, from ABC producer Rebecca Armitage:

Case study 4: Media internships

As a journalism student, I knew I was entering a dying industry. Internships, I was repeatedly told by my professors, were the only way to find a job.

When I was 21, I spent several months interning at Cosmopolitan magazine. One day a week, I would help the features department with their research and do the administrative tasks that no-one else had time for.

I fact checked, once calling a sexual health expert to ensure the tips they offered in that edition would indeed please their readers' boyfriends. Another time, I was asked to set up a database of slang terms for various sex acts to help the writer working on the sealed section (my father was particularly proud of me that day).

It wasn't going to win me a Walkley Award, but doing those tasks helped me build valuable research skills and I walked away with some good stories to tell.

The following year, I took an internship with Channel Nine's ill-fated chat-fest The Catch-Up. The show got off to a bad start, enraging its target audience by replacing the US soap The Young and the Restless.

Everyone knew it was doomed from the beginning, but I was given on-the-job training in television production, not to mention a front row seat to Eddie McGuire's heyday at the Nine Network.

Source: R Armitage, 'Interns toil for free, but they shouldn't toil in vain', The Drum, 17 April 2012

Unpaid internships or work experience in legal services

3.61 Prior to commencing our research for this project, we had heard occasional stories about certain lawyers (and perhaps more particularly barristers) in our home town of Adelaide using keen young law students to undertake unpaid legal research for them. With law schools producing many more graduates than could possibly find work in the legal profession, we were aware that students desperate to break into

⁶¹ It may be noted that some of the advertisements collected in Appendix H relate to work in the film and fashion industries. Although we had less contact with people from those industries, we formed the strong impression that the story was the same as in the print and broadcast media.

the profession might well want to offer their services for free to an established lawyer, in order to gain experience and make (or cement) a valuable contact. But as against that, we also knew that the larger commercial law firms each had a tradition of ‘summer clerkship’ programs, offering *paid* work to later year law students. Combined with the opportunities to volunteer at a range of community or not-for-profit legal services (including for instance the YWLS), we believed that unpaid work for legal businesses would be relatively unusual, at least prior to the work placement that is a typical requirement of the practical legal training course that must be completed in order to gain a practising certificate.⁶²

3.62 In order to test out that assumption, we conducted surveys of final year law students at our own institution, the University of Adelaide, and also at two interstate law schools with what we considered might have rather different student cohorts, QUT and the University of Western Sydney (UWS). The same survey was administered at each of the three law schools at a face-to-face lecture, without prior notice, so that in each case we could reach a random sample of final year law students. The results, which are presented in combined form in Appendix E, surprised us more than a little. Around half of those surveyed (the percentages were similar at the three institutions, though very slightly lower at UWS) indicated that they had performed unpaid work (other than as a volunteer or as part of their own or a family member’s business) since leaving high school; and for the most part they had not done so for credit towards a degree or qualification.⁶³ A significant minority had performed extracurricular unpaid work more than once, often for months at a time. While some of these arrangements involved work in non-law occupations, a substantial number reported working for law firms or (to a lesser extent) barristers. This struck us as highly notable. It has caused us either to question what we thought we knew about the paid work opportunities at the bigger firms, or (more likely) to infer that smaller firms may be willing to accept work from students on an unpaid basis.

3.63 The stated reasons for law students undertaking unpaid work experience varied somewhat; two particular but contrasting favourites of ours were ‘kindness’ and ‘cold ambition’. But they most commonly involved improving employability, practising skills and gaining a better understanding of the work environment. Only

⁶² As to that requirement in South Australia, for example, see 4.26.

⁶³ Adelaide law students were significantly more likely than those at the other two schools to have done all of their unpaid work for credit towards their degree (29% compared to 16% at QUT and only 6% at UWS). This may reflect the greater availability at Adelaide of internship or placement-based subjects.

around a third of those surveyed reported getting an offer of paid employment. Once again, the comments made for very interesting reading. Some noted the benefits or even necessity of working unpaid:

I believe it demonstrates the student's commitment and drive to securing employment in that organisation. To work unpaid shows a level of interest & determination to obtain paid employment in that area.

... Almost necessary without the right contacts in the legal industry

Others questioned what was involved:

I don't understand how people can afford to do it. Studying at Uni is a big enough expense. I also don't understand ethically how businesses can ask for that.

... I don't get paid to work, yet the firm still charges me out at \$150/hour. The firm is gaining a considerable financial advantage from me being there. For me, giving up my own time is a big deal as I work 20+ hours at another job & study full time. I will be disappointed if this placement doesn't increase my employability

- 3.64 While again we must be careful not to generalise from a small survey, it seems to us that the results reveal a fairly clear picture of unpaid and extracurricular work experience being common for those law students not fortunate enough to secure paid work opportunities at the larger commercial firms or in government departments.

Other industries and occupations

- 3.65 During the course of our work, we came across many other examples of unpaid internships or other forms of unpaid work. These spanned many different industries, including:

- advertising – an executive director of the Clemenger Group has described unpaid interns as being 'fairly common in ad land';⁶⁴
- marketing, PR and event management – industries which appear to be disproportionately represented in recent advertisements for unpaid internships;
- recruiting;

⁶⁴ Kennedy, above.

- human resource management;
- accounting;
- finance;
- architecture;
- music;
- sport and exercise science.

In many cases we would have liked to spend more time looking at these industries, or at least investigating further some of the information we were given. But given the time and resources available to us, that simply wasn't possible.

3.66 Nevertheless, to illustrate the range of experiences we encountered or read about, here are a few more case studies from a selection of different industries:

Case study 5: Advertising internship

I got by on a 6 month unpaid internship (3 days a week) with a little agency while I was at uni on Centrelink and doing a few hours a week at Nando's to make a little more on the side. Sure, I ate crappy sandwiches for lunch, drank goon 90% of the time and took major advantage of the company fruit and veg delivery box, but that's life. It's hard but so is getting a break in a competitive industry. There were 4 other interns while I was interning, and they all either dropped out, got jaded, went to higher paying client side graduate jobs or just gave up. That was 2 years ago and now I'm a junior copywriter for a good agency. I've had heaps of opportunity and that crappy no pay time I did at the other agency allowed me to apply for jobs that had 'experience' as a job requirement. It's a trade off. After a bit I went, no, I'm done not getting paid and then it's up to them to decide whether or not you've proved yourself invaluable to the company. So yeah. (I also got heaps of free beer and lunches and free tickets to stuff, so it's not like it was even that bad. And the paid staff always feel sorry for you and bring you back pies from lunch.)

Source: Reader comment to Kennedy article, at

*<http://www.bandt.com.au/news/advertising/does-ad-land-exploit-its-interns>
(accessed 11 November 2012)*

Case study 6: Orchestral internship

Now 22, [Rosa Gollan is] a journalism student at the University of Technology, Sydney. She's smart, articulate, touchingly enthusiastic and almost terrifyingly ambitious, in a nice way. Her work history is typical of someone of her age and background: a series of jobs with lousy pay, coupled with some internships ...

Her career hopes are vague but large, and she's willing to do almost anything to further them, including as many unpaid internships as it takes. In June this year, Gollan, a talented musician, scored one with the Sydney Symphony Orchestra, unconnected to course requirements. She is thrilled to have been chosen, after three rounds of interviews and set tasks. The SSO accepted all three 'finalists' and Gollan is now finishing a 15-week unpaid internship. She puts in one full day a week, with proofreading, editing and internet tasks, plus two or more days at home, she estimates, researching and writing program notes for the orchestra's publications.

'I've got a big project on now and I'm going out of my way to do my best,' Gollan says earnestly, 'so every day I've been doing a few hours' research. It's partly because I don't have the knowledge in my head; I'm not a musicologist or music historian, and often the people they use to do their programs are. I want mine to be as good as theirs.'

She couldn't be happier. 'I don't feel, as you do in some places, that they've employed me because they want cheap labour. My mentor is going out of her way to make sure I really understand what's going on. She has taught me so much. I feel I'm learning more than I'm giving; that it's more of a benefit for me than it is for them.'

Which, in fact, is precisely what internships should be - of benefit to the intern, rather than part of an employer's plan to meet budget.

If work is being produced, employers could be teaching interns and paying them, I suggest.

'I guess they could,' Gollan allows. 'But, with organisations like the SSO, if they had to pay me, they might not want to give me the experience of learning as much as I have. At the end of the day, I don't mind not being paid.'

Source: Souter article

Case study 7: 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.

Source: FWO files

- 3.67 This last example is a useful illustration of an internship that can be fairly readily distinguished from an ordinary paid job. It is significant too that the firm in question had received clear advice from an employer association, to the effect that anyone the firm engaged on 'work experience' should not be undertaking work of any value to the firm.

Agencies

- 3.68 It is apparent that a number of agencies are now operating in Australia to 'broker' unpaid internships or job placements. Besides the agencies that are responsible for delivering the kind of assistance to unemployed or injured workers discussed earlier in the chapter, these include firms that are in business to 'sell' work experience. As Fenella Souter notes:

Commercial intern agencies, like Borch Leeman and Punk Jobs in Melbourne, are cashing in on the trend, targeting graduate jobseekers, mostly former overseas students. These companies charge fees running into the thousands to 'place'

graduates into unpaid work with Australian companies. Just to be clear, it's the intern who pays. In the case of Borch Leeman, for instance, a three-month placement costs the applicant at least \$2850 (a \$550 non-refundable application fee plus a \$2300 placement and insurance fee) – money that has to be paid upfront before the placement goes ahead.⁶⁵

3.69 According to the AIIA, which represents a number of such agencies, intermediaries of this type have an important role to play:

[B]y mediating between hosts and interns, providers offer a level of control, in terms of quality, safety and standards of practice, that individual interns negotiating their own placement direct with a host may not receive. Although both providers and hosts are businesses, and as such need to operate as profitable enterprises (charity organisations who host being the exception) the provision of internships is driven by much more than profit. Internships are an important contribution to an individual's learning (as recognised by the increasing emphasis Universities are placing on experiential learning as part of a qualification). International internships are an important contribution to global awareness at both an individual and corporate level.

3.70 However, concerns have been raised at the activities of some agencies. In Chapter 5, we discuss a case successfully brought by the Consumer Action Law Centre against the Punk Jobs agency, to repay \$1150 to a dissatisfied customer who alleged he was deceived about the benefits he would get from his placement. The FWO has also investigated a number of agencies in the past year, but has not to date initiated any proceedings.

3.71 So far as we could determine from the limited material available to us, the practice of paying agencies to procure unpaid internships or other forms of work experience appears to be largely confined in Australia, at least at this stage, to international students or graduates who are in the country on temporary visas. It is to the experiences of that group that we now turn.

Visa Holders

3.72 The research undertaken for this project has revealed that for non-residents who have entered Australia under some form of visa there are often additional dimensions to the issues and problems arising in relation to the types of unpaid work

⁶⁵ Souter, above, amended online version accessed 7 May 2013.

examined in this report. In this section, we examine some of the factual background relevant to this and provide some examples of issues that have come to our attention. Our main focus is on international students, as a group likely to be particularly impacted by unpaid work experience, trial work and internships. We also examine briefly those on working holiday visas. However, this focus should not be taken to suggest that these are the only groups of visa holders who may be vulnerable in relation to unpaid work, as one of our examples will demonstrate. Later in this report, in Chapter 7, we examine the application of the *Migration Act 1958* and the *Migration Regulations 1994* to unpaid work.

Growth in international student numbers in Australia

3.73 There has been a dramatic increase in the number of international students in Australia over the last two decades. This has occurred as a result of a combination of ‘push’ and ‘pull’ factors, including globalisation, the nature of education and educational institutions and the opening up of greater opportunities for education, as well as the labour force development needs in both Australia and other countries. In 2002, there were only 274,114 international students in Australia. By 2009 this number had increased to 630,700, although since that time the numbers have declined a little (to 557,425 in 2011).⁶⁶ In the year to September 2012 there were 475,184 international students in Australia on a student visa.⁶⁷ In terms of global numbers of such students, Australia is third amongst recipient countries, accepting about 6.6% of international students, and Australia has the highest proportion of international students of all OECD countries.⁶⁸ Clearly international students have contributed, and continue to contribute, much to Australia. The ongoing processes of globalisation and the interests of public players (both government and

⁶⁶ See Australian Education International, *International Student Enrolments in Australia 1994–2011*, <https://aei.gov.au/research/International-Student-Data/Pages/InternationalStudentData2011.aspx> (accessed 24 October 2012).

⁶⁷ See Australian Education International, *Monthly Summary of International Student Enrolment Data – Australia – September 2012*, https://aei.gov.au/research/International-Student-Data/Documents/Monthly%20summaries%20of%20international%20student%20enrolment%20data%202012/09_September_2012_MonthlySummary.pdf (accessed 2 November 2012).

⁶⁸ See Australian Education International, ‘Research Snapshot: The Global Context of Tertiary Student Mobility’, September 2012, <https://aei.gov.au/research/Research-Snapshots/Documents/Global%20context%20of%20tertiary%20student%20mobility%202010.pdf> (accessed 1 November 2012); OECD, *Education at a Glance 2011: OECD Indicators*, 2011, p 326 as cited in Australian Human Rights Commission, *Principles to Promote and Protect the Human Rights of International Students*, October 2011, http://www.humanrights.gov.au/racial_discrimination/international_students.html (accessed 23 October 2011).

institutional) and private players (commercial businesses and individuals) suggest that this movement of peoples for the purposes of furthering their education and, thereby, strengthening their prospects for labour market participation and access to a decent standard of living will continue (even if not always at quite the same high level in Australia).

3.74 In this context it is little wonder that there has been a great deal of attention to issues relating to international students in recent years. The analysis conducted by Michael Knight in the *Strategic Review of the Student Visa Program for the Australian Government* in 30 June 2011 and the official response to it⁶⁹ are indicative of the high priority accorded to these matters by government. In 2010 the Council of Australian Governments (COAG) released the *International Students Strategy for Australia, 2010–2014*.⁷⁰ A variety of agencies are actively participating in furthering the strategy.⁷¹ The strategy includes seeking to enhance community engagement for international students, and strengthening the Australian Quality Training Framework to improve the quality of the student experience. In pursuance of the strategy, Australian Education International, an Australian Government agency, has sponsored a program of innovative projects to showcase best practice in enhancing, amongst other things, international students ‘career readiness’.⁷² This provides examples of models for ‘ensuring that the employability skills of international students are developed and improved on an ongoing basis through continuous learning and integration into the total study experience’.

3.75 Like their Australian peers, international students are hungry for opportunities to work, especially in their chosen field. For international students there is sometimes an even greater urgency for such work, because having work may make a critical difference to their success in a quest to gain permanent residence in Australia. Another report commissioned for Australian Education International, *Student Voices*,

⁶⁹ A summary of which is available at <http://www.immi.gov.au/students/pdf/2011-fact-sheet.pdf> (accessed 4 November 2011).

⁷⁰ Council of Australian Government, *International Students Strategy for Australia 2010-14*, 2010, <http://www.coag.gov.au/node/307> (accessed 23 October 2012).

⁷¹ See eg International Education Advisory Council, *Discussion Paper for the Development of an International Education Strategy for Australia*, April 2012, [https://aei.gov.au/IEAC2/Consultation\(IEAC\)/Documents/InternationalEducationAdvisoryCouncilDiscussionPaper.pdf](https://aei.gov.au/IEAC2/Consultation(IEAC)/Documents/InternationalEducationAdvisoryCouncilDiscussionPaper.pdf) (accessed 23 October 2012).

⁷² See Australian Education International, *Enhancing the International Student Experience: A report on seven demonstration projects funded by Australian Education International and conducted in collaboration with Universities Australia*, <https://aei.gov.au/research/Publications/Documents/Enhancing%20the%20International%20Student%20Experience.pdf> (accessed 23 October 2012).

emphasised that international students want work experience, not only for the income it brings but also for the opportunities to gain experience and to have wider social interactions.⁷³ The *Student Voices* report indicated that as well as language and cultural matters, visa status is one of the things that makes work experience, job placements and internships a challenge. This is because, as explained in Chapter 7, the conditions attached to the visas of the vast majority of international students restrict the number of hours they can work both in paid and unpaid work. Some students also indicated that they use volunteering to provide themselves with work experience.⁷⁴

- 3.76 Importantly, in another study for Australian Education International, *International Graduate Outcomes and Employer Perceptions*, work opportunities, especially in their chosen field were identified as particularly important for international students. Indeed, the recommendations of this study included that international students take full advantage of the opportunities to work in accordance with their visa, and also to participate in internship and placement programs. Educational institutions were also recommended to link with employers to provide internships and job placement programs.⁷⁵ As the recommendation in this study for work and work experience were presented separately from the recommendations relating to internships and job placement programs, it may be the case that the study assumed that internships were not ‘work’.

International students at work in Australia

- 3.77 Given their numbers it is not surprising then that international students comprise a significant, and largely unskilled, labour force. It is estimated that approximately 56% of international students work during the times when their studies are ‘in session’ and 70% during vacation periods. This means that at any one time there are approximately 200,000 international students working here, comprising approximately 1–2% of the Australian workforce and about 6% of part-time workers.

⁷³Report prepared by Christopher Lawson for Australian Education International, *Student Voices: Enhancing the Experience of International Students in Australia, June 2012*, esp pp 23–6, <https://aei.gov.au/research/Publications/Documents/Enhancing%20the%20International%20Student%20Experience.pdf> (accessed 23 October 2012).

⁷⁴ Ibid, pp 23–4.

⁷⁵See recommendations arising from Australian Education International, *International Graduate Outcomes and Employer Perceptions*, 2010, pp vi–vii and 19, <https://aei.gov.au/research/publications/pages/default.aspx> (accessed 23 October 2012).

While there are no comprehensive figures on where international students work, Alex Reilly, who has recently published a comprehensive and careful analysis of the topic, concluded that it is probable that they are working predominately in low-paid, precarious work in sectors such as retail, food services, taxi industry, and in urban areas.⁷⁶ The same is likely to be true for any dependent family members who accompany international students to Australia and who work during their stay.

Young tourists at work in Australia

- 3.78 Australia has reciprocal agreements with 28 countries which enable young people to work when in Australia as part of a working holiday. This program is one that has proved enormously popular, especially since the onset of the Global Financial Crisis which has resulted in a situation of poor labour market opportunities especially for young people in many of the partner countries. In June 2012 there were 132,107 sub class 417 visa holders in Australia (a 22.3% increase over the same time in the previous year) and 4,486 sub class 462 visa holders in Australia (a 12% increase over the same time in the previous year).⁷⁷
- 3.79 Those who are here on a working holiday sub class 417 visa are encouraged to live and work in regional Australia. If they do so for at least three months they become eligible to apply for a second such visa. The statutory provisions regulating this are discussed in more detail in Chapter 7.

The vulnerability of some visa holders: problems for enforcement

- 3.80 The enforcement of workplace rights for migrant visa holders can be particularly difficult, often because they are amongst the most vulnerable workers. International students, for instance, have a profile that suggests they are a particularly vulnerable group.⁷⁸ This has been acknowledged recently by the Australian Human Rights Commission, which has issued a set of Principles to Promote and Protect the Human

⁷⁶ A Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181 at 185.

⁷⁷ Department of Immigration and Citizenship, *Working Holiday Maker visa program report*, 30 June 2012, <http://www.immi.gov.au/media/statistics/pdf/working-holiday-report-jun12.pdf> (accessed 6 November 2012).

⁷⁸ See eg D Anderson, R Lamare and Z Hannif, 'The Working Experiences of Student Migrants in Australia and New Zealand' in R Price et al (eds), *Young People at Work*, Ashgate, Farnham, 2011, p 51.

Rights of International Students.⁷⁹ These principles highlight ‘safe and fair employment’ as a basic human right. Alex Reilly has identified and elaborated several of the dimensions of the vulnerability of international students.⁸⁰ These include their financial position, to which the costs of their education can obviously contribute; their profile as migrants, which means not only that they are in an alien culture but also they are often from developing economies and have a non-English speaking background; and the vulnerability arising from the work conditions attached to their visa. In addition, and like overseas tourists on working holiday visas, they are invariably young and usually in low paid and precarious work.

- 3.81 For international students and some other visa holders there is also the fact, as noted by Reilly, that they may have come from countries where government is often considered repressive rather than protective, thus making them suspicious of government authorities and more reluctant than others in the community to access the resources of enforcement agencies such as the FWO.
- 3.82 The decided cases discussed later in this report, in Chapter 7, provide some examples of circumstances where visa holders may be undertaking unpaid work. Young tourists for a variety of reasons, including wanting to gain more ‘experience’, may work unpaid. Such was the situation, for example, in *Braun v Minister of Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 152.
- 3.83 Anecdotally, we have heard stories of young tourists who seem to be happy to gain work experience in regional areas in exchange for accommodation. As is also discussed in more detail in Chapter 7, some organisations, such as Willing Workers on Organic Farms (WWOOF) encourage such work.⁸¹ Some young tourist workers particularly anxious to extend their holiday are likely to become willing participants in such schemes.
- 3.84 Indeed, the period of transition from one visa sub class to another appears to be a particularly precarious time, especially where the visa holder is beholden to the person for whom they are working as the sponsor of their visa. During our research we became aware of the following case, which was referred to the FWO by DIAC for investigation:

⁷⁹ Available at http://www.humanrights.gov.au/racial_discrimination/international_students.html (accessed 24 October 2012).

⁸⁰ Reilly, above at 186–92.

⁸¹ See <http://www.wwoof.com.au/> (accessed 4 November 2012).

Case study 8: Unpaid work as a trainee accountant

A young Chinese man, B, was on a temporary study visa and had applied for a permanent visa through the Regional Sponsored Migration Scheme. While awaiting that visa he had been working with an accountancy firm. He had been promised employment with the company once the visa was granted. B had initially said to DIAC that he was undertaking 'voluntary work experience' for three days a week as an 'unpaid trainee', but the work done included productive work which was charged to clients. However later, during the course of FWO investigations, B informed officers that he was not dissatisfied with his work conditions and no longer wanted to proceed with any claims.

Source: FWO files

It is not difficult to envisage the kinds of pressure, unspoken or otherwise, that B was under. Without B's co-operation there would be little chance of successfully pursuing the matter through the courts because other critical material, such as records of hours worked, would not be available.

- 3.85 There is other evidence from investigations conducted by FWO that unpaid work of the types examined by this report is an area of concern with migrant workers. The potential for abuse of such workers is demonstrated in a case initiated by the FWO in July 2012 concerning two Fijian workers who were alleged to be working eight hours per day and seven days a week on the restoration of a barge at Port Adelaide, in return for a 'living allowance' of \$100 per day.⁸² According to the FWO, the two men, in Australia on a sub-class 456 Short Stay Business visa, were working as part of a purported unpaid training program provided by the 'Adelaide Nautical College'. This body was not a registered training provider and the work was not part of any formal vocational placement course under the Fair Work Act. Documentation attached to the visa application made no mention of a training program, but referred to work as part of a crew. In gathering the evidence for this case it was evident the workers felt vulnerable and feared not being allowed to return to Australia. While the case has yet to be heard by the Federal Magistrates Court (or the Federal Circuit Court as it

⁸² See FWO, 'Fijian workers allegedly underpaid \$25,000 whilst working at Port Adelaide docks', media release, 25 July 2012, <http://www.fairwork.gov.au/media-centre/media-releases/2012/07/pages/25072012-devine-prosecution.aspx> (accessed 12 September 2012).

becomes in 2013), if the allegations are proved it appears to be a strong example of the vulnerability of many migrant workers to unpaid work.⁸³

3.86 When Stephen Howells submitted his *Review of the Migration Amendment (Employer Sanctions) Act 2007* to DIAC in 2011,⁸⁴ the scale of the problem regarding migrants working without permission was evident. His *Review* indicated that there were up to 100,000 such migrant workers in Australia at any one time. These include those who overstay their visa and work, those on visas which do not have work rights (for example, tourists), and those who work beyond their limited work rights (for example, international students and those on working holiday visas). The consequences of this were identified as serious: first, because it represented a threat to national sovereignty in terms of what it demonstrated about Australia's control of immigration; and secondly, such a situation was one in which intermediaries could exploit vulnerable workers. The problem of unpaid work as examined in this report is a related but slightly different one, because according to its wording the Migration legislation recognises unpaid work as 'work' for the purposes of the legislation (see 7.1–7.2). However, it is clear that those engaged in these unpaid work relationships may potentially also be covered by the Fair Work Act – a point to be discussed further in Chapters 4 and 6.

Conclusion: What Do We Know?

3.87 It should be clear that we are not in a position to say anything very definite or precise about the prevalence of unpaid work experience in Australia, other than in relation to the (relatively non-problematic) case of secondary school students. But it seems to us that the sheer weight of the anecdotal evidence justifies the following conclusions:

- (a) a significant number of workers, but especially younger workers, are asked or required to undertake unpaid job trials (sometimes under the guise of 'unpaid training');

⁸³ For a further possible example, see the proceedings instituted on 30 November 2012 by the FWO against two IT consultancy companies, Konsulteq Pty Ltd and Konsulteq Upskilling & Training Services Pty Ltd, and their director, Pradeep Gaur: see 'Melbourne IT companies face court over alleged sham contracting and underpayments of foreign workers', Media Release, 9 January 2013, <http://www.fairwork.gov.au/media-centre/media-releases/2013/01/Pages/20130109-konsulteq-prosecution.aspx> (accessed 9 January 2013)..

⁸⁴ <http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/> (accessed 11 November 2012).

- (b) unpaid internships and other forms of work experience are not confined to authorised education or training courses, or to arrangements that involve ‘volunteering’ in the sense described in Chapter 1;
- (c) in some industries, such as the print and broadcast media, such arrangements are a common (and perhaps *the* most common) prelude to securing paid work; and
- (d) there is reason to suspect that a growing number of businesses are choosing to engage unpaid interns to perform work that might otherwise (and perhaps in other businesses *is* otherwise) done by paid employees, especially in occupations that are considered particularly attractive or for which there is an oversupply of qualified graduates.

To that last, we would add – though this is more a matter of supposition – that if left unchecked, such a trend is likely to gather pace, as it has done in countries such as the United States, for the simple reason that some employers will be forced by their competitors into a ‘race to the bottom’.

3.88 We are fortified in these conclusions by two factors. The first is that almost nobody whose views we have sought or encountered has suggested that these arrangements are not a feature of the Australian labour market. We *have* been told that they are not a feature of certain industries, or, more commonly, that they are beneficial arrangements that should not be discouraged or suppressed. But that last type of view goes to the question of what (if anything) should happen by way of regulatory response, not whether there is an issue to address. The second factor is the outcome of the ACEN and student surveys we undertook. They may have been limited and small-scale, but in each case they confirmed the existence of extracurricular unpaid work experience arrangements – and in the case of law students, on a much more common basis than we had supposed.

3.89 On the other hand, one practice reported as occurring overseas that we did not really encounter in our research is that of unpaid internships being ‘auctioned’ off – that is, of young workers bidding to see who can buy the opportunity to undertake a highly sought after (yet unpaid) position.⁸⁵ There *are* workers in Australia who are prepared to pay thousands of dollars to agencies in order to place them in unpaid internships, but these appear to be largely (though not completely) confined to

⁸⁵ See eg Perlin, *Intern Nation*, ch 8.

international students or graduates who are in Australia on temporary visas, some seeking permanent residence.

- 3.90 To conclude then, while we cannot begin to estimate the exact percentage of workers who undertake unpaid work experience, we are sure it is not an insubstantial number, especially in certain industries. The situations described in this chapter are unlikely to be isolated occurrences. There is clearly a need for further and much more detailed research to establish the scale of the phenomenon, but we strongly believe that something is happening that warrants the attention of the FWO. What might be done by that agency is something to which we return in Chapter 9, but first we turn to the current legal position in Australia.

4

Regulation of Unpaid Work Experience: The Fair Work Act

- 4.1 This chapter examines the potential application to unpaid work experience arrangements of the *Fair Work Act 2009*. The Fair Work Act is singled out for attention not only because it is the main labour statute in Australia, but because it is the legislation under which the FWO is established and which is the main focus of its compliance responsibilities. The possible application of other statutory regimes is considered separately in Chapter 5.
- 4.2 The Fair Work Act is overwhelmingly concerned with the regulation of *employment*. There are some exceptions. Some of the ‘general protections’ in Part 3-1 against wrongful or discriminatory conduct apply in relation to a ‘contract for services’, whereby an ‘independent contractor’ performs work for a ‘principal’.¹ But for the most part, the Act creates rights or imposes obligations in respect of arrangements between *employers* and *employees*.

The Meaning of the Terms ‘Employer’ and ‘Employee’

- 4.3 There is no comprehensive definition of the terms ‘employer’ and ‘employee’ in the Fair Work Act. Instead, each Part of the Act has a section at the start that indicates whether it applies to ‘national system employers’ and ‘national system employees’, or more broadly to employers and employees in the ‘ordinary’ sense of those terms.
- 4.4 Most Parts – such as those dealing with the National Employment Standards, modern awards, enterprise agreements and unfair dismissal – apply only to employment arrangements entered into by a ‘national system employer’. Section 14(1) defines that term in such a way as to bring the following employers within the coverage of the Act:
- trading, financial or foreign corporations;

¹ As to the distinction between a contract for services and an employment contract, see 6.4.

- the Commonwealth and its agencies;
- those who employ flight crew officers, maritime employees or waterside workers in connection with interstate or overseas trade or commerce;
- bodies incorporated in a Territory; and
- any other persons or entities that carry on an activity (whether of a commercial, governmental or other nature) in a Territory and employ persons in connection with that activity.

4.5 Sections 30D and 30N also treat as a national system employer any person or body that falls within a referral of power from a State to the Commonwealth. In 2009, all States other than Western Australia passed referral legislation for this purpose.² These have the effect that in Victoria all employers are subject to the Fair Work Act; in Tasmania all except State public sector employers; and in New South Wales, Queensland and South Australia all except State public sector and local government employers.³ Certain public corporations are also formally declared not to be national system employers pursuant to section 14(2)–(5) of the Fair Work Act, even if they would otherwise fall within the section 14(1) definition.⁴

4.6 What sections 14, 30D and 30N fail to do is to indicate what the term ‘employer’ actually means. The same is true of the term ‘employee’, as used in the definition of ‘national system employee’ in sections 13, 30C and 30M. There is nothing new in this. The federal statutes that preceded the Fair Work Act – the *Conciliation and Arbitration Act 1904*, the *Industrial Relations Act 1988* and the *Workplace Relations Act 1996* – adopted the same approach. Each statute was drafted on the apparent assumption that a court would determine the meaning of those terms by reference to their established meaning at *common law* – that is, the judge-made law that

² See *Industrial Relations (Commonwealth Powers) Act 2009* (NSW); *Fair Work (Commonwealth Powers) Act 2009* (Vic); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Fair Work (Commonwealth Powers) Act 2009* (SA); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas).

³ See further B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, ch 5. At the time of writing, Queensland was considering whether to ‘pull out’ of the national system: see Office of Fair and Safe Work Queensland, *Should Queensland Maintain or Terminate the Referral of Industrial Relations Jurisdiction for the Unincorporated Private Sector to the Commonwealth?*, Issues Paper, December 2012, http://www.justice.qld.gov.au/_data/assets/pdf_file/0012/171102/ir-referral-issues-paper.pdf (accessed 18 December 2012).

⁴ See *Fair Work (State Declarations – employers not to be national system employers) Endorsement 2009*.

operates in default of any legislation.⁵ The same has so far been assumed to be true of the Fair Work Act.⁶

- 4.7 There is a crucial difference here between the approach taken to employment legislation by Australian courts and tribunals, and those in the United States. In Australia, any use by a legislature of terms such as ‘employer’, ‘employee’ or ‘employment’ will usually be construed as a reference to the common law conception of employment. In other words, it is generally assumed that these terms *have the same meaning* from one statutory scheme to another, regardless of the fact each scheme may have different objects.⁷ In the US, the notion of ‘employment’ takes its meaning from the scope and purpose of each regime.⁸ It is only rarely that the same approach is taken in Australia,⁹ and there has been no sign of it to date in relation to the Fair Work Act. Indeed given the long history of Parliaments *not* seeking to define ‘employment’, and the fact that there are references to the common law definition in the supporting materials for the Fair Work Act,¹⁰ it would be a brave judge who sought to take a different approach.
- 4.8 At any event, for the purpose of the common law, an employment relationship can only be said to exist where a person agrees to perform work pursuant to a ‘contract of service’, or contract of employment. The key question of whether an unpaid work experience arrangement can be characterised as such a contract is dealt with in Chapter 6.

⁵ See *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138; *ACE Insurance Ltd v Trifunovski* (2011) 284 ALR 489 at [23]–[28].

⁶ See eg *Cai v Rozario* [2011] FWA 8307 at [25]; *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677 at [95].

⁷ See A Brooks, ‘Myth and Muddle – An Examination of Contracts for the Performance of Work’ (1988) 11 *University of New South Wales Law Journal* 48 at 90–101. This is not to say that the particular legislative context may not sometimes influence the way the common law test is applied, especially in distinguishing between employees and contractors: see eg *Borg v Olympic Industries Pty Ltd* (1984) 26 ALR ¶363; *Articulate Restorations and Development Pty Ltd v Crawford* (1994) 57 IR 371 at 380–1. But it is still the same test that is being applied.

⁸ As in the case of the *Fair Labour Standards Act 1938*: see 8.129–8.132.

⁹ See eg *Holloway v Gilport Pty Ltd* (1995) 59 IR 305, discussed in 5.67; and see also *Broussard v Minister for Immigration Local Government and Ethnic Affairs* (1989) 21 FCR 472 (see 7.6).

¹⁰ For example, the Explanatory Memorandum for the Fair Work Bill 2008 refers (at para 28) to national system employers and national system employees being ‘employers and employees (at common law)’.

Deemed Employees

4.9 Historically, it has been common for State industrial laws (see 5.14) to ‘deem’ certain workers to be employees, even if they would not fall within the common law conception of that term. But this has been more unusual under federal law. The only deeming provision in the Fair Work Act is one that was recently added, with effect from July 2012.¹¹ Section 789BB provides that ‘TCF contract outworkers’ are taken to be employees for various purposes under the legislation. By virtue of the various definitions in sections 12 and 789BB, this covers workers in the textile, clothing or footwear industry who perform work at residential or other non-business premises, pursuant to a contract for services rather than a contract of employment.

The ‘Vocational Placement’ Exception

4.10 Importantly, there is one type of work arrangement that is *not* to be treated as involving employment for the purpose of the Fair Work Act, even if it would otherwise fall within the common law conception of an employment relationship. Sections 13, 15(1)(b), 30C(1)(a) and 30M(1)(a) each provide that the terms ‘employee’ or ‘national system employee’ do not include a person who is ‘on a vocational placement’.¹²

4.11 Section 12 provides as follows:

vocational placement means 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.

Besides ‘employer’, none of the various words and phrases used here are defined elsewhere in the Fair Work Act. Nor are they defined in the *Acts Interpretation Act*

¹¹ See *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*.

¹² For similar exclusions, see *Fair Work (Registered Organisations) Act 2009* s 6 (definition of ‘employee’); *Fair Work (Building Industry) Act 2012* s 4(2)(c).

1901. For example, the term ‘administrative arrangement’ does not appear to bear any technical meaning, although it is commonly used in federal legislation.¹³

Background

- 4.12 The exclusion of individuals on a vocational placement, and the definition of that term which now appear in the Fair Work Act were first inserted into the then *Workplace Relations Act 1996* by the *Workplace Relations and Other Legislation Amendment Act 1996*, among a large number of other amendments. The insertion of the vocational placement exception was not the subject of any comment in the second reading speech of the then Minister for Industrial Relations, Peter Reith. Nor was its insertion discussed in any detail in the Explanatory Memorandum that accompanied the legislation when it was introduced into Parliament. It was incorporated into the Fair Work Act, again without any comment.

Case law

- 4.13 Since its introduction the vocational placement exception has been very little discussed in case law. Where some aspect of it has been in issue, there has been a tendency to pass over it rapidly without considering each of the three elements of the definition. In *Corner v SkyCity Adelaide Pty Ltd* [2010] FWA 9259, for example, the issue arose in the context of an unfair dismissal claim. The applicant had responded to an advertisement from the casino inviting applicants to undertake an unpaid five-week training course in Blackjack dealing. The advertisement stated that successful completion of the course guaranteed a permanent part-time position at Adelaide’s SkyCity Casino. The applicant undertook the course and began employment with the casino which was subsequently terminated. For the purpose of her unfair dismissal claim it was necessary to work out when her employment had begun and whether the five-week training period counted as part of her employment. Senior Deputy President O’Callaghan concluded that the parties had not entered into an employment contract at the time the applicant began the training, in part because she was on a vocational placement. In determining that the applicant was on a vocational placement, the Senior Deputy President noted that she had not been paid for it and it had been part of a training course. However, the

¹³ To take just two examples, see *Acts Interpretation Act 1901* s 19BA; *Social Security (Administration) Act 1999* s 10. Compare the more specific uses of the term in the *Administrative Arrangements Act 1983* (Vic) and section 36 of the *Acts Interpretation Act 1954* (Qld).

requirement that the training course be ‘authorised’ under a law or an administrative arrangement of the Commonwealth, a State, or a Territory was not addressed in the decision.

- 4.14 Similarly, in *Sharp v JS Plumbing Ltd* [2011] FWA 7076 Commissioner Cribb had to determine whether the applicant could bring an unfair dismissal claim in relation to the termination of his training arrangement in Queensland. The Commissioner briefly considered whether the applicant’s position was affected by the vocational placement exception in the Fair Work Act but concluded (without addressing the criteria) that the applicant was under a ‘training arrangement’, as defined in section 12,¹⁴ rather than a vocational placement.

Elements of the definition

- 4.15 The definition of ‘vocational placement’ contained in the Fair Work Act is a complex one and, with respect, not particularly well drafted. There are three requirements, all of which must be satisfied in order for a particular arrangement to qualify for the exception.
- 4.16 The first is that the placement must not involve ‘a person’ – presumably the person undertaking the placement, though the provision does not say as much – being entitled to any remuneration. The term ‘remuneration’ is not defined in the Act. But from previous case law on the *Workplace Relations Act 1996*, it would seem clear that it is to be regarded as having a broader meaning than the word ‘wages’, extending to any form of ‘recompense or reward for services rendered’, including ‘non-cash benefits’.¹⁵ It would not matter how valuable these benefits are, since the definition refers to ‘any’ remuneration. It would also not seem to matter whether the remuneration is provided by the employer or by someone else. But payments by way of reimbursement for expenses incurred are not ordinarily treated as remuneration.¹⁶ It should also be stressed that a placement is only disqualified from falling within the definition if there is an *entitlement* to the remuneration. So if, for

¹⁴ That is, ‘a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees’. As to State and Territory training laws, see 5.21-5.28.

¹⁵ See *Oliveri v Australian Industrial Relations Commission* (2005) 145 IR 120 at [25]–[26]; *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 at 81. As to the range of ‘benefits’ that have been accepted as falling within the concept of remuneration, see eg T Donaghey, *Termination of Employment*, LexisNexis Butterworths, Sydney, pp 135–9.

¹⁶ See eg *Bell v McArthur Riving Mining Pty Ltd* (1998) 81 IR 436 at 449.

example, a person received a gratuity or bonus, without any obligation on the part of the payer, the arrangement would not for that reason alone be disqualified from falling within the exception.

- 4.17 Secondly, paragraph (b) of the definition says that the placement must be undertaken as a requirement of an education or training course. The term ‘course’ is ambiguous. It is sometimes used as a synonym for a complete program, degree or qualification: for example, a Certificate in Business Administration, a Diploma of Education or a Bachelor of Laws. But it can also be used to refer to a *component* of such a program, or what is sometimes called a ‘subject’ or ‘unit’. Given the context, and in particular the need to meet the authorisation criterion discussed below, it perhaps makes more sense to adopt the first meaning, as referring to a complete program. But that in turn then creates a potential issue with the meaning of the word ‘requirement’. Suppose, for example, that a placement is part of an *elective* subject or unit which is not itself a core element of a particular degree or diploma. Can such a placement be said to be ‘required’? On a strict view, the answer would be no, since the student may complete the qualification without doing the placement. This would have obvious consequences for the many university electives (see 3.32–3.33) which have been created or designed to give students the opportunity to undertake some form of work experience for credit towards a degree. But it is also possible to adopt a broader interpretation, whereby the effect of a student enrolling in or completing an elective is to *make* the placement a ‘requirement’, which can then in turn bring it within the Fair Work Act exception. In our opinion, this is the preferable interpretation; but unless and until the matter is considered by a court, the point cannot be considered to be free from doubt.¹⁷
- 4.18 As for the third requirement, given the structure of the definition a strictly grammatical reading gives the appearance that it is the *placement* that must be ‘authorised under a law or an administrative arrangement of the Commonwealth, a state or a territory’. It arguably makes more sense, however, to read the definition as meaning that it is the ‘education or training course’ referred to in paragraph (b) of the definition that requires authorisation. Certainly if a course were authorised in the relevant sense, it could be said in turn that any placement organised as part of that course would itself be authorised.

¹⁷ Compare the discussion in 7.41-7.44 concerning the equivalent (but differently worded) exception in the Migration legislation, as to what constitutes ‘work’ by international students.

- 4.19 Finally, it may be noted that each of the elements set out in paragraphs (a), (b) and (c) are all expressed as qualifications on the word ‘placement’. This in turn suggests that there must be some procedure or process for the ‘placing’ of individuals. For example, a period of work experience undertaken by a student at an organisation entirely on their own initiative would arguably not qualify as a ‘placement’, even if the student persuaded an educational institution to grant them credit for it. The concept of a placement surely connotes some form of arrangement between the institution and the host organisation.
- 4.20 If the various elements of the definition are satisfied, then it appears – though once again this is not spelled out as clearly as it might be – that the ‘person’ undertaking the placement is not to be regarded for the purposes of the Fair Work Act as an employee of the ‘employer’ with whom the placement is undertaken; though they might still qualify as an employee for other legal purposes. If employed by someone else to do other work, the person concerned would also presumably retain their status as an employee of that other employer.
- 4.21 If, on the other hand, one of the required elements of the exception is *not* satisfied, this does not automatically mean that the person concerned is an employee of the ‘employer’ for whom they are performing the relevant work. It may still turn out that they do not have a contract of employment. By the same token, it may be noted that if it were not *possible* to have an employment contract in this situation, there would be no need for the exception. That is a point to which we return in Chapter 6.

What does the exception cover?

- 4.22 There are some types of unpaid work experience which are clearly intended to fall within the Fair Work Act’s vocational placement definition. Work experience completed as part of the requirements of a university or TAFE course in Australia would plainly do so – their courses would surely be taken to be authorised by the laws or administrative arrangements which establish or accredit them. Presumably too a course conducted overseas could also count – but *only* if it was authorised under a federal, State or Territory law or administrative arrangement. A course or program authorised overseas, but not locally, would not fall within the definition.
- 4.23 Secondary school students who undertake work experience organised or required by their school or local education department would likely fall within the vocational placement exception, with their courses being taken to be authorised by the instruments which establish their school or which allow such schools to be

established – even in States or Territories which do not have specific legislation about work experience of the type considered in Chapter 5. The only issues might be whether the placement is in each case a ‘requirement’ of the relevant program, or indeed whether there is a ‘placement’ at all if the students themselves have made all the necessary arrangements to find and then attend a suitable workplace.

- 4.24 Courses which are on the National Register of Information on Training Packages, Qualifications, Courses, Units of Competency and Registered Training Organisations, established under section 216 of the *National Vocational Education and Training Regulator Act 2011*, would naturally fall within the definition, provided once again the ‘requirement’ and ‘placement’ elements could be satisfied.
- 4.25 It is less clear whether the government assistance programs discussed in Chapter 3 would be covered. For example, the unpaid work placement that Job Services Australia providers can arrange for job seekers would appear to be authorised by at least an administrative arrangement; while the NSW Workcover Authority’s trial work scheme appears to be authorised by section 53 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), which permits WorkCover to ‘institute, administer or co-ordinate vocational re-education and rehabilitation schemes for injured workers’. But can these be described as training courses? And in addition, if the arrangement is effectively voluntary, is there truly a ‘requirement’?
- 4.26 To take a clearer example, the Law Society of South Australia has for several years offered a training course for law students, the Graduate Diploma of Legal Education (GDLP), a key component of which is a six or seven week placement in a law firm. Completion of the GDLP (or an equivalent qualification) is a condition of admission to practice in the Supreme Court of South Australia. Placements are paid or unpaid at the discretion of the law firm. The requirement that lawyers have completed the GDLP is imposed by the Legal Practitioners Education and Admission Council (LPEAC), a body established by the *Legal Practitioners Act 1981* (SA). The LPEAC Rules 2004 are published in the South Australian Government Gazette. This would appear to satisfy the requirement that the placement be authorised, and providing the placement was unpaid, would therefore fall within the exception.¹⁸

¹⁸ In April 2012, prompted by the announcement of this research project, the Law Society issued ‘Guidelines for remuneration of GDLP Students or Law Clerks’: see http://www.lawsocietysa.asn.au/PDF/GDLP_Guidelines_for_remuneration.pdf (accessed 13 November 2012).

- 4.27 Another form of work experience that may be covered by the exception is the ‘Professional Year’ programme advocated by the Department of Immigration and Citizenship (DIAC) as a means by which foreign students who have completed an undergraduate or postgraduate award in Australia can earn points towards obtaining a General Skilled Migration Visa, pursuant to regulation 2.26AA of the *Migration Regulations 1994*. ‘Professional year’ is defined in this regulation as ‘a course specified by the Minister in an instrument in writing for this definition’. The Professional Year is described on the DIAC website as a ‘structured professional development program combining formal learning and workplace experience’, which aims to ‘familiarise participants with the norms and values in the Australian workplace’ and includes an internship ‘to educate participants about all aspects of work practices in an Australian company’.¹⁹ More is said about the role of the Professional Year in Chapter 7.
- 4.28 To date five Professional Year courses have been specified by the Minister, in the areas of computing science, accounting, and engineering. Navitas Professional Training Pty Ltd (trading as Navitas Workforce Solutions) is one of a number of organisations that offers these courses, in association with the professional organisations specified by the Minister (including Engineers Australia and the Australian Computer Society).²⁰ The course includes a professional internship lasting for 12 weeks. Participants in the programme receive a ‘Professional Year certificate’ and a Certificate III in Business which is said to be ‘government accredited’. Navitas is a Registered Training Organisation (RTO) under the *National Vocational Education and Training Regulator Act 2011* and is authorised to provide the Certificate III. On that basis, if the internship is a course required for the Certificate III it would, as with other courses provided by RTOs, fall within the definition. But what if Navitas or an equivalent organisation did not offer that qualification in addition to the ‘Professional Year certificate’? No mention is made of the Professional Year in the entry for Navitas in the government register of qualifications it is entitled to provide.²¹ Would this kind of internship then qualify as being ‘authorised under a law or an administrative arrangement of the Commonwealth, a state or a territory’?

¹⁹ <http://www.immi.gov.au/skilled/general-skilled-migration/professional-year.htm> (accessed 20 October 2012).

²⁰ The Australian Computing Society has a number of ‘accredited partners’ besides Navitas, including Central Queensland University, Swinburne University of Technology, Victoria University and Professional Pathways University: see <http://www.acs.org.au/migration-skills-assessment/professional-year-program/accredited-partners> (accessed 20 October 2012).

²¹ See www.training.gov.au (accessed 20 October 2012).

Presumably it would, given the link back to the *Migration Regulations 1994* and the process for Ministerial approval.

- 4.29 There are other forms of work experience which would clearly fall outside the ‘vocational placement’ exception. These include the internships regularly being advertised or promoted today without any connection to a course of study, as noted in Chapter 3. There may also be institutions which purport to provide training or an educational qualification in return for unpaid work, but which do so without any connection to an *authorised* training regime.²² To the extent that these internships and forms of work experience are not part of an education or training course authorised under an administrative arrangement of the Commonwealth of a State or a Territory, it remains possible that the participants might be employees for the purpose of the Fair Work Act.

‘Usually Employed’

- 4.30 The various definitions of ‘employee’ or ‘national system employee’ in the Fair Work Act each include a person who is ‘usually employed’ by an employer or national system employer.²³ Likewise, a person will be an employer or national system employer, so far as that person ‘usually employs’ an individual.²⁴
- 4.31 In *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 IR 165 at [30], it was noted that when the definition of ‘employé’ in the *Conciliation and Arbitration Act 1904* was originally expanded in 1910 to include ‘any person whose usual occupation is that of employé in any industry’, the purpose was to ‘meet the case of unemployed persons in an industry, since it is conceivable that there may be a dispute in an industry where in fact there are no contractual relations existing at the time’. An equivalent change was made to the definition of ‘employer’ in 1952: *ibid* at [31]. Justice North took the view that, even in the 1904 Act, the extension of these definitions was not limited to provisions dealing with the resolution of industrial disputes. He went on to hold that a company could be liable under the *Workplace Relations Act 1996* for refusing to re-employ a group of its former employees for reasons prohibited under the Act. Even though at the time it did not

²² As, for example, is alleged to be the case in relation to the proceedings being brought by the FWO against the Devine Marine Group: see 3.85.

²³ See *Fair Work Act 2009* ss 13, 15(1)(a), 30C(1)(a), 30M(1)(a).

²⁴ See *Fair Work Act 2009* ss 14(1), 15(2), 30D(1)(a), 30N(1)(a).

currently employ anyone, it was ‘usually’ an employer and hence was covered by the relevant prohibitions.

- 4.32 In the course of his judgment, and after considering various authorities,²⁵ Justice North observed (at [43]):

Whether a person is usually an employer is a question of fact to be determined in the light of all the circumstances in each case. There is no formula appropriate in all cases which can be used to answer the question. As to a past employment relationship, it may be relevant to know how long ago the person ceased to be an actual employer or to understand why the person ceased to be an actual employer. As to future employment, it may be relevant to know when such employment is to commence or resume, and the circumstances of any delay in commencing or resuming employment.

The same would presumably apply in relation to determining whether a person is ‘usually employed’.

- 4.33 The question is whether the extended concept of employment could, for example, cover a situation where a person, in the course of undertaking work experience, performs work of a kind that would *usually* be done by a (paid) employee; or where a person who hopes or expects to perform work pursuant to an employment contract agrees to perform work as part of an unpaid trial, before being hired. This would effectively equate ‘employment’ under the Fair Work Act with the way in which ‘work’ is defined under the migration legislation discussed in Chapter 7: that is, as an activity that ‘normally attracts remuneration’ (*Migration Regulations 1994* reg 1.03).
- 4.34 In our view, this is a possible but unlikely interpretation of the legislation. Taken in its historical context, the ‘usually employed’ extension is more obviously intended to cover a situation where an employee works intermittently for an employer, or has just ended an employment relationship; or where an employer ordinarily has employees but at a particular point in time does not have anyone on staff.

²⁵ Including *R v Findlay; Ex parte Commonwealth Steamship Owners' Association* (1953) 90 CLR 621 at 631, where Justice Dixon noted that under the extended definition, the 1904 Act could apply even in the absence of ‘an existing relation of master and servant’. The case concerned a claim for ‘daily hire’ wharf clerks to be paid an allowance for attending their usual place of work but not being offered employment.

Effect of the Fair Work Act

- 4.35 If a work experience arrangement (a) involves an employment contract, as discussed in Chapter 6, (b) is with an employer that qualifies as a national system employer (see 4.4–4.5), and (c) does not fall within the vocational placement exception just discussed, then a number of consequences follow.

Awards

- 4.36 For example, the employer will be obliged to ensure that the employee is paid at least the minimum wage rates set by any applicable award. Most forms of employment – and in particular non-managerial employment – are covered by one of the 122 ‘modern awards’ that took effect in January 2010 pursuant to Part 2-3 of the Fair Work Act. These typically set different rates of pay for a range of jobs within the relevant industry or occupation, varying according to skill levels, qualifications and/or length of service. There are also usually special rates for junior employees (those under 21) that vary according to their age, and for employees who have a disability that affects their productive capacity. According to a paper prepared by the federal government for a review of training wages initiated by Fair Work Australia (or the Fair Work Commission as it is called from 1 January 2013),²⁶ 46 modern awards also have rates that specifically apply to apprentices, typically expressed as a percentage of the ordinary rate that increases as the apprenticeship progresses. 95 modern awards have a schedule of rates for ‘trainees’, a term defined to cover employees undertaking training pursuant to a contract which is registered with the relevant State or Territory training authority (see 5.22). The minimum rate to which trainees are entitled varies according to the training package and certificate they are undertaking, their highest level of schooling, and the number of years since leaving school.
- 4.37 Besides basic wage rates, awards typically regulate start and finish times, shift lengths, rostering practices and the number of ‘ordinary hours’ to be worked over a week (or in some cases a two- or four-week period). Additional rates are typically required for overtime work, and ‘penalty rates’ may also be set for work at night, on the weekend or on a public holiday. A special loading must be paid to anyone

²⁶ Department of Education, Employment and Workplace Relations, ‘Scoping Paper for Fair Work Australia on Decision Points for Review of Apprentice and Trainee Wages and Conditions’, May 2012, available at http://www.fwa.gov.au/documents/awardmod/review/Scoping%20Paper_DEEWR.pdf (accessed 21 October 2012).

engaged on a casual basis (to compensate for the annual leave and other entitlements they typically forego). Allowances may also be payable in various circumstances, including for dirty work, provision of equipment or clothing, work-related travel, or work in remote areas. In addition, modern awards require employers to consult with their employees over any significant change that might affect their employment, and set down a procedure for resolving workplace disputes.

Enterprise agreements

- 4.38 Over 40% of employees in Australia are covered by registered collective agreements, most of them enterprise agreements made under Part 2-4 of the Fair Work Act, or under equivalent provisions that operated prior to July 2009.²⁷ Such agreements generally cover all or part of a single business or organisation and displace the operation of any otherwise applicable award. But to be registered, an enterprise agreement must offer conditions that are at least as favourable, when taken as a whole, as those mandated by the award(s) it is supplanting; and base rates of pay cannot fall below those prescribed by the relevant award.²⁸ For these reasons, enterprise agreements tend to deal with a similar range of matters to those dealt with in the ‘underpinning’ award, including both wages and working time.

National minimum wage

- 4.39 If no award or agreement covers the type of work being done by a national system employee, they must be paid in accordance with the national minimum wage order that the Fair Work Commission is required by section 285(2)(c) of the Fair Work Act to make each year. As a result of the most recent annual wage decision,²⁹ the rate currently set for adults who are not covered by a training arrangement and do not have a disability is \$606.40 per week or \$15.96 per hour. Special rates apply to juniors, apprentices, trainees (in the sense explained above of those working under registered training contracts) and workers with a disability.

²⁷ As to coverage of collective agreements, see J Edwards, R McCallum and M Moore, *Towards More Productive Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, 2012, pp 57–9.

²⁸ See *Fair Work Act 2009* ss 186, 193, 206.

²⁹ *Annual Wage Review 2011–12* [2012] FWAFB 5000.

Other rights and obligations

- 4.40 Besides complying with any applicable award, enterprise agreement or national minimum wage order, a national system employer must comply with the National Employment Standards (NES) in Part 2-2 of the Fair Work Act. Even for short-term employees, these cover matters such as annual leave, personal/carer's leave, public holidays, community service leave, maximum hours of work and notice of termination; although some entitlements (such as to annual leave) do not apply to casuals.³⁰ When an employee is engaged, they must also be given a Fair Work Information Statement, a two-page document issued by the FWO. A range of other entitlements under the NES cut in after one year's continuous service, including parental leave, redundancy pay, and the right for certain parents to request flexible working arrangements. There are unlikely to be many work experience arrangements that last for a year, although given some of the examples discussed in Chapter 3, the possibility cannot be ruled out.
- 4.41 National system employers are also obliged by section 535 of the Fair Work Act to keep records as to each of their employees, for at least seven years. These are required to include personal information, together with details of the nature of the employment, any wages paid, working hours (at least for some workers), leave accruals and a range of other matters, as prescribed by Division 3 of Part 3-6 of the *Fair Work Regulations 2009*. Section 536 of the Act also obliges an employer to provide each employee with a pay slip, though only in the event that they are actually paid for performing work.
- 4.42 Being a national system employee for the purpose of the Fair Work Act also has a range of other consequences, including:
- having to be given certain information about any proposed enterprise agreement that will cover the job the employee is doing, and an opportunity to vote on whether such an agreement should be approved;
 - being eligible to belong to a trade union registered under the *Fair Work (Registered Organisations) Act 2009*, and allowing officials of such a union to exercise certain statutory powers in relation to the employee (such as

³⁰ Note that to be engaged as a casual, most modern awards require the employee to have been 'engaged as such': see eg Clerks – Private Sector Award 2010 cl 12.1. If a person has not been told they have been hired as an employee, much less as a casual, it may be difficult later to argue that they have casual status if they do indeed turn out to be an employee.

entering workplaces to hold discussions, or organising ‘protected’ industrial action in relation to a proposed enterprise agreement);

- being able to lodge an unfair dismissal claim under Part 3-2 of the Fair Work Act, if terminated after at least six months’ continuous service as an employee (or 12 months in the case of an employer with fewer than 15 employees); and
- being protected, under Part 3-1, against various forms of ‘adverse action’ – such as for seeking to exercise a ‘workplace right’ or engaging in ‘industrial activities’.

4.43 The last-mentioned provisions, known as the ‘general protections’, also prohibit certain forms of coercion or misrepresentation in relation to the exercise, non-exercise or effect of a person’s workplace rights.³¹ They clearly protect ‘prospective employees’ against not being hired because of conditions or protections they would enjoy as an employee.³² But they would not, on the face of it, have any operation where a person undertaking work experience is misled into believing that they will be offered employment, or coerced into agreeing that they do not have the status of an employee. Whether there might be a remedy in these situations under the provisions of the Australian Consumer Law is a matter dealt with in Chapter 5.

4.44 The general protections provide additional protection against various forms of discrimination, as set out in section 351. But once again, these only protect prospective employees in relation to whether employment is offered, or the terms of such employment: see 5.51.

Consequences of non-compliance

4.45 Unfair dismissal complaints may result, if successful, in either reinstatement for the dismissed employee or an award of up to six months’ remuneration by way of compensation. Otherwise, a breach of any of the various obligations mentioned above, including a failure to comply with an award, the NES or record-keeping requirements, may lead to proceedings being instituted under Part 4-1 of the Fair

³¹ See *Fair Work Act 2009* ss 343, 345. As to the definition of a ‘workplace right’, see section 341. See also the provisions dealing with ‘sham arrangements’ in Division 6 of Part 3-1, which are concerned with misrepresentations or other wrongful conduct concerning a person’s status as an independent contractor, where they either are in fact an employee or used to do the same job as an employee.

³² See item 2 in the table that is included in section 342(1), defining what constitutes ‘adverse action’.

Work Act. These may be brought by the employee in person, by a union acting on their behalf, or by a Fair Work inspector. In some cases, a court hearing such an action may award compensation, or order the reinstatement for a dismissed employee, or grant an injunction to restrain a breach of the legislation. But most commonly, a court will impose a penalty (generally of up to \$6,600 per breach, or \$33,000 per breach in the case of a corporation), and/or order the payment of any moneys due to the employee. Importantly, section 550 of the Fair Work Act permits such orders to be made not just against an employer, but against any person (including a director, manager or external adviser) who is found to have been knowingly involved in a contravention. In practice, the FWO often initiates proceedings against such individuals, as well as the primary infringer.³³

Summary

- 4.46 In summary then, if a person on work experience turns out to be an employee, when they have not been treated as such, the consequences for the organisation that has engaged them may be severe. If the employment relationship is covered by the Fair Work Act, and the vocational placement exception cannot be invoked, the worker will need to be paid for their work at the applicable minimum rate. They are likely to have a claim for unpaid annual leave, while the employer will almost certainly be in breach of their obligations to have supplied a Fair Work Information Statement and to have kept the records required under the legislation. The penalties that may be imposed for failing to meet these various obligations can quickly mount up, not just against the employing organisation, but against managers, directors or even advisers found to have been culpably involved in the contraventions.
- 4.47 By contrast, if a person undertaking work experience does *not* do so pursuant to a contract of employment, as determined under the principles set out in Chapter 6, the Fair Work Act has little if anything to say about their treatment.

³³ For a recent example, see *Fair Work Ombudsman v Henna Group Pty Ltd* [2012] FMCA 244, where two managers (one of whom was also a director) were fined \$30,000 each for their part in the underpayment of a number of employees, in addition to a penalty of \$160,000 on the employing company. Taking action against ‘persons involved’ is an option considered in every matter where litigation is contemplated by the FWO: see ‘Litigation Policy of the Office of the Fair Work Ombudsman’, Guidance Note 1, 2nd ed, July 2011, pp 6–7, available at <http://www.fairwork.gov.au/fwoguidancenotes/GN-1-FWO-Litigation-Policy.pdf> (accessed 29 November 2012).

Regulation of Unpaid Work Experience: Other Laws

- 5.1 In this chapter we consider the potential application to unpaid work experience arrangements of general State industrial laws, as well as more specific legislation dealing with education and training, child employment, work safety, workers compensation, discrimination and superannuation. We conclude by considering the impact of the Australian Consumer Law. The *Migration Act 1958* is dealt with separately in Chapter 7.
- 5.2 We should stress that this is by no means intended to provide a comprehensive examination of the regulation of unpaid work experience. Such an exercise would be beyond the time and resources available for this project. We have chosen instead to focus on certain issues or regulatory regimes which appear to us to be especially important in understanding the potential legal risks and liabilities for an organisation that enters into a work experience arrangement.

State and Territory Industrial Laws

- 5.3 Since the expansion of federal labour regulation, first under the Howard Government's 2005 'Work Choices' amendments and then under the Fair Work Act, State industrial laws have come to cover fewer workers than they previously did. But aside from Victoria, which abandoned the idea of a separate State system in 1996, each State still has a general statute which covers a significant number of workers, predominantly in the public sector.
- 5.4 In this section we identify those laws and briefly analyse their potential application to those undertaking work experience. Before doing so, however, it is necessary to consider the effect of certain federal provisions that constrain the operation of both State and Territory industrial laws. This is important for the operation of both the general statutes and some of the more specific laws considered later in the chapter.

Federal exclusion of State and Territory laws

- 5.5 Section 26 of the *Fair Work Act 2009* makes it clear that in relation to national system employers and employees, the Act is intended to operate to the exclusion of

any ‘State or Territory industrial law’. This term is defined to include the general statutes listed below in 5.10, as well as any other generally applicable State or Territory laws regulating workplace relations or employment conditions. In practice then, as a general rule State industrial laws can only apply to employees who are not national system employees. In New South Wales, Queensland and South Australia that currently means anyone employed in the State public sector or local government; in Tasmania, anyone employed by the State public service; and in Western Australia, anyone employed by an unincorporated body (such as a sole trader or partnership), or by a corporation that is neither a trading, financial or foreign corporation.¹

- 5.6 There are, however, some important exceptions. For a start, the exclusion only catches laws that apply to employment generally. A State or Territory law that is limited to a particular industry or sector will not be excluded by section 26. Nor does the provision prevent even generally applicable laws from regulating work arrangements that do not involve employment.
- 5.7 In addition, section 27 of the Fair Work Act disclaims any intention to exclude certain anti-discrimination laws, as well as any law that deals with a ‘non-excluded matter’. Such matters include workers compensation, occupational health and safety, child labour, training arrangements, long service leave, prescription of public holidays, and claims for the enforcement of employment contracts. As section 29(2) makes clear, these laws are not just allowed to operate in relation to national system employers and employees, but can override any contrary provisions in a federal award or enterprise agreement. But there are limitations. Training or child labour laws, for example, cannot generally regulate employment conditions that are covered by the National Employment Standards (NES) in Part 2-2 of the Fair Work Act, or that can be included in a federal award: see *Fair Work Regulations 2009* reg 1.14.
- 5.8 It should also be noted that even where a State or Territory law deals with a non-excluded matter, it cannot do so in a way that is inconsistent with a federal law. Section 29(2) of the Fair Work Act does seek to minimise this possibility, by providing that modern awards and enterprise agreements are taken to operate subject to State and Territory laws on non-excluded matters. But again, there are similar

¹ As to the difficulty in determining whether an Australian corporation has sufficient trading or financial activities to qualify as a trading or financial corporation, see B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, pp 110–14; and R Owens, J Riley, and J Murray, *The Law of Work*, 2nd ed, OUP, Melbourne, 2011, pp 139–42.

exceptions to those mentioned above for training and child labour laws.²

Furthermore, section 29(2) does not shield State or Territory laws from being inconsistent with other provisions in the Fair Work Act itself.

- 5.9 Besides the Fair Work Act, the operation of State and Territory industrial laws is also constrained by Part 2 of the *Independent Contractors Act 2006*. Section 7(1) provides that a State or Territory law concerned with ‘workplace relations matters’ cannot treat a party to a services contract as if they were an employer or employee. But there are a range of exceptions, similar to those in the Fair Work Act, that preserve the operation of laws on workers compensation, occupational health and safety, discrimination, child labour and so on. The term ‘services contract’ means a contract relating to the performance of work by an ‘independent contractor’. While the latter term is not defined, it has been held that it covers only contractors who are ‘undertaking work which would otherwise be required to be performed by an employee’, not those rendering ‘professional’ services.³ To be covered by the Act, one of the parties to the contract must also be a trading, financial or foreign corporation, or a Commonwealth agency; or the contract must have some connection to a Territory.

General State industrial laws and their coverage

- 5.10 The remaining general State industrial laws are as follows:

- *Industrial Relations Act 1996* (NSW);
- *Industrial Relations Act 1999* (Qld);
- *Industrial Relations Act 1979* and *Minimum Conditions of Employment Act 1993* (WA);⁴
- *Fair Work Act 1994* (SA);
- *Industrial Relations Act 1984* (Tas).

² See *Fair Work Regulations 2009* reg 1.15.

³ See *ATS (Asia Pacific) Pty Ltd v Dun Oir Investments Pty Ltd* [2012] FCA 1004 at [43].

⁴ Note that under the draft Labour Relations Legislation Amendment and Repeal Bill released by the Western Australian government for public comment in November 2012, the *Minimum Conditions of Employment Act 1993* would be repealed and replaced by a new set of State Employment Standards in the *Industrial Relations Act 1979*.

- 5.11 As with the federal Fair Work Act (see 4.2–4.8), each of these statutes is generally expressed to cover ‘employers’ and ‘employees’, understood in the common law sense of those terms.⁵ Hence to the extent that a person undertaking work experience does so under a contract of employment, as discussed in Chapter 6, they may fall within the scope of these laws – although in some instances, it may be that they will only be covered if they are *paid* for their work. For example, section 4(1) of the South Australian Act defines an ‘employee’ as ‘a person employed for remuneration under a contract of employment’. ‘Remuneration’ is defined in the same section to mean ‘wages or salary’, payments ‘in the nature of piece-work rates, penalty rates, shift premiums, overtime or special work rates’, and ‘allowances’.⁶ Section 5(1)(a) of the Queensland Act speaks of ‘a person employed in a calling on wages or piecework rates’. By contrast, the definition of ‘employee’ in section 7(1) of the *Industrial Relations Act 1979* (WA) refers to ‘any person employed by an employer to do work for hire or reward’. The term ‘reward’ would seem to contemplate a broader notion of the type of ‘consideration’ (see 6.38) that may be provided in return for an employee’s labour.
- 5.12 As noted in 5.5 above, because of section 26 of the federal Fair Work Act these laws can only as a general rule apply to employees who are not national system employees. In New South Wales, Queensland and South Australia that means anyone employed in the State public sector or local government; in Tasmania, anyone employed by the State public service; and in Western Australia, anyone employed by an unincorporated body (such as a sole trader or partnership, or the State itself), or by a corporation that is neither a trading, financial or foreign corporation.
- 5.13 In some instances, State industrial laws provide that a person is not to be treated as an employee, even if they are working under a contract of employment. For example, the Western Australian and South Australian legislation exclude most

⁵ In some States the role of the common law understanding of ‘employment’ is made explicit: see eg *Fair Work Act 1994* (SA) s 4(1), defining ‘contract of employment’ to mean ‘a contract recognised at common law as a contract of employment’.

⁶ Section 69(1) of the South Australian Act does provide that a contract of employment ‘is to be construed as if it provided for remuneration in accordance with the minimum standard for remuneration’ set by the section, unless a more favourable rate is agreed or the rate of remuneration is fixed in accordance with an award or enterprise agreement. It might therefore be argued that if a contract for unpaid work otherwise qualifies as ‘a contract recognised at common law as a contract of employment’ (as per paragraph (a) of the definition of ‘contract of employment’ in section 4(1)), the effect of section 69 in importing a minimum rate can then in turn be taken to satisfy the remuneration requirement.

forms of ‘domestic’ work.⁷ More pertinently for present purposes, section 5(2) of the *Industrial Relations Act 1999* (Qld) provides that any person undertaking a ‘vocational placement’ is not an employee. As defined in the *Vocational Education, Training and Employment Act 2000* (Qld), this covers the placement of a student with a person who will deliver certain training, under a formally approved agreement. The student must be undertaking a course with an organisation that is registered under the *National Vocational Education and Training Regulator Act 2011* (Cth), and the purpose must be to ‘give the student practical training and experience that is required under, and is an assessable part of, the student’s course’. It is unclear whether this exclusion is intended to limit only the operation of the Queensland Industrial Relations Act, or to have more general effect. Even if the latter, it could not preclude someone who would otherwise qualify as a national system employee from claiming the benefit of the NES or modern award entitlements under the Federal Fair Work Act, given the exclusionary provisions in that Act mentioned earlier. Instead, it would be a matter of considering the somewhat differently worded exception for vocational placements in the federal statute itself (see 4.11).

- 5.14 Each general State industrial law deems certain workers to be employees, even if they would not be treated as such under the common law. For example, Schedule 1 to the *Industrial Relations Act 1996* (NSW) contains a lengthy list of occupations that includes work such as bread and milk vending, contract cleaning and many other trades. Under section 275 of the *Industrial Relations Act 1999* (Qld), the Queensland Industrial Relations Commission can also declare any ‘class of persons who perform work in an industry under a contract for services’ to be employees. However, the operation of these provisions is overridden by the Independent Contractors Act, at least in relation to contracts for services that involve a ‘constitutional corporation’ or a Commonwealth agency.
- 5.15 It is perhaps unlikely, though not inconceivable, that a person undertaking work experience would do so as an independent contractor. But if they did, and they were performing work for an incorporated business, they would be subject neither to the Fair Work Act nor (thanks to the Independent Contractors Act, and at least for most purposes) general State industrial laws, even if they were otherwise within the scope of a deeming provision.

⁷ See *Industrial Relations Act 1979* (WA) s 7(1) (definition of ‘employee’); *Fair Work Act 1994* (SA) s 6; *Fair Work (General) Regulations 2009* (SA) reg 5.

Specific provisions on work experience in general industrial laws

- 5.16 It is open to the States to include provisions in their general industrial laws that regulate work experience arrangements. Such provisions could, in the case of an arrangement that did *not* involve an employment contract, apply irrespective of whether the arrangement was with a national system employer. Work experience that *did* involve an employment relationship in the common law sense could still be regulated, but only for non-national system employers in the State in question, or if the laws concerned fell within one of the exceptions detailed at 5.7.
- 5.17 However, while some States have enacted provisions about work experience in their education or training legislation (see 5.29–5.30), and Western Australia has proposed to regulate unpaid trials by child workers (see 5.39, only two States have sought to deal with the issue in their general industrial statutes.
- 5.18 In Queensland, section 140A of the *Industrial Relations Act 1999* empowers the Queensland Industrial Relations Commission to make an order fixing remuneration and conditions for any ‘vocational placement’ (see 5.26) of a student that is for more than 240 hours a year (around 5 hours a week). In making a decision the Commission may consider a range of factors, including the objectives of the placement scheme, the kind of work performed, the experience to be gained by the students, and any remuneration or benefit they may be receiving from the Commonwealth or the State. The importance of obtaining such an order is explained at 5.26. Despite what is said there, however, we can find no record of an order having been made under section 140A.
- 5.19 In South Australia, section 98B of the *Fair Work Act 1994*, which was inserted in 2005,⁸ deals specifically with ‘trial work’. Subsection (1) provides that the Industrial Relations Commission of South Australia may, by award:
- (a) determine that a person who undertakes a specified category of work (in any specified circumstances) on a trial basis in an industry, or a sector of an industry, specified by the award with a view to obtaining employment with the person from whom the work is performed is entitled to be paid for that work in accordance with the terms of the award;

⁸ Section 98B was added by the *Industrial Law Reform (Fair Work) Act 2005* (SA). The provision was not part of the original Bill, but was successfully proposed by independent MP Bob Such during its passage through the House of Assembly: see 3.12.

- (b) impose limitations of the performance of work on a trial basis in an industry, or a section of an industry, specified in the award;
- (c) make any other provision relating to work on a trial basis as the Commission thinks fit,

if the Commission is of the opinion that action under this section is justified in order to prevent the abuse of the performance of work on a trial basis in the relevant circumstances.

Subsection (4) confirms that the provision applies ‘even though the persons to whom an award will relate will not be employees for the purposes of this Act’.

5.20 In theory, this power to regulate job trials by requiring that work be paid for, or by imposing conditions such as a maximum duration, might be a useful way of tackling exploitative arrangements of the type discussed in Chapter 3. But so far as we can determine, no award has ever been made, or even sought, under this provision. One reason for this may be that the enactment of the new provision was quickly followed by the passage of the federal ‘Work Choices’ legislation in 2005, which excluded State industrial laws from being able to apply to the majority of employers. It may well have been believed that any attempt to invoke the new provision against an incorporated employer would have been excluded by section 16 of the *Workplace Relations Act 1996*, the precursor to what is now section 26 of the Fair Work Act. But it is also notable that, while it would be open for a trade union or the State Minister for Industrial Relations to apply to the South Australian Commission seeking the exercise of this power, there is no provision for an individual worker to do so – unless they are an employee, in which case they would already be entitled to a minimum wage under either the federal or State Fair Work Act.⁹

Education and Training Laws

5.21 Each State and Territory has legislation that regulates the conduct of both secondary and post-secondary education and training. In what follows we briefly identify some of the regimes and provisions that may be relevant to work experience arrangements.

⁹ See the rules in section 194 of the *Fair Work Act 1994 (SA)* as to standing to commence an application before the Commission.

Training contracts

5.22 Although the Commonwealth has recently taken over responsibility for the accreditation of training courses and providers, under the *National Vocational Education and Training Regulator Act 2011*, the State and Territories continue to play an important role regulating training arrangements, under the following statutes:

- New South Wales – *Apprenticeship and Traineeship Act 2001*
- Victoria – *Education and Training Reform Act 2006*
- Queensland – *Vocational Education, Training and Employment Act 2000*
- Western Australia – *Vocational Education and Training Act 1996*
- South Australia – *Training and Skills Development Act 2008*
- Tasmania – *Vocational Education and Training Act 1994*
- ACT – *Training and Tertiary Education Act 2003*
- Northern Territory – *Northern Territory Employment and Training Act 1999*

5.23 Although these statutes vary in both substance and terminology, they generally require apprenticeship or training contracts to be in a specified form and registered with a local training authority, and provide for various forms of monitoring and/or dispute resolution. Importantly, however, while the making of a formal contract is generally required in the case of an ‘apprenticeship’, or training in any prescribed vocation, it may be optional for other types of training arrangement.¹⁰ Furthermore, the statutes are generally concerned – subject to the exceptions outlined below – with the *employment* of apprentices or other trainees.¹¹ These laws are not generally concerned with the validity of informal training or work experience arrangements that do not involve a contract of employment.

¹⁰ See eg *Training and Skills Development Act 2008* (SA) s 46.

¹¹ Apprentices are generally treated as employees: see eg *Rowe v Capital Territory Health Commission* (1982) 62 FLR 383. Other kinds of trainees may also be employees: see eg *Phung v Advanced Arbor Services Pty Ltd* [2010] NSWCA 215.

Course-related placements

- 5.24 The Victorian *Education and Training Reform Act 2006* contains provisions that regulate what are called ‘practical placements’, in Division 2 of Part 5.4. These apply to post-secondary students of registered TAFE providers who are placed with an employer for work experience or training. A written agreement must be made between the employer and the TAFE provider, and the placement must comply with any restrictions or conditions imposed by the Victorian Skills Commission. The Act also envisages that a minimum rate of payment can be imposed. However, although a rate of \$5 per day was fixed in 2009, an order subsequently made by the Secretary of the Department of Education and Early Childhood Development under section 5.4.20 of the Act dispenses with any need for such payment.¹²
- 5.25 Division 1 of Part 5.4 of the same Act deals with what are called ‘structured workplace learning arrangements’. These involve placement of a secondary school student with an employer in order to undertake training as part of an accredited course of study. The principal of the relevant school must enter into a written arrangement with the employer. Such arrangements must comply with the requirements of a Ministerial Order, which imposes a series of stringent conditions.¹³ These include, among other things, that the employer must:
- comply with occupational health and safety requirements;
 - ‘not use the Arrangement as a substitute for the employment of employees or the payment of appropriate wages’;
 - ensure that the student ‘will not be continuously engaged by the employer in a production or service capacity’; and
 - ‘provide adequate levels of supervision to ensure the welfare and safety of the student in a non discriminatory and harassment free working environment’.

¹² See the *Amended Guidelines for Registered Training Organisations and Employers in relation to students of technical and further education undertaking Practical Placement*, available at http://www.skills.vic.gov.au/Pages/skills_corporate/providers/training-organisations/practical-placement-guidelines.aspx (accessed 29 October 2012). A copy of the Secretarial Order that took effect on 1 January 2011 is appended to the Guidelines.

¹³ See *Ministerial Order 55 – Structured Workplace Learning Arrangements*, available at <http://www.education.vic.gov.au/sensecyouth/careertrans/worklearn/structuredlearning.htm> (accessed 29 October 2012).

The Order also requires principals to limit the duration of arrangements, restricts the hours at which a student can work, limits the number of students an employer can take on, and requires that each student be paid at least \$5 per day to reimburse them for expenses.

- 5.26 In Queensland, Chapter 4 of the *Vocational Education, Training and Employment Act 2000* deals with ‘vocational placements’. As explained in 5.18, these are agreements that allow a student with a registered training provider to undertake work experience that is not just required under their course, but formally assessed. Any scheme that requires such a placement must be registered with, and approved by, Skills Queensland. The agreement must be signed by the training organisation, the student and the person providing the placement. If the placement is for more than 240 hours per year, it must be registered with Skills Queensland, something that cannot happen unless the Queensland Industrial Relations Commission has made an order under section 140A of the *Industrial Relations Act 1999* (Qld) fixing remuneration and other conditions for the placement (see 5.18). In the case of any shorter placement, by contrast, section 120(2) of the 2000 Act provides that the student is *not* entitled to remuneration for the placement.
- 5.27 Section 113 of Queensland’s *Vocational Education, Training and Employment Act 2000* also confirms that a student is not to be regarded as the employee of the person with whom they are placed. Section 114 further provides that other laws regulating employment do not apply, although exceptions are made for laws dealing with health and safety, discrimination, child employment and occupational licensing. As noted in 5.13 in relation to equivalent provisions in the *Industrial Relations Act 1999*, section 113 could not prevent a student who would otherwise qualify as a national system employee from asserting entitlements under the federal Fair Work Act. In practice, however, provided they received no remuneration they would almost certainly be caught by the vocational placement exception in the federal statute (see 4.10–4.11).
- 5.28 Vocational placements are also subject to regulation (albeit less elaborate) under Division 2 of Part 6 of the Tasmanian *Vocational Education and Training Act 1994*. Section 3 defines such a placement as one that ‘provides *paid or unpaid* employment at the work place as part of training leading to a qualification for a period of less than 240 hours in a 12 month period’ (emphasis added). The ‘qualification’ in question must be one provided under an accredited training course or package. It is an offence for an employment to provide such a placement without a written

agreement with the relevant training provider, in a form approved by Skills Tasmania, and without the approval of ‘any relevant trade union’.

Other regulation of work experience

- 5.29 Two States have laws that deal specifically with forms of work experience other than those covered by the placement provisions considered above. In Victoria, Division 1 of Part 5.4 of the *Education and Training Reform Act 2006* is concerned with work experience arranged for school students as part of their education, though not to meet the training requirements of a particular course. As with the provisions (also found in Division 1) described above at 5.25 in relation to structured workplace learning arrangements, there must be a written arrangement between the principal of the school and the employer. Once again, a Ministerial Order imposes detailed conditions that are similar to those that apply to placements, including a requirement that the student be paid at least \$5 per day.¹⁴ The Act also stipulates a limit of 10 working days for any one arrangement.
- 5.30 Queensland has a separate statute for work experience arrangements, the *Education (Work Experience) Act 1996*. The Act covers any arrangement made on behalf of a student by an ‘educational establishment’ for a person to provide work experience as part of the student’s education. The requirements are less stringent than in Victoria, but again the arrangement must be in writing and cannot start unless appropriate insurance cover is arranged. There are also limits on the number of days to be spent on work experience in any year (30), and the student must not be paid for their work. Unlike Victoria, however, the legislation is not confined to secondary school students. TAFE colleges, registered training organisations and indeed universities are all covered – except where the work experience is arranged as a ‘mandatory or assessable part’ of a university course.
- 5.31 Section 10 of the *Education (Work Experience) Act 1996* provides that, subject to certain exceptions, ‘A student on work experience is taken not to be the employee of the work experience provider and the provider is taken not to be the employer of the student’. However, while this may be the case with Queensland laws, it cannot exclude the operation of the federal Fair Work Act, assuming the student would otherwise qualify as a national system employee. It is true that, under section 27(1)

¹⁴ See *Ministerial Order 382 – Work Experience Arrangements*, available at <http://www.education.vic.gov.au/sensecyouth/careertrans/worklearn/workexperience.htm> (accessed 29 October 2012).

and (2)(f) of the federal Act, State laws relating to ‘training arrangements’ are not as a rule excluded from applying to national system employees. But an exception is made for terms and conditions set by the NES or a modern award.¹⁵ Clearly, therefore, a State training law cannot disqualify a national system employee from access to those minimum standards. The same would apply in relation to other protections under the Fair Work Act, such as the right to complain of adverse action under the ‘general protections’ in Part 3-1, since a Queensland statute cannot validly operate in a manner that is inconsistent with a Commonwealth law. Importantly too, a work experience arrangement of a type covered by the 1996 Act would in many cases not satisfy the criteria for the Fair Work Act’s ‘vocational placement’ exception, for absence of a *requirement* to undertake a placement.

- 5.32 The other States and Territories do not appear to have specific legislation that governs work experience. It is common, however, for Education Departments to issue guidelines to cover work experience or workplace learning programs for secondary school students. In New South Wales, for example, the relevant document is entitled *An Employer’s Guide to Workplace Learning for secondary students in government schools and TAFE NSW institutes*, and was issued by the Department of Education and Training in 2011.¹⁶ Among other things, it states (on p 3) that ‘Students are voluntary workers and should not be paid’ and ‘Students must not be used in place of regular employees’.

Child Employment

Laws regulating working conditions for children

- 5.33 As noted earlier, section 27 of the Fair Work Act provides that national system employers can still be covered by State or Territory laws on ‘child labour’. This is subject to regulation 1.14(a) of the *Fair Work Regulations 2009*, which provides that such laws cannot regulate employment conditions that are covered by the National Employment Standards, or that can be included in a federal award, except to the extent that those laws deal with the times at which a child can be employed. But this limitation only applies to the extent that the arrangements being regulated involve ‘employment’ in the common law sense.

¹⁵ See *Fair Work Regulations 2009* reg 1.14(b).

¹⁶ See <https://www.det.nsw.edu.au/vetinschools/documents/worklearnimplementation/EmployersGuide.pdf> (accessed 30 October 2012).

- 5.34 Child employment laws differ dramatically across Australia, both in detail and coverage.¹⁷ In New South Wales, for example, while section 223 of the *Children and Young Persons (Care and Protection) Act 1998* requires permits for the employment of children in certain occupations, ‘employment’ is defined by section 221 to mean ‘paid employment or employment under which some other material benefit is provided’. By contrast, the more comprehensive laws in Victoria and Queensland, although different in important ways,¹⁸ each cover certain types of unpaid work. Section 4(1) of the *Child Employment Act 2003* (Vic) defines ‘employment’ to include both work performed under a contract of services and contract for services, and work ‘in a business, trade or occupation carried on for profit under any other arrangement whether or not the child receives payment or other reward for performing that work’.¹⁹ But ‘participating in an apprenticeship, a traineeship or practical training under the *Education and Training Reform Act 2006*’ (see 5.24–5.25) is specifically excluded. In Queensland, section 8 of the *Child Employment Act 2006* defines work to include ‘unpaid or voluntary work’, but not – at least for most purposes – ‘work experience’ within the meaning of the *Education (Work Experience) Act 1996* (see 5.30–5.31), or work that is part of an apprenticeship, a traineeship or a vocational placement, as defined by the *Vocational Education, Training and Employment Act 2000* (see 5.26–5.27).
- 5.35 Other jurisdictions that have child employment laws likewise tend to have a broad application. In Western Australia, section 188 of the *Children and Community Services Act 2004* provides that to ‘employ’ means to ‘engage’ a child to carry out work, whether or not the child receives ‘payment or other reward’, and whether or not ‘under a contract of service, a contract for services or any other arrangement’. This applies for the purpose of the general prohibition in section 190 on the

¹⁷ See A Stewart, *Making the Working World Work Better for Kids*, NSW Commission for Children and Young People, Sydney, 2008, proposing a more uniform approach; and see further A Stewart and N Van der Waarden, ‘Regulating Youth Work: Lessons from Australia and the United Kingdom’ in R Price et al (eds), *Young People and Work*, Ashgate, Farnham, 2011, p 185.

¹⁸ In Victoria, the general rule is that children under 15 require a permit from the government to work. Queensland, by contrast, has a general rule requiring parental consent.

¹⁹ Curiously, section 4(2) goes on to list certain factors that ‘may be taken into account’ in determining whether an arrangement falls into this last category. Those factors are ‘whether the parties intend that the work would constitute employment’, ‘whether the work would commonly attract payment’, ‘whether the primary purpose of the child’s work is for another person to derive a profit’, and ‘whether the child is subject to the direction of any person who will derive a profit from the child’s work’. It is unclear – and the Explanatory Memorandum for the *Child Employment Amendment Act 2010* that introduced these provisions does not explain – to what extent these ‘factors’ are intended to limit, or might be taken as limiting, the otherwise general words of section 4(1).

employment of those under the age of 15 in any ‘business, trade or occupation carried on for profit’. (As with other laws of this kind, there are exceptions to that prohibition, including for work in family businesses.)

- 5.36 Section 781 of the *Children and Young People Act 2008* (ACT) defines ‘employment’ to include ‘an apprenticeship, traineeship or other work-related training for a trade or occupation’, as well as any ‘work experience’. In each case, it does not matter whether the child or young person concerned receives any ‘payment’. ‘Work experience’ is defined in section 780 to mean an ‘engagement’ arranged by an educational institution as part of a ‘work experience program (however described)’ conducted by that institution, though the institution can apply for an exemption from the various controls imposed by the legislation. Similarly, section 200 of the *Care and Protection of Children Act 2007* (NT) defines ‘employ’ to mean ‘to engage the child to perform work under a contract of employment or any other contract or arrangement (whether written or unwritten and whether for a reward or not)’.
- 5.37 South Australia and Tasmania do not currently have any general child employment legislation, although in both States the possibility of such laws being introduced is presently under discussion.²⁰ Although there is a specific power under section 98A of the *Fair Work Act 1994* (SA) to regulate child employment by award, it has never been exercised. Each State has prohibitions on ‘employing’ children who are of compulsory school age during school hours, without a special permit.²¹ In South Australia, this prohibition extends to employment ‘in any labour or occupation that renders, or is likely to render, the child unfit to attend school’. But it is unclear whether the term ‘employ’ in these provisions covers work experience arrangements that do not involve a contract of employment.
- 5.38 In principle, there is no reason why a State or Territory could not legislate to regulate work experience arrangements for anyone under the age of 18, even in relation to a national system employer. One interesting proposal in Western Australia was contained in clause 38 of the Industrial and Related Legislation Amendment Bill 2007, which (among other things) would have inserted a new Division 4 of Part 8 into the *Children and Community Services Act 2004*. The new provisions were intended to deal with ‘unpaid work on a trial basis’, in the sense of ‘unpaid work that is carried

²⁰ In South Australia, a Child Employment Bill 2011 was introduced to Parliament but subsequently lapsed. As to the position in Tasmania, see Workplace Standards Tasmania, *Review of Tasmanian Child Labour Laws*, July 2012.

²¹ See *Education Act 1972* (SA) s 78; *Education Act 1994* (Tas) s 82.

out with a view to obtaining paid work with the person for whom the unpaid work is carried out, whether under a contract of service, a contract for services or other arrangement'.²² A person engaging a child to carry out such work would have been required to ensure that the work was carried out 'on not more than one day in any calendar year', and then for no more than seven hours, excluding a required break of at least 30 minutes. According to the Explanatory Memorandum for the Bill (at p 30), 'volunteer work' and 'work experience carried out pursuant to an educational or vocational program' would not have been subject to this limit. At any event, the Bill lapsed with the calling of the 2008 State election.

- 5.39 More recently, this proposal has been revived, although in a different form. As part of the draft Labour Relations Legislation Amendment and Repeal Bill released by the Western Australian government for public comment in November 2012,²³ it is proposed to add a new section 192A to the *Children and Community Services Act 2004* (WA). This would prohibit a person from requiring a child to perform work for no reward or purely 'nominal' reward, where that is required for the purpose of the child becoming employed to perform paid work. There would be exceptions for certain educational, training or government assistance programs. The purpose of the provision is evident both from its heading ('Children not to do unpaid trial work') and from the examples of its operation given in the draft Explanatory Memorandum released with the Bill. It is suggested there that 'volunteer work' (such as selling raffle tickets for a school fundraiser) would not be unlawful under the new provision, provided that there was no link to future employment. Nor would a *paid* trial be prohibited, so long as the amount in question was 'more than minimal in comparison with real worth' (para 358).

Laws regulating who can work with children

- 5.40 It has become common for various requirements and restrictions, including criminal record checks, to be imposed on those whose work brings them into close proximity with children. Legislation of this kind typically defines 'work' broadly, to include at least some kinds of work experience. Hence, for example, section 5 of the *Child*

²² As to the existence of unpaid trial work arrangements for children in WA, see Fair Employment Advocate, *Vulnerable Workers: Young People*, Fair Employment Discussion Paper 3, Perth, 2008, pp 12–14.

²³ Details of the draft Bill and its accompanying Explanatory Memorandum can be accessed at http://www.commerce.wa.gov.au/labourrelations/content/Employers/About_IR_in_WA/Reforms_to_WA_IR_System.html (accessed 3 January 2013).

Protection (Working with Children) Act 2012 (NSW) defines a ‘worker’ to mean ‘any person who is engaged in work’ in a series of ‘capacities’. Those capacities include work as a ‘volunteer’, and also as ‘a person undertaking practical training as part of an educational or vocational course (other than as a school student undertaking work experience)’. Section 9 of the Victorian *Working with Children Act 2005* has a similar definition for ‘child-related work’.

Work Safety

- 5.41 In recent years, occupational health and safety laws have come to cover a much wider range of working relationships than the common law category of employment.²⁴ Organisations are now obliged, so far as reasonably practicable, to ensure the safety not just of employees, but of other types of worker as well. This approach is reflected in the Model Work Health and Safety legislation already in force in New South Wales, Queensland, South Australia, Tasmania and the Territories.²⁵ A general duty is imposed by section 19(1) on any person conducting a business or undertaking, in relation to any workers that they engage or cause to be engaged, or whose work activities they influence or direct, at least while those workers ‘are at work in the business or undertaking’.²⁶ The term ‘worker’ is broadly defined in section 7 of the Model Act to mean any person who ‘carries out work in any capacity for a person conducting a business or undertaking’, and is specifically taken to include ‘an apprentice or trainee’, a ‘student gaining work experience’ or a ‘volunteer’.
- 5.42 It is clear, therefore, under the Model Act that, whether or not a work experience arrangement involves an employment contract, the ‘host’ organisation for which the work is performed must take responsibility for the safety of the individual concerned. Whether the same is true of any third party that has been involved in facilitating or arranging work experience, such as an educational institution, or an agency that arranges internships, will depend on whether it can be said that the individual is ‘at work in’ the third party’s own business or undertaking, as well as that

²⁴ See eg R Johnstone, S McCrystal, I Nossar, M Quinlan, M Rawling and J Riley, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012, ch 7.

²⁵ See *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT).

²⁶ For discussion of this duty and its scope, see R Johnstone and M Tooma, *Work Health & Safety Regulation in Australia: The Model Act*, Federation Press, Sydney, 2012, pp 48–62.

of the host.²⁷ As a ‘worker’, a person undertaking work experience will also owe duties of their own under section 28 of the Model Act, for example to take reasonable care of both their own and others’ safety while at work.

- 5.43 In the States that have not yet adopted the model legislation, the duties of organisations are not quite so broadly expressed. Nevertheless, even where a person undertaking work experience cannot be regarded as an employee, the organisation for which they are working will still come under some form of duty. In Victoria, section 23(1) of the *Occupational Health and Safety Act 2004* requires employers to ‘ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer’. In Western Australia, section 22(1) of the *Occupational Safety and Health Act 1984* imposes a similar duty on any person who has ‘control of ... a workplace where persons who are not employees of that person work or are likely to be in the course of their work’.

Workers Compensation

- 5.44 Each State and Territory has a statutory scheme that requires organisations to insure their workers against work-related injury or illness. The term ‘worker’ is generally defined to cover those who are employees in the common law sense. For example, section 4(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) refers to ‘a person who has entered into or works under a contract of service ... with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing)’. The legislation then goes on to exclude certain workers who would otherwise be employees, but more typically to extend the coverage of the scheme to non-employees. Workers who are deemed to be employees for this purpose typically include volunteer firefighters and a range of other emergency services workers, as well as those in various trades or occupations where personal labour is often provided under a contract for services rather than an employment contract: see eg the lengthy list in Schedule 1 of the New South Wales Act.
- 5.45 Apprentices or trainees engaged under a registered training contract are also typically singled out as being covered by workers compensation arrangements,

²⁷ As to the concept of concurrent or overlapping duties, see Johnstone and Tooma, above, pp 77–88.

although as noted earlier they are in any event generally regarded as employees in the common law sense. Beyond that, a number of States and Territories have provisions that are particularly relevant to those undertaking other forms of work experience.

- 5.46 In Victoria, for example, section 5F of the *Accident Compensation Act 1985* covers secondary students employed under a work experience arrangement or a structured workplace learning arrangement within the meaning of Part 5.4 of the *Education and Training Reform Act 2006* (see 5.25, 5.29). They are treated as being employed by the Education Department and as such are eligible for workers compensation if injured. The same applies to a post-secondary student of a TAFE provider working under a practical placement agreement.
- 5.47 In Queensland, section 8 of the *Education (Work Experience) Act 1996* (see 5.30) provides that a work experience arrangement of the type covered by the Act must not start until the educational establishment concerned has taken out an insurance policy of the type contemplated by section 22 of the *Workers' Compensation and Rehabilitation Act 2003*. Registered training organisations conducting courses requiring vocational placements are likewise required by section 124 of the *Vocational Education, Training and Employment Act 2000* to maintain such a policy.
- 5.48 Section 14 of the *Workers Compensation Act 1951* (ACT) casts the net particularly wide. Anyone 'engaged under an arrangement (whether or not under contract) by which training or on-the-job experience is provided' is treated as a 'worker', at least to the extent that they perform 'work that is for (or incidental to) the principal's trade or business while so engaged'. This is so even if they receive no payment. But they are not treated as the principal's worker if the training is arranged for them by an educational institution or is 'part of a work experience program (however described) run by the educational institution'.²⁸
- 5.49 Section 3(1) of the *Workers Rehabilitation and Compensation Act 1986* (NT) defines 'worker' in an extremely broad fashion, to include any person 'who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person' (emphasis added), unless they fall within a nominated exclusion. Most of the

²⁸ Note that other 'volunteers' are excluded from coverage by section 17A. Exceptions include 'commercial voluntary workers', a term defined in section 18 as individuals engaged under an arrangement by which they perform unpaid work that is for or incidental to an enterprise, trade or business carried on by someone else for their own financial benefit.

exclusions are directed at contractors genuinely carrying on an independent business, but there is also an exclusion for anyone who is ‘employed in voluntary work and receives in relation to that work, if anything, nothing more than reasonable travelling, accommodation or other out-of-pocket expenses’. Since there is no definition of ‘voluntary work’, it is unclear whether or not this would cover an agreement for unpaid work experience, which would otherwise potentially fall within the ‘worker’ definition.

Discrimination

- 5.50 Work-related discrimination in Australia is covered by a patchwork of overlapping federal, State and Territory laws. Each of these laws apply not only to discrimination against employees, but a range of other workers, including independent contractors and commission agents. But for the present at least, only some of them apply to workers who are engaged on a ‘voluntary’ or non-contracted basis, and then only at State or Territory level.
- 5.51 The main federal laws that currently prohibit discrimination or harassment at work – the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*, together with section 351 of the *Fair Work Act* – generally apply only to those working or seeking to work under employment contracts or contracts for services, or as part of a formal partnership. They do apply in relation to prospective employees – but only in relation to whether or not an employment contract is offered, or as to the terms of any employment.²⁹ Discrimination in the engagement or treatment of a non-employed worker would not in itself be covered by these provisions.
- 5.52 It is possible that the Australian Human Rights Commission can enquire into a broader range work-related discrimination, under the *Australian Human Rights Commission Act 1986*. Section 3 of that Act defines ‘discrimination’ to include ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment *in employment or occupation*’ (emphasis added). Those last two terms are not defined, so they are capable of extending beyond employment in the common law sense. But even if they did, the

²⁹ See eg *Sex Discrimination Act 1984* s 14(1); *Fair Work Act 2009* ss 342(1) (meaning of ‘adverse action’, item 2 in table), 351(1).

Commission has no power to impose any sanctions in relation to such discrimination; at most it can highlight a problem, and/or make non-binding recommendations.

5.53 In November 2012 the federal government released for public comment an exposure draft of a Human Rights and Anti-Discrimination Bill 2012, which would consolidate the current federal statutes and extend their operation. The draft Bill would prohibit discrimination on the basis of certain ‘protected attributes’, and also sexual harassment, in connection with ‘areas of public life’. These are taken by section 22(2)(a) to include ‘work and work-related areas’. Section 6(1) defines the latter phrase to include ‘employment’, which is in turn defined to mean not just ‘work under a contract of employment’, or ‘work that a person is otherwise appointed or engaged to perform’, but also ‘voluntary or unpaid work’. According to the Explanatory Notes issued by the Attorney-General’s Department (at p 134), the broader coverage has been proposed in response to a 2008 Senate Committee recommendation that protection against sex discrimination be extended to (among others) ‘volunteers’.³⁰ If the Bill were introduced and passed, it would significantly extend protection for unpaid workers against discrimination and sexual harassment.

5.54 Of the State and Territory anti-discrimination statutes (which would continue to operate even under the proposed new federal legislation), Queensland’s *Anti-Discrimination Act 1991* has especially broad coverage, and explicitly extends to work experience. ‘Work’ is defined as including:

- (e) work under a work experience arrangement within the meaning of the Education (Work Experience) Act 1996, section 4; and
- (ea) work under a vocational placement under the Vocational Education, Training and Employment Act 2000; and
- (f) work on a voluntary or unpaid basis; and ...
- (h) work under a guidance program, an apprenticeship training program or other occupational training or retraining program.

Both the South Australian and ACT statutes define ‘employment’ to include ‘unpaid work’, in the sense of work performed ‘for no remuneration’.³¹ The Tasmanian legislation likewise defines employment to include ‘employment or occupation in

³⁰ See Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Commonwealth, Canberra, 2008, pp 149–50.

³¹ See *Equal Opportunity Act 1984* (SA) s 5(1); *Discrimination Act 1991* (ACT) Dictionary.

any capacity, with or without remuneration'.³² The scope of the Northern Territory's *Anti-Discrimination Act 1992* (NT) is perhaps less clear, but section 4(1) defines 'work' to include work 'under a guidance program, vocational training program or other occupational training or retraining program'.

- 5.55 In two other States protection is extended in relation to sexual harassment, but not other forms of discrimination. In New South Wales, section 22B of the *Anti-Discrimination Act 1977* covers 'workplace participants', including a 'volunteer or unpaid trainee'. Section 3 of the Victorian *Equal Opportunity Act 2010* likewise defines employment to include 'an unpaid worker or volunteer', but only for sexual harassment purposes. In Western Australia the *Equal Opportunity Act 1984*, as with the federal legislation, does not appear to apply beyond employment, contracted services and partnerships.

Superannuation

- 5.56 Under the *Superannuation Guarantee (Administration) Act 1992*, an employer must pay a tax or 'charge' if it fails to pay a specified percentage (currently 9%) of each employee's ordinary time earnings into a superannuation fund on behalf of that employee. This is subject to a number of exceptions, including where less than \$450 is earned in a month, and where a worker under 18 is employed to work for 30 or fewer hours a week.
- 5.57 As defined in section 12 of the 1992 Act, the terms 'employer' and 'employee' are given their 'ordinary' (ie, common law) meaning, and then expanded in various ways, including to cover a person working 'under a contract that is wholly or principally for the labour of the person'.³³
- 5.58 In practice, a person undertaking unpaid work experience would only qualify for compulsory superannuation contributions if they were found to be working under a contract of employment and therefore entitled to wages under an award, minimum wage order or enterprise agreement. Strictly speaking, the employer's failure to have made contributions during the period of the work experience arrangement would not expose them to penalties under the 1992 Act. This is because under section 19, the required contribution is calculated by reference to the total salary or

³² *Anti-Discrimination Act 1998* (Tas) s 3.

³³ See eg *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448.

wages 'paid' to an employee for the relevant quarter (ie, three-month period), not wages that are *payable*. However, once any wages are back-paid, an obligation to pay superannuation will arise in relation to that sum, up to the 'maximum contribution base' of (currently) \$45,750 per quarter. This is confirmed by the Australian Taxation Office in its Superannuation Guarantee Ruling SGR 2009/2 at para 70:

If unpaid salary or wages are recovered by way of a settlement of a debt via court order, out-of-court settlement or negotiated settlement, and that settlement contains an identifiable and quantifiable amount of unpaid salary or wages, that amount retains its character as 'salary or wages' for SGAA purposes.

Even if the worker concerned is a 'former employee' by the time their wages are paid, because their employment relationship has ended, section 15B of the Act makes it clear that the worker is still to be regarded as an employee for the purpose of calculating any charge.

The Australian Consumer Law

5.59 The Australian Consumer Law (ACL) is set out in Schedule 2 to the *Competition and Consumer Act 2010*, formerly known as the *Trade Practices Act 1974*. By virtue of section 131 of the Competition and Consumer Act, the ACL applies as a federal law to conduct by (or in some cases affecting) 'corporations', a term given an extended meaning by section 6 of the Act. To the extent that a person or organisation is not covered by the ACL as a federal law, it will generally apply to them as a State or Territory law instead. Each State and Territory has passed legislation adopting the ACL.³⁴ Where the ACL applies as a federal law, responsibility for enforcing it rests with the Australian Competition and Consumer Commission (ACCC); though where conduct breaches the ACL in one of the ways outlined below, it is generally open to anyone affected by that conduct to seek civil remedies in respect of that conduct under Part 5-2.

Misleading and deceptive conduct

5.60 Despite its name, various provisions in the ACL apply to transactions or dealings that do not involve a 'consumer' in the ordinary sense of the term. This is true, for

³⁴ See eg *Fair Trading Act 1987* (NSW) ss 27–32.

example, of the broadly-worded section 18 (formerly section 52 of the Trade Practices Act), which prohibits misleading or deceptive conduct in trade or commerce. This can, for example, apply to conduct between two businesses. Furthermore, since ‘trade or commerce’ is defined in section 2 of the ACL to include ‘any business or professional activity (whether or not carried on for profit)’, it can also apply to not-for-profit organisations.

5.61 What is less clear is how section 18 applies in relation to conduct between an organisation and a person performing work for it. In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 the High Court held that a representation made to an employee as to the safety of a workplace was not conduct occurring ‘in’ trade or commerce. But the Court did not rule out the possibility that there could be ‘commercial’ dealings between an employer and employee, and many subsequent cases have found that statements made in the course of pre-employment negotiations can be regarded as occurring in trade or commerce.³⁵ There have been a number of cases in which workers who were induced to enter into an employment relationship by misleading statements or representations have been able to recover substantial sums by way of compensation.³⁶ However, not every unfulfilled promise will lead to liability under section 18. Where the allegedly misleading conduct involves a statement or prediction as to something that will happen in the future, section 4 has the effect that there will be no liability if the employer can prove that reasonable grounds existed for making the statement or prediction.³⁷

5.62 By analogy with these cases, it should in principle be possible for a person undertaking work experience, even if not employed, to take action under section 18 of the ACL if the organisation for whom they have agreed to work has induced them to enter into the arrangement by some form of misrepresentation: for example as to the nature of the work they would be performing, the extent of any supervision of training, or the prospects of gaining paid employment. An even clearer example would involve action being taken against an agency that had accepted money to place a person in an internship or work experience arrangement that turned out to

³⁵ See eg *Barto v GPR Management Services Pty Ltd* (1991) 105 ALR 339. However, there remains disagreement amongst members of the judiciary as to the circumstances in which the ‘in trade or commerce’ requirement can be satisfied: see eg the case law summarised in M Tamvakologos, ‘Misleading and Deceptive Conduct in an Employment-Related Context’ (2009) 15 *Employment Law Bulletin* 28.

³⁶ See eg *O’Neill v Medical Benefit Funds of Australia* (2002) 122 FCR 455; *Moss v Lowe Hunt & Partners Pty Ltd* [2010] FCA 1181.

³⁷ See eg *Robertson v Knott Investments Pty Ltd (No 3)* [2010] FCA 1074.

be different from what was promised. The possibility of action here would be clearer, because there could be no doubt as to the commercial nature of the arrangement between the parties.

- 5.63 There does indeed appear to have been at least one example of such an action being successfully brought against an agency. According to a media release issued in May 2012 by the Consumer Action Law Centre in Victoria:

The Victorian Civil and Administrative Tribunal (VCAT) has ordered Punk Jobs to repay \$1150 to a dissatisfied customer who alleged he was misled and that Punk Jobs failed to deliver promised services. Mr Madhab Giri also argued that Punk Jobs acted unconscionably in its dealings with him in relation to obtaining him an unpaid job placement.

Catriona Lowe, co-CEO of the Consumer Action Law Centre which assisted in the matter, said the case alleged Punk Jobs engaged in misleading and deceptive behaviour by implying that Mr Giri would be given a paid job at the end of his job placement.

... Ms Lowe said that Punk Jobs didn't appear at the hearing, but after examining Mr Giri's evidence VCAT ordered that the contract be rescinded and a significant refund was due.³⁸

- 5.64 Also noteworthy, although not involving work experience as such, is the case of *Australian Competition and Consumer Commission v Zanok Technologies Pty Ltd* [2009] FCA 1124. Proceedings were successfully brought under section 52 of the Trade Practices Act against a firm that induced job applicants to pay thousands of dollars for IT training, as a precursor to starting employment in jobs that the firm had no intention of offering.
- 5.65 It would be less likely that an action of this kind could be brought under section 18 against a government agency or educational institution that misled or deceived a person seeking work experience from someone else. Even if the body or institution was otherwise engaged in some form of trading, it would be harder to establish that any statements or representations about the work experience had been made 'in

³⁸ 'Punk Jobs ordered to refund \$1150 to unhappy job seeker', 23 May 2012, available at <http://consumeraction.org.au/media-release-punk-jobs-ordered-to-refund-1150-to-unhappy-job-seeker/> (accessed 1 November 2012). No judgment appears to have been issued in the case. See further C Zappone, 'Recruiter forced to pay punk'd jobseeker', *The Age*, 23 May 2012, which includes comments from the CEO of Punk Jobs, who claimed to have 'not been fully informed of the date of the hearing'.

trade or commerce', unless the arrangement concerned was closely bound up in the agency or institution's own trading activities.³⁹

Misleading information about proposed employment

- 5.66 A further provision in the ACL that might be invoked is section 31 (formerly section 53B of the Trade Practices Act):

A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:

- (a) the availability, nature, terms or conditions of the employment; or
- (b) any other matter relating to the employment.

Section 31 is mirrored by section 153, which makes such conduct a criminal offence. Significantly, and unlike section 18, these provisions do *not* contain any requirement that the conduct in question be in trade or commerce.

- 5.67 Ordinarily, as explained in 4.7, the term 'employment' is usually construed as referring to engagement under what the common law would regard as a contract of service. However in *Holloway v Gilport Pty Ltd* (1995) 59 IR 305, a case decided under an equivalent provision to section 31 (what was then section 46 of the *Fair Trading Act 1987* (NSW)), Chief Justice Hunt of the New South Wales Supreme Court indicated (at 309) that in this context the term should be given a 'beneficial' interpretation:

The ordinary meaning of the noun 'employment' ... is the act of employing or the state of being employed. The verb 'employ' is to engage or to make use of the services of a person in return for money. It is quite naturally applicable to both a contract for services ... and a contract of service.

On that basis, the defendant was held to be liable for publishing two misleading advertisements for commission agents, whom the defendant intended to engage as independent contractors.

- 5.68 It is unclear, however, why a 'beneficial' interpretation would limit the concept of employment to engaging a person's services 'in return for money'. On that basis, it

³⁹ As to the extent to which an educational institution can be said to engage in trade or commerce, see eg *Shahid v Australian College of Dermatologists* (2008) 168 FCR 46.

could possibly be argued that a person who is misled about some aspect of an unpaid work experience arrangement could take action against the person who misled them, whether the organisation at which they were to work, or a third party such as an agency or an educational institution. But even if ‘employment’ was not interpreted so broadly, sections 31 or 153 could on any basis be invoked where a person undertaking unpaid work experience (including an unpaid trial) was misled into thinking that the organisation genuinely intended to offer them a paid job.

Unconscionable conduct

- 5.69 Section 20 of the ACL prohibits conduct, in trade or commerce, that is ‘unconscionable within the meaning of the unwritten law’. This gives statutory effect to a common law doctrine that allows the courts to intervene when unfair advantage is taken of a person who is operating under some form of ‘special disability’. While many persons seeking or undertaking work experience might be regarded as being vulnerable to exploitation, the courts have stressed that ‘inequality of bargaining power’ is not sufficient to constitute a ‘special’ disadvantage.⁴⁰ For that reason, it is difficult for workers to invoke this type of provision, even if they have been unfairly treated by an employer with superior power and resources.⁴¹ This is quite apart from any difficulty that may arise in showing that any conduct has occurred ‘in trade or commerce’.
- 5.70 However, certain workers may, because of their situation, be able to establish the kind of special vulnerability that makes them more susceptible than others to exploitation. The case of *Australian Competition and Consumer Commission v Zanok Technologies Pty Ltd* [2009] FCA 1124, to which reference was made in 5.64, is particularly instructive. Besides being liable for misleading and deceptive conduct in promising jobs that did not exist, the defendants were found to have breached section 51AA of the Trade Practices Act, the precursor to section 20 of the ACL. The job applicants who were targeted here were temporary visa-holders who had completed degrees in Australia and were looking to find skilled work that would enable them to qualify for permanent residence. As Justice Edmonds of the Federal Court noted (at [17]):

⁴⁰ See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

⁴¹ See eg *Downe v Sydney West Area Health Service (No 2)* (2008) 174 IR 385 at [233]–[238].

This conduct constituted more than simply taking advantage of a superior bargaining position but involved an unconscientious exploitation of another's inability or diminished ability to conserve his or her own interests. Dangling the 'employment carrot' in return for a fee in circumstances in which the applicant faces having to leave Australia, constitutes a high level of moral obloquy especially where the promised employment does not exist ...

Hence while a mere desire to find employment, no matter how desperate, might not qualify as a special disability for most workers, the added insecurity created by the potential loss of residence was considered sufficient here to bring what is now section 20 into play – and this might also be the case for certain internship arrangements undertaken and (as we have seen in Chapter 3) often paid for by temporary visa-holders.

5.71 Section 20 is complemented by section 21, which among other things prohibits unconscionable conduct in trade or commerce 'in connection with ... the acquisition or possible acquisition of ... services from a person (other than a listed public company)'. As section 21(4)(a) makes clear, this provision is intended to operate in a broader range of circumstances than the common law doctrine referred to above. Hence there is no need, for instance, to show that the person against whom the conduct is directed has any form of special disability. It is sufficient to establish that the conduct involves 'serious misconduct, or something clearly unfair or unreasonable', or 'actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable'.⁴² A court must determine whether conduct is unconscionable by reference to a lengthy list of factors set out in section 22, which include 'the relative strengths of the bargaining positions' of the parties, 'whether any undue influence or pressure was exerted on, or any unfair tactics were used against' the person supplying services, and whether the parties have 'acted in good faith'.

5.72 Employees cannot invoke section 21, because the term 'services' is specifically defined in section 2 of the ACL to exclude 'the performance of work under a contract of service'. But someone engaged in work experience without an employment contract would not be caught by this exclusion. Nor, unless they were a true 'volunteer', could they be said to be 'donating' their services, something excluded by section 5(1). It would still be necessary, however, to establish that any conduct occurred 'in trade or commerce'.

⁴² *Hurley v McDonalds Australia Ltd* [2000] ATPR ¶141-741 at 40,585.

6

A Key Legal Issue: Is There an Employment Contract?

- 6.1 It was explained in Chapter 4 that the application of the *Fair Work Act 2009* to any arrangement for unpaid work experience primarily depends on whether the arrangement can be characterised as, or as part of, what the common law would recognise as a *contract of employment*. The same is true, as Chapter 5 indicates, for many other statutory regimes, including those dealing with workers compensation, taxation and superannuation.
- 6.2 This chapter explains how Australian courts and industrial tribunals determine the existence of an employment contract. After setting out some general principles, we analyse how they can or might be applied to an arrangement for unpaid work experience, based on the admittedly limited body of case law that has addressed this issue. We then go on to assess how the FWO is currently approaching this matter.

General Principles

The two requirements for an employment contract

- 6.3 In order for an arrangement to be characterised by the common law as a contract of employment, two distinct requirements must be met: (a) the arrangement must involve a valid and enforceable *contract*; and (b) that contract must be one of *employment*.¹
- 6.4 In practice, the overwhelming majority of cases before courts or industrial tribunals that involve a dispute over the existence of an employment relationship turn on the second of these issues. A contract for work to be performed exists, or is assumed to exist, but the question is whether it has the hallmarks of employment. In particular, the issue is typically whether the contract is one 'of service' (that is, an employment contract), or 'for services' (that is, an arrangement for services to be rendered to a

¹ As to the tendency of some courts to conflate or confuse these requirements, see J Murray, 'The Legal Regulation of Volunteer Work' in C Arup et al (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006, p 696 at p 713, citing *Robinson v Tyndale Christian School* [1998] SAIRC 41 as an example.; and see also *Schultz v Vlack* [1996] SAIRC 44, discussed below at 6.68.

‘principal’ by an ‘independent contractor’ who has their own business). To draw that distinction, the courts have developed a ‘multi-factor’ test whereby a series of questions are asked about selected features of the arrangement, based on an examination of the ‘totality’ of the parties’ relationship.² Those features include the extent of any right on the part of the supposed employer to control the performance of the work; the extent to which the worker is ‘integrated’ into the employer’s organisation; the extent of any freedom for the worker to supply similar services to others, or to delegate responsibility for the performance of the work; and whose responsibility it is to supply any tools or equipment needed to undertake the work. Based on which way the answers to those questions point, an adjudicator will form an impressionistic view as to the appropriate characterisation of the relationship.³

- 6.5 A further subset of cases turn on whether an acknowledged contract to provide labour is with one organisation or another. This can arise, for instance, where a labour hire agency agrees to supply the services of a worker to a client of the agency. Ordinarily, the absence of any contract between the worker and the client (or ‘host’) means that the worker can only be an employee of the agency, the entity that pays them and with whom they *do* have a contract.⁴ The question can also arise where there is some doubt as to which out of a group of related entities has entered into a contract with a particular worker.⁵
- 6.6 It is only rarely, in practice, that the issue will be whether there is any contract at all for the performance of the relevant work. An example, and a case which neatly illustrates the separate nature of the two requirements for employment mentioned above, is *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95. The plaintiff was an archbishop who was claiming unpaid annual and long service leave

² See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

³ For further discussion, see C Sappideen, P O’Grady, J Riley and G Warburton, *Macken’s Law of Employment*, 7th ed, Lawbook Co, Sydney, 2011, pp 26–51. In recent times, there has been a perceptible shift in the willingness of some judges (but not others) to apply this test by reference to the ‘economic reality’ of the parties’ relationship, as opposed to what they may have formally agreed: see eg *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 279 ALR 341; *ACE Insurance Ltd v Trifunovski* (2011) 284 ALR 489; but compare *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1. See further C Roles and A Stewart, ‘The Reach of Labour Regulation: Tackling Sham Contracting’ (2012) 25 *Australian Journal of Labour Law* 258.

⁴ See eg *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; *Mason and Cox Pty Ltd v McCann* (1999) 74 SASR 438.

⁵ See eg *Silcar Pty Ltd v Victorian Workcover Authority* [2012] VSC 357; *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071.

from the Greek Orthodox community whom he had agreed to serve. His claim was rejected by a Full Court of the South Australian Supreme Court, on the basis that there was no evidence to suggest that the parties had intended to create a legally binding contract. This finding was overturned by the High Court, on the basis that the industrial magistrate who originally heard the case had properly considered the matter and found such an intention to exist. But rather than simply grant the plaintiff's claim, the Court remitted the matter to the Supreme Court to determine whether the contract was one of employment. The Supreme Court subsequently ruled that on the assumption a contract had been created, there was no reason to displace the magistrate's view that the relationship was one of employment, given in particular the extent of the community's control over the plaintiff's work.⁶

The general law of contract

6.7 Under the general law, the following requirements must generally be satisfied for a valid contract to be found to exist between two parties:

- The parties must have reached *agreement*, something that may (but does not have to be) demonstrated by showing that one party has accepted an offer put by the other to make an agreement on certain terms.
- The parties must *intend to create legal relations*, in the sense that they must intend any commitments given as part of the agreement to be enforceable in a court of law if they are not fulfilled.
- Except in the case of a contract 'under seal' (that is, expressed in a formal document known as a 'deed'), each party must provide *consideration* – there must be a bargained exchange that involves each party doing or promising to do something of value in return for what the other is doing or promising to do.
- The terms of the agreement must be *certain and complete* – they must not to be vague or uncertain, nor fail to deal with any matter that is considered 'essential' for whatever kind of transaction is involved.

⁶ See *Greek Orthodox Community of SA Inc v Ermogenous* (2002) 223 LSJS 459.

- There must be no element of illegality, incapacity or any other ‘vitiating factor’ (such as the use of misrepresentation or unlawful coercion) that would deprive the agreement of legal effect.

6.8 In applying these requirements, but especially the first, the courts often emphasise the need to adopt a flexible and realistic approach to the formation of contracts. While some contracts are created with a good deal of ceremony, involving the preparation of a detailed document that is duly signed by each party, others are concluded in a far less formal manner. It is not unusual, even when two businesses are dealing with one another, to have to infer the existence of a contract from their conduct, rather than from any formal assent.⁷ The same can apply in relation to an employment contract.⁸ Indeed many casual employment contracts are concluded with little or no documentation, with an inquiry about the availability of work resulting in a verbal arrangement for the job to start at some point in the future – sometimes the same day.⁹

6.9 As Justice McHugh explained in his widely quoted judgment in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117–18:

It is often difficult to fit a commercial arrangement into the common lawyers’ analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of ‘offer’, ‘acceptance’, ‘consideration’ and ‘intention to create a legal relationship’ which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship ...

Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties’ subsequent conduct become sufficiently specific to give rise to legal rights and

⁷ See eg *Empirnal Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523.

⁸ See eg *Walker v Salomon Smith Barney Securities Pty Ltd* (2003) 140 IR 433; *Hermens v Acacia Group Ltd* [2011] FCA 1286; *Farah v Ahn* [2012] FMCA 44.

⁹ Unlike some other countries, there is no requirement in Australia for written terms to be agreed or provided. Under Division 12 of Part 2-2 of the *Fair Work Act 2009*, an employer must provide each new employee with a Fair Work Information Statement formulated by the FWO, or face a penalty for not doing so. But this is in no sense a prerequisite for the creation of a valid employment contract.

duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.

In *Branir Pty Ltd v Ouston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [369], after referring to this and other similar statements, Justice Allsop said:

The essential question in such cases is whether the parties' conduct, including what was said and not said and including the evident commercial aims and expectations of the parties, reveals an understanding or agreement or, as sometimes expressed, a manifestation of mutual assent, which bespeaks an intention to be legally bound to the essential elements of a contract.

The distinctiveness of employment contracts

- 6.10 There can be no doubt that, subject to any statutory provision, the general principles of contract law outlined above apply to employment contracts, as they do in relation to other types of contract.¹⁰ At the same time though, as the courts are increasingly inclined to recognise, employment contracts are different in certain ways.¹¹
- 6.11 A particularly important illustration is provided by the decision of the United Kingdom Supreme Court in *Autoclenz Ltd v Belcher* [2011] ICR 1157. The case involved the employment status of a group of 'valeters' who were hired out to clean cars. The issue was not whether they had contracts to perform this work, but rather whether they were 'self-employed contractors' (as the written agreements they had signed described them) or employees (as the court in fact held them to be).
- 6.12 In accepting (at [36]) the need to look at the 'practical reality' of the valeters' working arrangements, and not be swayed by the 'elaborate protestations in the contractual documents', Lord Clarke quoted (at [33]) an observation by Lord Justice Sedley in the court below, to the effect that 'while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract'. He went on (at [34]) to approve the following observation by Lord Justice Aikens:

¹⁰ See eg *Gillies v Downer EDI Ltd* [2011] NSWSC 1055 at [159].

¹¹ For an extensive discussion of the distinguishing features of an employment contract, see M Irving, 'What is Special About the Employment Contract?', Industrial Relations Society of South Australia State Convention, 19 October 2012 (copy on file with the authors).

[T]he circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.

Lord Clarke himself then said (at [35]):

So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

6.13 This is a powerful statement by Britain’s leading court of the need to understand the realities of the typical employment relationship, and to be alert to the potential for organisations to use their superior bargaining power to craft documents that do not reflect the true nature of the working arrangements they are purporting to embody or reflect.¹² Strictly speaking, the decision in *Autoclenz* is not binding on Australian courts or tribunals; but given the shared common law heritage of the two countries, it can be expected that the observations quoted above would be regarded as carrying ‘persuasive’ force. They are certainly consistent with a number of recent decisions in Australia that place a similar emphasis on the economic reality of a relationship in determining whether it is one of employment.¹³

6.14 In one of those cases, *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 279 ALR 341 at [189]–[200], Justice Bromberg of the Federal Court quoted a number of authorities that support a focus on ‘the substance or reality’ of a relationship. Referring to a 2006 report prepared for the International Labour Organisation (ILO),¹⁴ His Honour observed (at [96]):

¹² See A Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *Industrial Law Journal* 328.

¹³ Above, n 3.

¹⁴ *The Employment Relationship*, Report (V)(1), International Labour Conference, 95th Session, 2006. See also Article 4(b) of ILO Recommendation No 198 concerning the Employment Relationship (2006), which suggests that member states should adopt measures to ‘combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status’.

The importance of courts focusing on the reality of the relationship and not merely its form arises in the context of the increasing world trend towards the prevalence of what the ILO calls 'disguised employment relationships'. As the ILO report recounts, changes in the legal status attributed to workers are a sign of the times and are now commonly observed. Those changes may be real or artificial. As to the artificial, the ILO Report (at [46]) describes a disguised employment relationship as:

'...one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise, or by giving it another form.'

Justice Bromberg concluded (at [200]):

A wide range of entitlements and protections are conferred upon workers by legislation and industrial awards or agreements made pursuant to industrial legislation like the *Fair Work Act 2009* ... It is commonplace for such legislation to identify the recipient of such entitlements or protections by reference to the common law definition of 'employee'. In that context, it is particularly important that the common law look to the reality of the relationship in determining whether an employment relationship exists. A contrary approach would place many workers who are in truth employees, beyond the protective reach of labour law.

- 6.15 At any event, we turn now to examine the three most common objections to regarding work experience arrangements as involving employment contracts: that is, the absence of intention to create legal relations, of consideration, or of 'mutuality of obligation'. These are first discussed in general terms, before looking at the case law dealing specifically with work experience.
- 6.16 Before going on, however, it should be noted that we will not deal further with the issue of certainty and completeness. This is because in practice it is very hard to find a case in which an employment agreement that has satisfied all other requirements for the formation of a valid contract has been found to be too uncertain or too incomplete to be enforceable. Where issues of uncertainty are raised in an employment context, it is usually to question the enforceability of a particular *term*, rather than the whole contract.¹⁵ As for completeness, a court will usually need very little convincing that the 'critical elements' have been settled.¹⁶ So long as the work

¹⁵ See eg *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130.

¹⁶ See *Macdonald v Australian Wool Innovation Ltd* [2005] FCA 105 at [213].

to be done has been identified, any remaining gaps can be filled by the implication of terms that under the common law operate as default rules – as to the duration of the hiring, the care and skill with which the work is to be performed, the obligation to comply with work-related instructions, and so on.¹⁷ Even where no remuneration has been agreed for work that was evidently intended to be paid for, a term can be implied to the effect that there must be a ‘reasonable’ payment, judged by prevailing market rates.¹⁸

Intention to Create Legal Relations

- 6.17 In delivering the leading High Court judgment in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at [24], Justices Gaudron, McHugh, Hayne and Callinan stressed that any contract must involve ‘a voluntary assumption of a legally enforceable duty’.¹⁹ If the circumstances show that the parties ‘did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts’,²⁰ then there can be no contract.

Identifying an intention not to be bound

- 6.18 In the simplest situation, parties may formally agree that their transaction is not to have legal effect. For example, in *Rose & Frank Co v J R Crompton & Bros Ltd* [1925] AC 445, a distribution agreement contained a clause to the effect that the arrangement was not a ‘legal agreement’ and would not be ‘subject to legal jurisdiction in the Law Courts’, but rather recorded an ‘honourable pledge’ to carry through the parties’ declared intention in a spirit of ‘friendly co-operation’. The House of Lords held that this had the effect of making the agreement binding ‘in honour only’, so that one party could not sue the other for breach of contract.
- 6.19 Ordinarily, however, the matter is not so straightforward. According to the High Court in *Ermogenous* (at [25]), in determining whether the necessary intention to create legal relations exists, a court must ‘take account of the subject-matter of the

¹⁷ See B Creighton and A Stewart, *Labour Law*, 5th ed, 2010, pp 237–9; R Owens, J Riley, and J Murray, *The Law of Work*, 2nd ed, OUP, Melbourne, 2011, p 256ff.

¹⁸ See eg *Midya v Sagrani* [1999] NSWCA 187. The payment must also, of course, comply with any applicable award or minimum wage order: see 4.31–4.39.

¹⁹ The quotation is from an earlier High Court judgment in *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 457.

²⁰ Quoting Justice Windeyer in *South Australia v Commonwealth* (1962) 108 CLR 130 at 154.

agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances'. Their Honours also reaffirmed something that has become a central principle in the law of contract: the need to approach the ascertainment of intention from an *objective* perspective.²¹ It is not a question of searching for the each party's 'uncommunicated subjective motives or intentions'. Rather, it is a matter of considering what 'would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened'. In other words, it is a question of what a reasonable person would *infer* the parties intended, judging by their words and conduct.

6.20 Although that approach has been generally accepted, it does not mean that subjective (actual) intentions will be ignored. In *Air Great Lakes Pty Ltd v K S Easter Holdings Pty Ltd* (1985) 2 NSWLR 309 at 331, Justice Mahoney observed:

The law would not, I think, impose the relationship of contract where, eg, A thought he was play-acting and B knew of that fact. A's actual subjective intention would be effective to prevent the contract arising. A fortiori, if both A and B had the intention that no contract should result, and each knew of it, then none would be imposed. And, I think, this notwithstanding that a reasonable bystander would take from what they said and did that there was an exchange of congruent promises and a mutual purpose to contract.

This observation was quoted and applied by Justice Nicholas of the New South Wales Supreme Court in *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201. Teachers at a Baptist school, who were each members of the church, were found not to be employees, even though they received discretionary 'stipends' for their work. Despite the outward appearance of having enforceable employment contracts, the teachers' own evidence was that they had no intention to enter into legal relations with the school, but were rather providing their services 'as volunteers in response to a calling to serve God' (at [59]).²²

6.21 Another example of intention to create legal relations being found to be absent in the case of a 'voluntary' worker is *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308. The question was whether the applicant, who worked at a holiday programme for

²¹ See also *Taylor v Johnson* (1983) 151 CLR 422 at 429; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].

²² It may be noted that the teachers were not making any claim in this case against the school. The question of whether they were employees arose because, under the *Defamation Act 1974* (NSW), the school could not as a corporation bring an action for defamation unless it employed fewer than 10 persons.

teenagers at a non-denominational Christian camping facility and was injured, was a worker for the purpose of section 66 of the *Workers Compensation Act 1987* (NSW). He had worked there on an intermittent basis over a period of eight years. He was never paid for what he did, but received food and accommodation, and free use of the camp's facilities when off duty. Whether or not he worked was entirely up to him. He was also expected while at the camp to observe various rules. On the basis of these facts, it was held there was no contract of employment, and hence the applicant's claim failed. Any commitments the parties may have made had moral rather than legal force. Altruism, rather than 'private gain and material advantage', was taken to be the motivation for the arrangement.

6.22 In *Zheng v Cai* (2009) 239 CLR 446 the plaintiff performed voluntary work for the Roseville Church of the Christian Assembly of Sydney and received fortnightly payments of about \$580 per week to assist with her rent and living expenses. In determining whether those payments should be taken into account in assessing damages for her personal injury claim, the trial judge held that the plaintiff was not an employee of the Assembly. This finding was not challenged on appeal. But the High Court evidently agreed with the trial judge's view, describing (at [29]) the payments as a 'private benefaction'.

6.23 The receipt of a payment described as an honorarium may also indicate voluntary work, rather than employment. In *Andreevski v Western Institute Student Union Inc* (1994) 58 IR 195 at 200 Judicial Registrar Murphy of the Industrial Relations Court of Australia said of the word 'honorarium':

I accept that the dictionary definitions of the term point strongly to its non-contractual nature. It is a term common in the context of unincorporated associations formed for social or sporting purposes ... The term has the connotation of a voluntary payment to the incumbent of a position regardless of the amount of work involved in that position.

In this case an editor of a student magazine who received such a payment for his services was found not to be an employee. Similar findings were made in *Gibbs v Christies Beach Sports & Social Club (No 1)* [2000] SADC 28 and *Bergman v Broken Hill Musicians Club Ltd* [2011] FWA 1143, concerning members of not-for-profit clubs who were paid honoraria for calling bingo games.

6.24 A more unusual example of 'voluntary' work is presented by *Eldridge v Kemblawarra Child and Family Centre* [1999] NSWCA 395. This involved a pre-school teacher who had previously worked as an employee, but who agreed to do some further work on

an unpaid basis, at a time when the Centre had run out of funding and was unable to pay her. This sort of 'crisis' was apparently not unusual. The Centre was described (at [4]) as being in a perpetual 'state of financial turmoil', and to cope with this 'it either made it a term of its contracts with its employees that they work for certain periods without pay or it employed voluntary labour'. During one of these periods, the teacher was injured. It was found by the New South Wales Compensation Court that the unpaid work was not covered by any form of contract, so that the teacher could not be regarded as an employee for the purpose of making a workers compensation claim. This was said to be because there no intent to create legal relations for the period in question, the teacher having elected to work as a 'volunteer'. The Court of Appeal held that no appeal could lie against such a finding of fact.

- 6.25 Finally, mention may be made of *South Australia v Day* (2000) 78 SASR 270, in which a Full Court of the South Australian Supreme Court held that an injured teacher was not 'employed' when she performed work as a school services officer as part of a rehabilitation plan. Although she was paid during this period, these were income maintenance payments required by the relevant workers compensation legislation, not wages. The court held that there was no evidence of any intention to enter into contractual relations in relation to the work covered by the rehabilitation plan, which continued to describe the worker as a teacher.

The role of presumptions

- 6.26 Returning to *Teen Ranch*, Justice Handley referred (at 310) to the well-established principle, previously expressed in cases such as *Balfour v Balfour* [1919] 2 KB 571, that 'family, social, and domestic arrangements do not normally give rise to binding contracts because the parties lack the necessary intention'. In *Ermogenous*, however, the High Court majority expressed the view (at [25]) that it would be wrong to formulate rules as to 'the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist'. The judges doubted (at [26]) the 'utility of using the language of presumptions', such as that expressed in *Balfour*, preferring to emphasise that it was a question of who bore the onus of proof as to the existence of a legally binding contract. In a case such as this one, where 'issue was joined' on that matter, 'there could be no doubt that it was for the [Archbishop] to demonstrate that there was such a contract'.
- 6.27 The High Court majority's principal concern here, as the judges went on to make clear (at [27]), was to reject any suggestion of a presumption that 'an arrangement about remuneration of a minister of religion will not give rise to legally enforceable

obligations'. In that case at least, as already mentioned, the requisite intention to create legal relations was found to be present.²³ In subsequent cases, however, the lower courts appear to have treated what was said in *Ermogenous* as simply a warning not to overstate the effect of any presumptions as to legal relations, rather than an instruction to abandon them.²⁴ Hence, for example, judges have continued to quote the *Balfour* principle, in finding that work performed within a family business was not undertaken as an employee.²⁵

- 6.28 More significantly for present purposes, there has also been continued reliance on another well-established principle, that 'there is a presumption with commercial arrangements that parties intend to create legal relations'.²⁶ The presumption is considered to be a strong one, which can 'only be rebutted with difficulty'.²⁷ In *Shahid v Australasian College of Dermatologists* (2008) 168 FCR 46 at [211], Justice Jessup of the Federal Court expressed the principle as being that 'in a business context, and where the requirements of a contract are otherwise established, the person proposing that the parties did not intend to create legal relations bears the onus of so proving'. He emphasised the longstanding support for this proposition and could not accept that in *Ermogenous* – a case in which no mention at all was made of any of the relevant authorities – the High Court had intended to dispense with this principle.
- 6.29 It is not totally clear whether an employment relationship is considered to be 'commercial' for this purpose. As we have seen, in the context of what is now the Australian Consumer Law, courts have taken different views as to whether dealings between an employer and its employees can be considered to occur 'in trade or commerce': see 5.60–5.61. In *Damevski v Giudice* (2003) 133 FCR 438 at [92], Justice Marshall of the Federal Court specifically referred to the presumption that commercial agreements are intended to be legally binding, in the context of a dispute over whether an employment contract existed. But this was a case in which the issue was not whether there was a contract at all, but with whom. It was found

²³ Compare *Sturt v Farran* [2012] NSWSC 400, where two Anglican priests were found not to be employees, for lack of any demonstrated intention to create legal relations.

²⁴ See eg *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs (No 2)* [2011] FCA 1207 at [36]–[37].

²⁵ See eg *Williamson v Suncorp Metway Insurance Ltd* [2008] QSC 244; *Confidential v Commissioner of Taxation* [2012] AATA 178.

²⁶ *Atco Controls Pty Ltd v Newtronics Pty Ltd* (2009) 25 VR 411 at [68].

²⁷ *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* (2005) 12 BPR 23,021 at [48].

that the plaintiff remained employed by the company for which he had started working, despite what was in effect a botched attempt to 'transfer' him to a labour hire agency that would then supply his services. Given that *Ermogenous* was itself a case of a disputed employment contract, it may be safer to assume that where a question arises as to whether there was any intent at all to create a legally enforceable contract for the performance of work, it is for the party alleging that contract to exist to establish the necessary intent. If a presumption in favour of a contract applies at all, it may in any event apply only in situations where the work is remunerated.²⁸

Admissible evidence

6.30 A final point to make in this context concerns the evidence that may be considered by a court in determining whether there is a common intention to create legal relations. Consistently with what was said earlier about the objective approach taken by the courts, the fact that one party may, subjectively, have believed or intended that a contract was or was not to exist will not be determinative.²⁹ Hence, for example, a description used by one or other party as to the nature or status of their relationship will not of itself be treated as relevant.³⁰ But where a contract, if it exists, has to be inferred from the parties' conduct, 'it is permissible, indeed it may be essential' to have regard to the way the parties have behaved.³¹ It is indeed a general principle that while what may turn out to be 'post-contractual conduct' is not admissible to resolve a dispute about the meaning of a contractual term, it is admissible to help decide whether a contract was formed.³²

²⁸ See *Shahid v Australasian College of Dermatologists* (2008) 168 FCR 46 at [215], where Justice Jessup observed: 'Where one party makes, and the other party accepts, a money payment as consideration for a promise by the other to provide some service or to bestow some benefit, the proposition that each intended the promise to be taken seriously and to carry the conventional legal consequences does seem rather obvious.' *Shahid*, however, was not a case involving an alleged employment contract.

²⁹ See *Atco Controls Pty Ltd v Newtronics Pty Ltd* (2009) 25 VR 411 at [44].

³⁰ Note that the same principle applies in determining whether a contract is one of employment, or for services: see eg *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 45.

³¹ *Atco Controls Pty Ltd v Newtronics Pty Ltd* (2009) 25 VR 411 at [45].

³² See *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [25]–[26].

Consideration

The requirement of exchange

- 6.31 The doctrine of 'consideration' has at least two distinct functions. The first is to ensure that any contract involves an element of *bargain*. There must be some form of exchange, or 'quid pro quo'. One party must agree to do something *in return for* what the other is doing or agreeing to do. If A promises to confer a benefit on B, and then B does something in response, that does not of itself constitute a contract, even if B's act is of benefit to A. It must be clear that there was an agreement for B to act in a certain way, as the 'price' for A's promise.³³
- 6.32 The case of *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308, mentioned above, illustrates this principle. Besides a lack of intention to create legal relations, it was also found that there was no consideration to support any employment contract. There was nothing to suggest that the applicant had agreed to perform work in order to 'earn' the board and lodging he received. They were not the 'price' for his work.

The requirement of 'value'

- 6.33 The second function of the doctrine of consideration is to ensure that what each party provides to the other has some value in the eyes of the law. The concept of 'valuable' consideration is an extremely broad one. As famously expressed in *Currie v Misa* (1875) LR 10 Ex 153 at 162, it may include any 'right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other'. Consideration must be 'sufficient', in the sense of something that the law treats as having some value. But it need not be 'adequate', in the sense of providing fair value for what is exchanged³⁴. It may consist of a token sum of money, or an item (such as a peppercorn) that has little intrinsic or market value.³⁵
- 6.34 In some cases, what appears to be a promise of a valuable benefit will be treated as 'illusory', because there is in fact no true commitment to provide the benefit.³⁶ This

³³ See *Australian Woollen Mills Pty Ltd v Commonwealth* (1955) 93 CLR 546; *Beaton v McDivitt* (1987) 13 NSWLR 162.

³⁴ See *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All ER 1686.

³⁵ See *Chappell & Co Ltd v Nestlé & Co Ltd* [1960] AC 87.

³⁶ See eg *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353.

may occur where an 'employer' has an unfettered discretion as to whether to make a payment in return for services rendered. Hence in *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201, considered earlier, Justice Nicholas noted (at [89]):

The evidence was that stipends were paid at the discretion of the elders according to the needs of the member and the Church's capacity to pay. Accordingly, any obligation to pay was illusory ...

- 6.35 This is not to say, however, that *any* element of discretion or choice in the performance of one party's promises will necessarily make those promises illusory.³⁷ For example, it may be implied that the discretion must be exercised honestly and reasonably. This has become an increasing feature of the courts' approach to bonus or incentive payment provisions in employment contracts. For example, in *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 it had been agreed that any payment of a performance bonus was 'entirely within the discretion' of the employer. According to President Allsop of the New South Wales Court of Appeal (at [5]–[6]), the fact that the bonus scheme required the employee's performance to be measured against 'set objectives' meant that it should not be construed so as to permit the employer to 'withhold the bonus capriciously or arbitrarily or unreasonably', or to give the employer 'a free choice as to whether to perform or not a contractual obligation'. Rather, the discretion must be 'exercised honestly and conformably with the purposes of the contract'.

Must an employee be entitled to wages?

- 6.36 It is not at all unusual to find judicial statements of the following kind, made by a Full Court of the Federal Court in *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 at 114:

The element of consideration which is essential to a contract of employment is the promise by the presumptive employer to pay for service as and when the service is rendered.

Similarly, in *Forstaff v Chief Commissioner of State Revenue* (2004) 144 IR 1 at [91], Justice McDougall of the New South Wales Supreme Court expressed the view that 'for there to be a relationship of employer and employee, it is essential that the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it'.

³⁷ See *Thorby v Goldberg* (1964) 112 CLR 597 at 605.

- 6.37 However, such propositions need to be understood in their proper context. For instance, the cases just mentioned involved labour hire workers who were being paid for their work, the issue being who (if anyone) was their employer and what 'service' was being required of them. There was nothing to suggest that the judges concerned were intending to suggest that an employment contract *must* involve wages, rather than the provision of some other kind of benefit.
- 6.38 Indeed in cases in which this point has arisen squarely for decision, courts have held that there *can* be an employment contract in the absence of wages. For example, in *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92 the New South Wales Court of Appeal held that a live-in caretaker and instructor at a flying club was an employee. Although he received no wages, the provision to him of rent-free accommodation was taken to satisfy the need for consideration. Similar findings were made in *Morris v Anglican Community Services* [2000] SAIRC 6, concerning caretakers at a church camp site; and in *Rau v Rau* [2005] VCC 1643, involving an arrangement for a son to work on his father's farm. In *Re McGee* (1992) 41 IR 27 Justice Keely of the Federal Court accepted that being given a slab of beer in return for washing and cleaning a panel van was sufficient 'remuneration' to make the worker an employee. In *Spackman v Morrison* [2000] NSWCC 61 it was held that a share of meat from a slaughtered bullock could be sufficient consideration to support an employment contract.³⁸
- 6.39 What may be less clear is whether the provision of training or work experience might itself be treated as sufficient consideration to support an employment contract. There is certainly some UK authority in favour of that view. In *Edmonds v Lawson* [2000] 2 WLR 1091, a case concerning a 'pupil barrister' discussed in more detail in Chapter 8, the English Court of Appeal was clearly of the view that the provision of education and training by the chambers (ie, group of barristers) to which the pupil was attached could constitute good consideration for a contract of employment, even if the pupil was not being paid. If anything, it was more difficult to determine what consideration the pupil was providing. While this point was overcome, the Court decided in the end that the pupil did not have a contract of employment with the chambers, since she was not undertaking to perform any work in return for her training. Any 'ad hoc' work that directly benefited a particular barrister, and for

³⁸ See also *Schultz v Vlack* [1996] SAIRC 44 (see 6.68), where the offer of a reference and free hair colour or perm appears to have been treated as sufficient to satisfy any requirement of consideration.

which the pupil *was* entitled to be paid, was considered to be the subject of a separate contract.

- 6.40 Of greater relevance is an observation by the Employment Appeal Tribunal in *Quashie v Stringfellows Restaurants Ltd* [2012] UKEAT 0289_11_7604. The case concerned the employment status of a lapdancer at a 'gentlemen's club'. Although she was in fact paid for her work, through a system that involved cashing in vouchers received from clients, Judge McMullen rejected (at [51]) any narrow focus on the idea of a 'wage/work bargain':

The problem with it is that it does not encompass all forms of bargains within employment relationships ... These days, it is not uncommon to find a person agreeing to work for no pay (to gain work experience), or to attend for the mere opportunity of being given work for which remuneration would be available. The wage/work bargain would be satisfied if Ms Quashie agreed to dance in exchange for accommodation, for free meals, for fees paid directly to her university, or even for payment of 1p a night. She could make the bargain to dance to the Respondent's tune if the Respondent agreed to let her be seen at the club so as to enhance her reputation, or to keep her hand in, or even just to maintain networking in a congenial workplace.

In His Honour's view, all that mattered was that there was an *obligation* to work – the obligation found to have been missing in *Edmonds*, but which was present here. So long as the dancer was agreeing to work for *something* in return, it did not matter what that something was.

- 6.41 In our opinion, consistent with the view expressed in *Quashie*, there is no reason in principle why the requirement for consideration in an employment contract could not be satisfied by the provision of training or experience, or an opportunity to make contacts or to practise skills, in return for the performance of whatever kind of work or service the employer may bargain to obtain.

The illegality of employment without wages

- 6.42 That said, one potential difficulty with the concept of employment without wages must be confronted. This is that it is effectively unlawful under the *Fair Work Act 2009*. This is because of a combination of two features of that legislation.
- 6.43 First, every national system employee is in practice covered either by a modern award that prescribes minimum wages, or by a national minimum wage order (see 4.36 and 4.39). In the case of some pieceworkers or commission-only workers,

awards permit arrangements that involve payment according to the amount of work produced or sales achieved.³⁹ Even so, the obligation is still to pay a monetary sum. While the operation of an award can be displaced by an enterprise agreement, section 206 provides that an agreement must always set a 'base rate of pay' that is at least equal to that of any award it has otherwise supplanted.

- 6.44 Secondly, section 323(1) of the Fair Work Act provides that any amounts payable to an employee in relation to the performance of work must be paid in full (subject to certain permissible deductions), and *in money*. While section 323(2) provides that the latter requirement can be satisfied in various ways, including through cash, a cheque or electronic funds transfer, the payment must still be in some form of money. The provision does not contemplate that an employer could satisfy a minimum wages obligation by providing some other form of benefit, such as board or lodging, beer or meat – no matter how valuable they might be.⁴⁰ Much less would the provision of training and experience suffice.
- 6.45 This in turn raises the question: can there ever be an intention to create an employment contract without wages, if it must inevitably be unlawful? One answer is to consider what happens when an employer and employee agree on a wage rate that is below the minimum prescribed by an award, enterprise agreement or minimum wage order. It is clear that such an agreement is unlawful, and it remains so even when the employee has voluntarily agreed, without coercion, to be paid less than the prescribed minimum.⁴¹ Yet it has never been suggested that the illegality of such an arrangement means that there can be no valid employment contract in such a case,⁴² or that the parties must not have intended to be bound in the first place.
- 6.46 In the same way, we would say that if an arrangement to work in return for something other than monetary wages satisfies the common law requirements for

³⁹ See eg Horticulture Award 2010 cl 15; Real Estate Industry Award 2010 cl 16.

⁴⁰ It may be different where an employer seeks to deduct the value of board or lodging supplied to an employee from the wages paid to them, or otherwise requires the employee to pay for board or lodging. This would depend on whether the deduction or requirement satisfies the requirements of sections 324 and 325 of the Fair Work Act. Compare *Fair Work Ombudsman v Kensington Management Services Pty Ltd* [2012] FMCA 225, a case decided under differently worded provisions about the payment of wages.

⁴¹ See eg *Textile Clothing and Footwear Union of Australia v Givoni Pty Ltd* (2002) 121 IR 250.

⁴² This is not to say that certain kinds of illegality cannot affect the validity of an employment contract, as for example where a person is prohibited from working at all. Even there, however, the better view may be that the worker concerned remains an employee: see the cases discussed in Creighton and Stewart, above, pp 177–8.

an employment contract, then the mere fact that the arrangement may contravene the Fair Work Act is a matter that may attract sanctions under the legislation, but does not of itself negate the existence of the contract.

Mutuality of Obligation

6.47 *Dietrich v Dare* (1980) 54 ALJR 388 involved an arrangement between the respondent, the Secretary of the Alice Springs Chamber of Commerce, and the appellant, an alcoholic with a physical disability. He had been referred to the respondent by the manager of the hostel where he resided, to see if there was any work he could be given to do. The respondent discussed with him the possibility of painting the respondent's house, a job that was not in fact needed but which the respondent was prepared to have done to help the appellant out. The appellant was not sure he could manage the work, but agreed to give it a go, on the understanding that he would be paid \$2.00 an hour, and that if all went well a further arrangement would be worked out. He had only just started when he fell off a ladder and was injured. His claim for workers compensation was rejected, the High Court holding that he was not engaged under a contract of service. According to Justices Gibbs, Mason and Wilson (at 390, emphasis added), with whom Justice Aickin agreed:

It seems to us that the arrangement lacked the element of *mutuality of obligation* that is essential to the formation of such a contract. A contract of service is of its nature a bilateral contract ... [I]n the present case we cannot discover an obligation on the appellant to perform any work at all.

6.48 The reasons for that conclusion are explored further below. But for now it may be noted that the concept of mutuality is one that has attracted a great deal of attention in recent years in the United Kingdom. It has been understood in that country to require an obligation on the part of the employer to provide work to be performed, and a corresponding duty on the part of the employee to undertake that work. This has been used by some courts to deny employment status – and, therefore, access to various statutory benefits and protections – to certain casuals and other workers who cannot demonstrate an ongoing entitlement to be given work.⁴³ This stands in marked contrast to the approach taken in Australia, where courts and tribunals 'have no difficulty in finding that a contract of employment can exist in relation to casuals even if there is no overarching contract and the casual is

⁴³ See S Deakin and G S Morris, *Labour Law*, 6th ed, Hart Publishing, Oxford, 2012, pp 164–9.

free to refuse to work and the employer has no obligation to continue to offer work'.⁴⁴

- 6.49 In *Forstaff v Chief Commissioner of State Revenue* (2004) 144 IR 1 at [90], Justice McDougall preferred to distinguish the British cases and express the Australian requirement of mutuality 'not as an obligation on the one side to provide and on the other to perform work, but as an obligation on the one side to perform work (or provide service) and on the other side to pay'. This was considered to be more consistent with the way in which the 'wage-work bargain' had been analysed in cases such as *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435.⁴⁵
- 6.50 On one view, the concept of mutuality might be seen as nothing more than a way of expressing the ordinary requirement of 'quid pro quo' that the doctrine of consideration demands of any enforceable agreement. But on a close reading of the majority judgment in *Dietrich v Dare*, it appears their Honours had something else in mind. If there had been no consideration for the arrangement in that case, there could never have been a contract. But that is not, it seems, what was found by the majority. Nor was the decision expressed by reference to any lack of intention to create legal relations (as the respondent had argued). The emphasis in the passage quoted above is that this was not a *bilateral* contract.
- 6.51 The distinction between a bilateral and a unilateral contract is well established in the common law of contract – even if, as the High Court noted in *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 456, the word 'unilateral' in this context 'is open to criticism on the ground that it is unscientific and misleading', since there 'must of necessity be two parties to a contractual obligation'. In the ordinary case of a bilateral contract, the contract is formed by the exchange of promises that the parties are yet to perform. A unilateral contract is a more unusual arrangement. It involves A making a promise that need only be made good if B fulfils a condition set by A. B is not obliged to do whatever has been requested of them. But if they happen to meet the condition, a contract is formed and A must fulfil their promise. Such a contract is called 'unilateral' because only one party (A) is ever under an obligation. The classic example is a reward that is offered for someone

⁴⁴ C Sappideen, P O'Grady, J Riley and G Warburton, *Macken's Law of Employment*, 7th ed, Lawbook Co, Sydney, 2011, p 29.

⁴⁵ The reference here to 'pay', as noted above at 6.36-6.37, needs to be understood in the context of a case where the work was on any basis being paid for, so that it does not necessarily rule out the idea of employment without wages, at least as a matter of common law.

finding a lost item or supplying helpful information. Nobody who hears of the offer is obliged to do anything about it. But *if* they do what has been asked, they can assert a contractual entitlement to the reward.

6.52 In *Dietrich*, the High Court evidently considered that this was the nature of the arrangement. The majority judges stressed (at 390) that there was real doubt about whether the appellant could perform the work at all, and that it must have been within the parties' contemplation that he might start the work but be unable to continue. Had that happened, the trial would presumably have ended and there could have been no 'recrimination' from the respondent. If, on the other hand, the trial had 'proceeded to a satisfactory conclusion', then a contract 'would have emerged', with 'provision for a realistic rate of remuneration'. On the basis of this reasoning, it would not seem to have mattered if the trial had been completed successfully. The appellant would still never have been under any obligation to work, even if he had done enough to earn his agreed wage. At least for the trial period, as opposed to anything that might have followed, there would still not have been a *bilateral* contract.

6.53 Justice Murphy dissented. He considered (at 391) that 'an intention to create a legal relationship should be inferred from the fact that the payment was agreed upon and that the work (even if not presently necessary) was intended to produce something of value'. He added:

A trial in which a person endeavours to produce something of value to the putative employer is different to an attempt to do more than demonstrate ability on a test which, if successful, produces or does nothing of value. If a prospective employer of a typist tests an applicant by a standard typing test, that creates no legal relationship of contract; if he asks the applicant to join the typing pool for a morning (or any lesser but appreciable period) to do actual work of the office on a trial basis, which is to be paid for, a contract may, and should be, inferred, for the performance of personal services.

His Honour went on to note that it was 'very common' in Australia for contracts of employment 'to be entered into on a trial basis', and that it would defeat 'the intent of workers' compensation legislation' if the fact that work was being done on a trial basis took it 'out of the protection given' to workers. Nor did he think that it mattered that the respondent may have been acting benevolently. What is not clear is whether Justice Murphy thought that the appellant was under any obligation to undertake the work – or whether that mattered.

6.54 At all events, two things are clear from *Dietrich*. One is that the decision turned on its own very peculiar facts, a point to which we return in the next section. The second is that if any legal proposition emerges from the case, it is that a work arrangement can only be treated as a contract of employment if it involves mutual commitments by the parties. If the worker is under no obligation to perform any work, they cannot be regarded as being engaged under a *bilateral* contract – and according to the High Court, that is a prerequisite to having an employment contract.

The Status of Work Experience Arrangements

6.55 As we have seen then, an arrangement for work experience can only be regarded as an employment contract, so as to bring it within the scope of the Fair Work Act and many other labour statutes, if:

- (a) a reasonable person would infer that the parties intended to create legal relations, and there is no clear evidence that the parties actually intended otherwise;
- (b) each party has agreed to provide valuable consideration, which in the case of the employer might be a commitment to offer training or useful experience, or other non-monetary benefits;
- (c) the requirement for mutuality of obligation is satisfied, in that there is a commitment by the worker to perform work in return for whatever experience or benefits the employer is offering.

If these requirements are satisfied, then it must further be determined (using the test described at the beginning of the chapter) whether the contract concerned is one of *employment*, as opposed to (say) being a contract for services. In practice, however, it is highly unlikely that a person seeking to gain work experience on an *unpaid* basis could credibly be regarded as an independent contractor. The key issue in such a case is therefore the threshold one of whether a contract exists at all, or at least a bilateral contract that commits the person to work for something in return.

6.56 In practice, there have been relatively few cases in Australia dealing with the status of unpaid work experience arrangements. What cases there are, however, can conveniently be discussed under three headings: unpaid trials; other kinds of work experience; and arranged placements.

Unpaid trials

6.57 There is clearly no rule that an arrangement for a person to work on a 'trial' basis, in order to determine their suitability for employment, cannot be characterised as an employment contract. So much was emphasised in *Dietrich v Dare* – albeit this was a case dealing with a *paid* trial. According to Justices Gibbs, Mason and Wilson (at 390):

It may be conceded that merely to say that the parties had agreed upon a trial does not necessarily rule out [the formation of a contract of service]. The answer in that respect will depend on the detail of the arrangement. In particular, the answer will be affected, among other things, by the discovery in the arrangement of the assumption by the 'worker' of an obligation to perform some work, it being the purpose of the trial to determine whether the work is performed in a satisfactory manner.

In practice, however, other cases involving job trials have generally reached the same conclusion as in *Dietrich* about the absence of an employment relationship.

6.58 For example, in *Davies v Workcover* [2003] SAWCT 137 the applicant arranged with the owner of a cafe that she would come in on a particular day with a view to being employed as a counter-hand, to familiarise herself with the working environment and enable the owner to decide whether she would be suitable. On the day before the appointed date the applicant, uninvited, came to the cafe and volunteered her services to help, in an effort to show willing. She cut her left wrist with a knife while doing so. The Judge found that the applicant was a volunteer and there was no contract of service. Accordingly she could not claim workers compensation for her injury.

6.59 In *Richards v Cornford* [2009] NSWDC 60 the applicant applied for a position as a truck driver with the respondents and was injured during the course of a 'work trial'. The respondents' insurer refused to indemnify them for the incident because the policy excluded indemnity where the injured person was engaged under a contract of service (because such injury would be covered under workers compensation legislation). Citing *Dietrich*, among other cases, Chief Justice Murrell held that there was no contract of service, saying at [27]:

The arrangement between Ms Richards and the defendants did not require Ms Richards to perform any work. She was to accompany and observe Mr Cornford. Mr Cornford could have asked her to leave at any time. She could have left of her own volition. She offered to perform only one task. She was under no obligation to make

that offer and Mr Cornford was under no obligation to accept it. Regardless of whether she undertook that or any other task well or at all, Mr Cornford was under no obligation to offer her a position. There was no 'mutuality of obligation' and no intention to enter into legal relations. There was no day-to-day control over work activities, no consideration and no agreement as to work hours. Consequently, there was no contract of service.

- 6.60 *Pierce v Workcover* [2001] SAWCT 98 involved a rather longer work trial. The question was whether the applicant had been employed at a cleaning services company when he sustained an injury. The respondent contended that the applicant was on an unpaid work experience trial at the time and therefore was not employed. The Workers Compensation Tribunal found that there was an agreement that the applicant would present himself for work experience when required by the employer over a fortnight, but it was not a term of the arrangement that he would be paid; rather there was an intimation that if his work was satisfactory he might receive some payment at the discretion of the company and offered paid work at the completion of the trial period. Accordingly the Tribunal concluded that there was no common intention that the relationship entered into be that of employer or employee and so the applicant had no entitlement to workers compensation.
- 6.61 A contrasting decision is that of the Federal Magistrates Court in *Workplace Ombudsman v Golden Maple Pty Ltd* (2009) 186 IR 211. The case involved the imposition of penalties on two companies and a director for underpaying employees – most of them temporary residents on working holiday visas – at a number of Japanese restaurants. In the case of two of the employees, the breaches included not paying them for the first 20 hours of their employment, which was spent on 'unpaid training'. The lack of payment was explained by the director as follows (at [17]):

The people concerned were not proficient in English and lacked experience and we wanted to let them try out if they could handle the job before they were hired and to let them see if they could fit into the job. At the time we understood that they considered this to be fair and were in agreement with this. I now appreciate that this was a mistake and that the people concerned should have been paid for this initial period.

The case cannot, however, be regarded as a strong precedent, because there is no suggestion that any argument was put as to the 'training' period *not* being

‘employment’ in the common law sense.⁴⁶ The same point applies in relation to a similar finding in *Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81. There a 7-Eleven franchise was fined for breaches that included failing to pay international students for ‘training periods’ that were described by the magistrate (at [23]) as providing the defendants with ‘several weeks of free labour’.

- 6.62 Similarly, in the *Child Employment Principles Case 2007* (2007) 163 IR 41 at [283] a Full Bench of the Industrial Relations Commission of New South Wales was clearly of the view that it would be unlawful for children to be ‘employed on the basis that they will be “trained”, during periods of work for which they receive no payment at all’. But there is nothing in the judgment to suggest that they were considering a case in which it might be argued there was no employment contract, so that any relevant awards or minimum wage provisions would not apply.

Other kinds of work experience

- 6.63 There have been cases in which periods of work experience, even if not presented as a ‘trial’ as such, have been found not to involve employment.⁴⁷ The most notable of these is *Pacesetter Homes Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449. Here a builder had agreed with a youth organisation to give unemployed school leavers a chance to gain work experience. The worker in question ended up staying for six months and, having started out mostly observing, was performing productive work towards the end of this period. He was paid throughout the period, though below the award rate. Despite the length of the engagement, it was held by the Industrial Appeal Court of Western Australia that there was no contract of employment, and hence no obligation on the builder to pay award wages. The Court suggested that, as in *Dietrich*, the fact that the worker was never under any obligation to turn up for work showed an absence of the necessary mutuality of obligation. Indeed, the Court went further and found that neither party had intended to create legal relations at all. Much was made of evidence that showed the builder’s primary motivation was to assist unemployed

⁴⁶ Compare *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* (2010) 245 FLR 242, which also involved a period of ‘unpaid training’ that was found (at [217]) to have occurred after employment had commenced, it being a ‘concomitant’ of the employees’ engagement.

⁴⁷ See eg *Drzyzga v G & B Silver Pty Ltd* [1994] NSWCC 12; [Roberts v Stewart Hicks Real Estate \[2000\] NSWIRComm 138](#); *Williamson v Paul* [2002] SAIRC 43; *Lukac v Geddes Video Pty Ltd* [2011] FWA 5097 at [31]–[36]. As to the peculiar circumstances in the first of these cases, where the worker concerned had already been working for the same business as a casual employee, see Murray, above, pp 706–7.

young persons to gain experience and skills that might stand them in good stead, rather than to obtain productive work.

6.64 However, Justice Rowland sounded a note of caution (at 455):

In cases where the length of work experience is longer and where more work is required to be undertaken than when the period that the work experience person is able to observe the teacher is of a short duration, and where the tuition is in fact scant, then the real intention may be that a person is an employee and a contract of employment may be found, notwithstanding that the label 'work experience' is applied to the arrangement.

6.65 A clear example of such a finding occurred in *Cossich v G Rossetto & Co Pty Ltd* [2001] SAIRC 37. The applicant sought recovery of underpaid wages. She had begun an Associate Diploma in Wine Marketing, in which one subject required her to perform 240 hours of work experience within the wine industry. This work could be paid or unpaid. The applicant attended at the respondent's wine cellars and worked there until she had completed 39 days of certified work experience. This in addition to hours worked earlier at a winery would have satisfied the requirement of her course. However, the applicant continued to work for the respondent for a further 8 months, every Saturday for nine hours each day. The last 13 weeks of her time with the respondent were full-time, as had been three earlier periods. The respondent's manager paid the applicant \$50 per day from the till, regardless of the hours she attended and without deducting tax. The applicant did not receive group certificates. The respondent said this money was paid to assist the applicant with travelling expenses, but there was no attempt to estimate those expenses and the amount would have exceeded them. The applicant received minimal instruction and tuition. Industrial Magistrate Hardy accepted the applicant's evidence that there was a requirement or expectation that she attend for work. He said (at [29]-[30]):

My view is that the respondent, knowing that the applicant had commenced a working relationship with it on the basis of work experience ought to have done more than it did. I think that it had a positive duty to satisfy itself of the correct status of its putative employees. It does not sit well on the respondent for it to regard the applicant as a work experience student for a period well in excess of a year. It has not escaped me that it suited the respondent to do nothing. In effect it was gaining the services of an employee for an outlay well below her award entitlement. I do not regard the work of the applicant performed as anything less than would be required of a full-time employee who was properly engaged under the relevant award ...

To my mind the very length of the period in question, which was in excess of a year and one which the respondent would have me treat entirely as work experience, militates against it being so treated. By nature work experience ought to be relatively short and little more than a period of acquaintance and understanding of the duties of the work involved. Without attempting to put a limit on it, a year is simply far too long and suggestive of exploitation.

The Industrial Magistrate concluded that the applicant had been engaged on a contract of service and made an order for payment of the underpaid wages.

6.66 A further decision in which work experience was found to be employment is *Nominal Insurer v Cleanthous* [1987] NTSC 51. The defendant operated a lawn farm, where he occasionally used casual labour but largely worked on his own. In 1982 he met a young man, Davis, who was interested in starting a gardening business. The defendant gave him advice about his prospects, and the risks of self-employment, and offered him the opportunity to train with him while he prepared for his landscape gardening venture. Davis worked for the defendant on a casual basis, with no guarantee of continual work and no obligation to work particular hours. He received remuneration of over \$200 per week. The defendant did not regard Davis as an employee, deducting no tax. Justice Muirhead noted (at [3]) that the defendant 'regarded the payments he made as assistance by way of work experience to a young man endeavouring to better himself with a view to future cooperation.' The defendant did not have an insurance policy to cover Davis, who used the defendant's vehicle, and at times his equipment. The defendant directed his work and stipulated tasks from time to time. The judge considered that when Davis was injured, this occurred in the course of employment.

6.67 The decision in this case is also notable for the way in which the element of benevolent intention on the part of the employer is discounted, something that presents an interesting contrast to the reasoning in *Pacesetters*. According to Justice Muirhead at [15]:

[The defendant] temporarily employed Davis, basically, I accept, to further the latter's prospects of self-employment. He had been in error in his understanding that as he generally employed only intermittent casual labourers he was not required to insure his liability to workmen, but it was perhaps an understandable error. But the fact that an employer's motivation in employing a person is 'benevolent' rather than for reasons of self-interest does not necessarily intrude upon the analysis of the legal relationships; as observed by Murphy J in his dissenting judgment in *Dietrich v Dare*.

Arguably this approach is more consistent with the objective approach that is generally applied to the ascertainment of contractual intention.

6.68 Another example of a work experience arrangement being found to involve employment is *Schultz v Vlack* [1996] SAIRC 44. The applicant's mother arranged for her to undertake work experience at a hair salon operated by the respondent. The applicant ended up leaving after being there for six days in total. There was a dispute between the parties about what was involved, but on the facts as found by Industrial Magistrate Cunningham, the arrangement went 'beyond simple observation' and extended to 'helping around the salon', including by cleaning up, replenishing supplies and occasionally tending to customers. It was in fact envisaged that the arrangement would 'extend over some number of weeks, not just two or three days; and that the applicant would, for that period, be subject to the work discipline and the direction of the respondent'. It had also been agreed that the applicant would receive a reference at the end of this time, together with a free hair colour or perm. In fact, the applicant chose to terminate the arrangement early, on advice from her mother, and subsequently lodged a claim for unpaid wages in accordance with the South Australian Hairdressers and Toilet Salons Award.

6.69 In upholding the claim, the Industrial Magistrate was prepared to accept that 'if the issue were solely one of contract law, based purely upon the agreement reached between the parties', the applicant had agreed to work at the salon 'without any expectation of being paid wages or any form of remuneration'. On the other hand:

Since the operations of the respondent are subject to an award, however, the issue is not one of contract but of the application of that award. Whatever the agreement of the parties, the award must be given full effect, and the award does not permit such volunteer arrangements. If as a matter of fact and law the applicant were held to have been taken on by the respondent as an employee, then she is entitled to receive, and the respondent is obligated by the award to pay, the minimum rates of pay specified in it for the hours which the applicant actually worked, including those hours in which she was available to assist the respondent even if in fact she was not called upon to do anything.

In this case, since the applicant had 'shown that she was expected by the respondent to be available for work, to do what the respondent might ask of her within her experience and capabilities, and that she was to be rewarded on some basis provided she accepted and complied with those conditions', that was sufficient to create an employment relationship and attract the operation of the Award.

6.70 Importantly, the Award here contained a clause exempting any person ‘participating in bona fide unpaid work experience schemes, recognised by the Department of Education of South Australia, the Independent Schools Board, the Catholic Education System [or] the Department of Technical and Further Education’. This did not apply here, since the applicant had left school and was not attending any relevant educational institution. But its presence was treated by the Magistrate as significant:

[I]t demonstrates that those who made the award turned their minds to the recent industrial phenomenon of work experience – of young would-be workers (particularly) attending at a work place and doing work that might otherwise be done by an employee, albeit of a limited range, as part of their education and without thereby becoming entitled to be paid. In recognising this phenomenon, however, this award also limits it quite strictly to the educational courses mentioned, and by implication excludes any informal arrangement for unpaid work under the name of ‘work experience’.

It has been argued from time to time in this court that where the parties agree to some limited trial or work experience prior to an employee entering into employment the Court should recognise such arrangements, but I do not agree. Unless an award makes specific provision for any period of unpaid work (and ensures as a result some adequate safeguards against exploitation of the arrangement by the unscrupulous), the Court has no choice in law but to give full effect to the intention of the award-makers, and apply the provisions of the award strictly in accordance with its terms.

6.71 The Magistrate voiced a concern that the respondent had only agreed here to take the applicant on after much persuasion from the applicant’s mother, and that had the respondent known the applicant was going to claim wages, ‘it is quite clear that she would have refused to have anything to do with the arrangement, whatever minimal benefits she saw in it for herself’. Indeed on one view, ‘the benefits of the award may be presented as a windfall gain for the applicant, and an unanticipated and therefore unjust burden on the respondent’. As against that, it had been the respondent who wanted to continue the arrangement, even after taking advice from her industry association (which told her the arrangement was lawful, but only it appears because the respondent described the applicant’s role as merely ‘observational’). Moreover, this was a case in which ‘the general public interest must be seen to prevail’, in terms of ensuring compliance with the Award.

6.72 A final example of a ‘work experience’ arrangement being found to involve employment occurred in *National Tertiary Education Industry Union v University of New South Wales* [2011] FWAFB 5163. In dealing with an appeal against a decision to

approve an enterprise agreement, a Full Bench of Fair Work Australia considered the position of certain 'cadets', students who were working for Nura Gili (an organisation created by the University to administer programs for indigenous persons) during breaks from their studies. At first instance, Vice-President Lawler had ruled that these cadets were not employees, on the basis (citing *Dietrich*, among other decisions) that 'absent an express agreement to [the] contrary, there is no contract of employment involved in [a] period of "work experience", even where some (modest) payment is agreed': *Re University of New South Wales (Professional Staff) Enterprise Agreement 2010* [2010] FWAA 9588 at [78]. The Full Bench accepted a submission from the NTEU that this finding should be overturned, noting (at [40]) that neither the Union nor the University had in fact sought to argue that the cadets were anything other than employees. But no reasons were given in the decision, probably because in the end nothing turned on this particular point as far as the validity of the agreement was concerned.

Work placements

- 6.73 A further group of cases deal with work experience that arises through some form of 'placement' arrangement. For the most part, these have been found *not* to involve employment in the common law sense.
- 6.74 In *Birkett v Tubbo Estate Co Pty Ltd* [1997] NSWCC 12 the applicant was a student undertaking an advanced certificate in agriculture, for which she was obliged to undertake two one-month blocks of work experience. Her college arranged a placement for her at the respondent's property. The applicant was reimbursed for her \$170 fare to the property and issued with a group certificate for it. No other payment was made, but she was provided with meals, accommodation at the homestead and the use of a car or motor cycle on her days off. The applicant performed general farm duties, and was supervised and instructed to do so. Her only obligation, however, was to remain on the property to obtain an assessment at the end of the month. She was injured by a ewe and sought compensation. Judge Truss held that there was no employment contract between the applicant and respondent, following *Dietrich v Dare* and *Teen Ranch v Brown*:

I have not been persuaded that the arrangement between the applicant and the respondent evinced a clear and positive indication that legal relations were contemplated. The provision of meals, accommodation and the travelling expenses could not in my view be regarded as the consideration for the applicant providing her services. This is not why she was working on the stud. She was there for a

specific purpose, namely to fulfil the practical requirements of her course pursuant to an arrangement made between her college and the respondent. She was free to leave the property at any time without repercussion so far as the respondent was concerned, although it would have had repercussions in relation to completion of her studies.

- 6.75 This is of course a situation which would in any event now probably fall within the 'vocational placement' in the Fair Work Act (see 4.10–4.11). The same might also be true of the arrangement in *Bolden v Smith Reid Training Group* [1997] IRCA 26. The respondent was retained by the Commonwealth Department of Employment and Training to deliver the New Works Opportunities Program in which long term unemployed people participated in work experience and training sponsored by the respondent and were paid a training allowance while doing so. It was held that the respondent was not the employer of those who participated in the program.
- 6.76 In *Frattini v Mission Imports* [2000] SAIRComm 20 the applicant was engaged by the respondent on a period of one week of unpaid work experience that had been organised by Jobs Statewide, the provider of an employment training program in which the applicant was involved. Although the applicant was ultimately hired to work as a storeman, the initial week was found *not* to be part of his employment. The fact that he was paid \$100, having asked for a contribution towards his travel expenses, was not regarded as converting the arrangement to one of employment. The payment was clearly made *ex gratia* and the applicant had never understood that he was entitled to receive it. Deputy President Hampton arrived at this conclusion, notwithstanding what he described (at [40]) as his 'reservations regarding the use of so called unpaid "work experience" ... as a prelude to employment'.
- 6.77 In *Fogliano v Royal & Sun Alliance Workers Compensation* [1999] SAWCT 33, the Quality Training Company was retained by the government to arrange work placements. The applicant was referred to Quality's program and the company agreed to provide a work experience and training placement, involving 30 hours per week and a training allowance of \$315.00 per week. The applicant was injured while performing work at a hotel and lodged a compensation claim. The insurer argued that there was no contract of service between the applicant and Quality because the applicant was paid a set rate for attendance regardless of hours worked or tasks performed, on-the-job training was provided by the hotel and not by Quality, and any remuneration received by the applicant was from the Commonwealth. Judge

McCusker agreed that there was no contract of service within the common law sense:

An examination of the agreements here ... leads to the conclusion that there was no intention to create an employer/employee relationship. The agreement was essentially to train and qualify the participant to enable him to take employment in a designated industry. Arguably underlying the scheme was a strategy to overcome the dichotomy facing the unemployed, that employment cannot be obtained without experience and experience cannot be obtained without employment. The words, 'for training, work experience and program administration', set the character of the relationship. That is reinforced by the first clause stating, 'the work experience and training placement shall commence ...'

In support of this view, the Judge cited a decision by the Industrial Court of New South Wales, *In re Crown Employees (Technical Teachers) Award (1974) 74 AR (NSW) 450*, in which trainee teachers were found not to be employees. The contracts in that case were treated as being primarily for the provision of scholarships. Although the agreements with the teachers also contemplated practice teaching, that was characterised (at 467) as 'practical work undertaken as part of the course of training', rather than as employment.

6.78 In *Fogliano*, Judge McCusker went on to hold that the arrangement *did* constitute a 'contract of service' for the purpose of the *Workers Rehabilitation and Compensation Act 1986* (SA). But this was only because it fell within an extended definition in section 3. This deemed such a contract to exist in the case of 'a contract, arrangement or understanding under which a person (the worker) (i) receives on-the-job training in a trade or vocation from another (the employer); and (ii) is during the period of that training remunerated by the employer'. The finding that this extended definition applied was upheld by the Supreme Court in *Workcover Corp v Fogliano* (2000) 76 SASR 192, without reference to the issue of whether the agreement came within the common law meaning.

6.79 By contrast, in another case under the same statute, *Kura Yerlo Council Inc v Leonard* [1998] SAWCAT 12, it was held that an unemployed man who had been referred to the Council by a broker for the Commonwealth Government's Jobskills Program was engaged by the Council under a common law employment contract. He had been engaged under an agreement that was signed not just by himself and the Council, but by the broker and also the Australian Services Union. The agreement provided for both on and off-the-job training, as well as for work to be allocated and

controlled by the Council, together with a government-subsidised wage. According to Judge Parsons:

The nomenclature ascribed to a position in the agreement cannot be decisive of the nature of the contract. One has to look beyond the use of the words ‘work experience training placement’. The lack of training and minimal supervision by the putative employer, the extent of the work performed, the responsibility given to the respondent in the performance of the work, and the expectation as to his competence militate against a finding that he was engaged in work experience.

The decision in *Pacesetter Homes* was cited in support of this last proposition.

Conclusion

- 6.80 It is apparent from this review of an admittedly limited body of case law that work experience arrangements *may* in certain circumstances be found to involve employment relationships. But this does not always happen, especially with ‘trial’ arrangements, where it is open to a court to find either that there is no intention to create legal relations, or that the necessary element of ‘mutuality’ is absent. On the other hand, the longer the period of work experience, and the more that productive rather than merely ‘observational’ work is involved, the greater the chance of an employment contract being identified – even if the work is unpaid. This is apparent from the observations in *Pacesetter Homes*, and in particular the decision in *Cossich*. As we have seen, there is no barrier in such a case to satisfying the ordinary requirements for the formation of a contract, including the provision of consideration.
- 6.81 There is one final point that we would make at this juncture. It concerns the role of policy considerations. As Jill Murray notes in her review of the case law on the broader category of ‘volunteer’ labour, it is not possible to identify any ‘over-arching or coherent judicial policy’ in relation to the application of contract law to such work – other, perhaps, than a reluctance to perceive an intention to create legal relations within certain kinds of charitable, religious and sporting associations.⁴⁸ Importantly, with only a few exceptions, including Justice Murphy’s dissenting judgment in *Dietrich v Dare* and Industrial Magistrate Cunningham’s judgment in *Schultz v Vlack*, there is very little evidence of judges being overtly influenced by *statutory* objectives in determining the existence of an employment contract. This is perhaps surprising,

⁴⁸ Murray, above, pp 703, 708.

and some at least of the decisions mentioned in this chapter where a contract was found not to exist might, we suggest, have been decided differently if greater emphasis had been laid on the protective function of the legislation in question. In the case of the Fair Work Act, the objects in section 3 speak of ‘providing workplace relations laws that are fair to working Australians’, and of ‘ensuring a guaranteed safety net of fair, relevant *and enforceable* minimum terms and conditions’ (our emphasis). In our opinion, courts and tribunals would be entirely justified, in cases of doubt, in leaning towards finding that an employment contract exists for the purpose of the Fair Work Act.

- 6.82 That argument can indeed be bolstered by reference to the very existence in the Act of the vocational placement exception. As explained in Chapter 4, it ensures that unpaid work undertaken to satisfy an authorised course requirement cannot be regarded as constituting employment for the purpose of the Fair Work Act – though of course it still might for the purpose of other legislation. The question has to be asked: why would this exception be necessary if such placements could not be regarded as falling within the ordinary common law definition of employment? Even if its purpose is regarded as being to avoid any doubt, rather than to counter a strong possibility, its very existence provides support for the view that unpaid work experience can be the subject of an employment contract. Indeed, the argument can be taken a step further. Just as in the case of the award considered in *Schultz v Vlack*, it may be said that Parliament has chosen to exempt only certain types of unpaid work experience – those required by an authorised course. If so, then there can be no fundamental objection to treating other kinds of work experience as falling within the regulatory regime that the Act establishes.
- 6.83 In saying this, we do not wish to be seen as losing sight of the fact that Parliament has also chosen to continue to use the common law conception of employment as the primary trigger for the operation of the Fair Work Act. If it is clear that parties have intended to create an arrangement that is not legally binding, or that lacks true mutuality of obligation, then there will be no contract of employment, and the Act will not apply. But before jumping to that conclusion on a given set of facts, the courts and tribunals administering the legislation should arguably pause to consider whether that would be consistent with the objects of the Act.⁴⁹ And they should also bear in mind the caution, so powerfully expressed by the UK Supreme Court in

⁴⁹ As to the role of policy considerations in determining whether it is lawful to forego statutory rights that are ‘conferred in the public interest, rather than for the benefit of an individual alone’, see *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54 at [46].

Autoclenz v Belcher, about the need to be ‘realistic and worldly wise’ in determining the true nature of an arrangement that is presented as a ‘job trial’ or ‘work experience’. As Jill Murray argues:

Objective assessment of the employer’s intention should take as broad a view as possible of the benefits flowing to the business through the worker’s volunteer labour to avoid the artificial exclusion of some workers from the labour regulation regime.

The FWO’s Current Approach

- 6.84 As noted in Chapter 1, the FWO’s interest in examining the legality of unpaid work arrangements has significantly increased since the publication in August 2011 of newspaper articles advocating the use of interns as a source of ‘free’ labour. This prompted the development of a Fact Sheet on ‘Internships, Unpaid Work Experience and Vocational Placements’, which was released in October 2011 following extensive consultation with stakeholders.⁵⁰ In December 2011, a dedicated section on ‘Student placements & unpaid work’ was launched on the FWO website.⁵¹
- 6.85 Having reviewed the Fact Sheet, which is reproduced at Appendix A to this Report, we believe that it generally presents a fair and balanced picture of the current legal position. After noting the recognition given to ‘vocational placements’ in the Fair Work Act, and the criteria that must be satisfied for that exception to apply, the Fact Sheet goes on to address unpaid work experience placements or internships that fall outside the exception. It correctly notes that for such arrangements to be lawful, ‘businesses need to ensure that the intern or work experience participant is not an employee’. The equivalent section of the current website is a little more expansive on this point:

If a work experience arrangement or internship does not meet all of the above criteria, the next step is to determine whether the person undertaking the arrangement is an employee ... Whether a person is an employee will depend on

⁵⁰ The Fact Sheet is available at <http://www.fairwork.gov.au/factsheets/FWO-fact-sheet-Internships-Vocational-Placements-Unpaid-Work.pdf> (accessed 9 November 2012).

⁵¹ See Fair Work Ombudsman, *Annual Report 2011–2012*, p 23. The relevant section of the website can be found at <http://www.fairwork.gov.au/pay/student-placement-and-unpaid-work/pages/default.aspx> (accessed 9 November 2012). All quotes that appear below are from pages accessed from this URL.

whether the internship or work experience arrangement created an employment relationship between the business and the person.

6.86 Both the Fact Sheet and the website then go on to note that a 'key issue' in this regard is whether the parties concerned 'intended to create a legally binding employment relationship'. A series of relevant factors are listed, including the purpose of the arrangement, its duration, whether the person concerned is expected to engage in 'productive activities', who benefits from the arrangement, and whether the placement was entered into through a university or vocational training organisation.⁵² In the Fact Sheet, hypothetical examples are then presented. In Example 3, concerning a graduate journalist who spends three months writing stories for a local paper as an 'unpaid intern', it is suggested that he 'may have been engaged as an employee and entitled to remuneration'. The current website offers a further example, as follows:

Julianne is studying law, and has been given the opportunity to undertake a 2 week internship with a legal firm during the summer holidays. While the internship is not a mandatory requirement of her course, she knows that she will be receiving a real benefit from gaining on the job experience in the field that she would eventually like to work.

During the internship, Julianne observes others working, takes notes and asks questions about what they are doing. She sits in on court hearings and client meetings, and attends a seminar that is provided to clients.

Because Julianne is not undertaking productive work for the legal firm, the period of the internship is limited and she is the person gaining the main benefit from the arrangement, Julianne is unlikely to be an employee. This means that she would not be entitled to payment of wages, even though the internship is not a required part of her course.

There is nothing in these various examples that in our view could be considered out of kilter with the case law we have reviewed in these chapters.

6.87 Attention is then given to 'unpaid trials'. According to the Fact Sheet, a person undertaking such a trial will 'normally be an employee ... and entitled to be paid as such' if it is the employer who requests the trial, *or* if 'it is expected that the person will be performing productive activities'. The same will apply if 'a work experience placement or internship is used to determine a prospective employee's suitability for a job'. The website puts it more succinctly: 'As a general rule, a prospective

⁵² For further and more detailed comment, see 9.16–9.17.

employee must be paid for any trial work they have performed to establish their suitability for a role.’

- 6.88 The Fact Sheet and website each note, again correctly, that the existence of any employment relationship depends on the particular circumstances of each arrangement. Educational institutions and businesses are encouraged to seek ‘professional advice from their solicitor, chamber of commerce or industry association before entering into any such arrangement’. The website also invites individuals to contact the FWO if they are ‘in a work experience arrangement or internship that does not appear to meet all of the criteria to be a vocational placement as defined by the Fair Work Act’, or if they believe they are ‘not receiving appropriate entitlements’.
- 6.89 We have heard criticism from certain stakeholders that the Fact Sheet does not provide sufficient certainty as to what is lawful and what is not in this area. In our view, at least three factors militate against the FWO being able to provide clear and definite advice in relation to the legality of unpaid work experience arrangements. Those factors are: first, the complex nature of the legal principles we have outlined in this chapter; secondly, the latitude those principles afford to courts and tribunals in relation to the identification of a contract of employment; and, thirdly, the absence of recent test cases on the types of arrangement currently under examination, whether under the Fair Work Act or otherwise.
- 6.90 That said, we do see room for providing slightly more guidance on the types of arrangement that are more or less likely to attract intervention from the FWO, a matter to which we return in Chapter 9.
- 6.91 There is, on the other hand, one area in which we believe the FWO might be criticised for occasionally being *too* definitive in its advice. This concerns unpaid trials. As we have explained, the case law on such arrangements suggests that, even when paid (as in *Dietrich v Dare*), trial work arrangements can be found to be lawful. This may be on the basis either that the parties did not intend to create a legally binding arrangement, or that the necessary ‘mutuality of obligation’ is lacking for the agreement to be an employment contract.
- 6.92 From a policy perspective, we agree with the following view, expressed by the Ombudsman himself in an article written shortly after announcing the commissioning of this report:

About a year ago, a Melbourne mum rang my direct line. She was very concerned about her 20-year-old son. He'd approached an inner city café to work as a barista after having done some training.

Initially, he spent half a day without pay showing that he could work the espresso machine and relate to customers. But they kept asking him to come back, day after day, and by the time his mum rang me, he had worked for over a week without pay. Every day, with a promise of 'I'll make a decision to take you on tomorrow'.

I told her I thought the first half day might be fair enough. No-one is going to take on a barista without checking they know the difference between a flat white and a macchiato.

I also told her what she already knew – her son had been exploited and should be paid. Simply put, there comes a point where the legitimate questions of a future employer about a person's skill and experience move from legitimate to exploitative.⁵³

Given the objects of the Fair Work Act, we believe that such an arrangement *ought* to be regarded as unlawful. Indeed it can be argued that, whatever the parties' subjective beliefs, an intention to create legal relations could be inferred from the objective circumstances. It could also be said that as time went on, the 'request' to come into work had effectively become a requirement, as indeed may occur in relation to many casual employment relationships. At the very least, in the absence of any clear case law to the contrary under the Fair Work Act, this is a stance the Ombudsman and his staff are entitled to take.

6.93 But it is rather harder, on the basis of the analysis in this chapter, to agree with the following article, which appeared on the FWO website on 17 October 2012:⁵⁴

Workplace Myths; unpaid trials

There is no such thing as an unpaid trial.

If someone is working for your business you have to pay them wages ...

Only genuine volunteer arrangements or 'vocational placements' can be unpaid.

We often receive complaints and enquiries from people who have worked a trial to get a job and haven't been paid for it.

⁵³ N Wilson, 'Experience and exploitation: defining internships', *The Drum*, 19 April 2012, <http://www.abc.net.au/unleashed/3960252.html> (accessed 10 November 2012).

⁵⁴ <http://www.fairwork.gov.au/media-centre/latest-news/2012/10/pages/20121017-workplace-myths-unpaid-trials.aspx> (accessed 10 November 2012).

A KEY LEGAL ISSUE: IS THERE AN EMPLOYMENT CONTRACT?

You can ask a prospective employee to demonstrate a skill that is required for the job, for example a touch typing test, or asking them to make a coffee. However, if they perform work, such as working a shift, they have to be paid for it.

In contrast to what is said in the Fact Sheet and elsewhere on the website, which speaks of what is 'generally' the case, this piece admits of no doubt. It presents a clear distinction between a test and a trial, using one of the examples (a typing test) mentioned by Justice Murphy in *Dietrich* (see 6.53). But that, it will be noted, was a dissenting judgment, and in a case dealing with a paid trial at that. So while this kind of advice may have the merit of being crystal clear, it arguably oversimplifies the legal position.

Unpaid Work and Migration Legislation

- 7.1 In this chapter we consider the position of a group of workers, who may be particularly vulnerable in relation to their working arrangements, and the principal legislation that governs their rights and obligations. The right of migrants¹ to work in Australia depends on the particular class of visa they hold and the conditions attached to it. Section 41(2)(b) of the *Migration Act 1958* provides that visas may impose restrictions on work, in respect of either '(i) any work; or (ii) work other than a specified kind; or (iii) work of a specified kind'. The definition of 'work' is not found in the Migration Act but in regulation 1.03 of the *Migration Regulations 1994*. There 'work' is defined as 'an activity that, in Australia, normally attracts remuneration'. In accordance with regulation 2.05 of the Migration Regulations, Schedule 2 sets out the provisions in relation to each sub class of visa, and Schedule 8 contains the list of conditions relating to work that may be attached to those various sub classes of visa.

The Definition of 'Work' in the Migration Legislation

- 7.2 In defining 'work' as 'an activity that, in Australia, normally attracts remuneration', regulation 1.03 would seem, if given its ordinary meaning, to be wide enough to encompass the kind of unpaid work which is the subject of this study. There have been a number of cases before the Federal Court interpreting the term 'work' as used in the Migration Act and Migration Regulations which are useful in this respect.
- 7.3 In *Minister for Immigration, Local Government and Ethnic Affairs v Montero* (1991) 31 FCR 50 a Full Court of the Federal Court considered the meaning of the term 'work', which at that time was not further defined in the Migration legislation. Turning first to an ordinary dictionary, the Full Court indicated (at [25]) that there 'work' was broadly defined as referring to:

exertion directed to produce or accomplish something; labour; toil and employment; a job, specially that by which one earns a living.

¹ A note on terminology: the term 'migrant' is used in this report to refer generally to a person who is in Australia but is not an Australian citizen or a permanent resident.

The Full Court then elaborated upon this by considering the characteristics of ‘monetary reward’, and the nature of the distinction between work and other activities such as a hobby.

7.4 First, in relation to monetary reward, it opined (at [25]):

It is a term which frequently connotes activity of the mind or body undertaken in exchange for monetary reward, and may aptly be used to describe a person’s occupation or employment, which again, will usually be pursued by that person for monetary reward. The payment of a monetary or other material benefit will be a strong indication that the activity undertaken is ‘work’. But monetary reward is not a necessary component of ‘work’ which has a wider meaning in the Act.

Secondly, the Full Court considered the question of how work can be distinguished from hobbies or leisure, which may involve identical activities. It said (at [26]):

Just as in some cases the pursuit of an activity for the purpose of gaining a livelihood or monetary reward will lead to the conclusion that the activity constitutes ‘work’, there will also be cases where an activity is so clearly in pursuit, for example, of leisure or a hobby that beyond question no element of ‘work’ in the ordinary sense of the term will be involved. Between the two extremes will fall cases where no particular factor is conclusive. In these cases considerations such as the length of time an activity is pursued, the nature and the purpose of the activity, other activities being pursued more or less contemporaneously with the activity in question, and the obligation of the person to undertake the activity, may bear on the decision whether the activity is fairly to be described as ‘work’.

The Court then concluded (at [27]) that the identification of work would always be a question of law and fact:

In the end, the decision is one of fact and degree which must be decided in all the circumstances of the case. Decisions in decided cases will assist in elucidating the limits of the meaning of ‘work’ as used in the Act, but it is not possible to lay down a universal test. The term ‘work’, in the abstract, and in the context of the Act, is probably incapable of precise definition.

7.5 The *Montero* case involved an appeal by Mr Montero against a decision to refuse to allow him entry into Australia on a tourist visa, which had already been granted to him. He was stopped at the airport by customs and immigration officials who, after interviewing him and examining items in his possession, formed the view that he was intending to breach a condition of his visa that he not work in Australia. Mr Montero, a cook, was visiting his mother and sister who lived in Australia and who were to support him during his stay. His sister conducted a weekly market stall, selling (it was

presumed) Filipino food. When he had been asked about recipes that he had in his possession, Mr Montero indicated that he was going to teach his sister at home to cook certain menus for food to be sold at the market. In response to questioning about whether he was to be paid, he indicated that if he were to receive anything from his sister it would be ‘pocket money’.

- 7.6 In coming to the view that there were sufficient grounds to cancel Mr Montero’s visa, the immigration official indicated he had relied on the department procedures manual, which said: ‘For the purposes of visitor entry, “work” means the “undertaking of activity in Australia in a paid or unpaid capacity”.’ Justice Olney, when hearing the case at first instance in the Federal Court, considered that this could not be taken in a literal sense, because the ‘undertaking of activity’ encompassed every aspect of living: *Re Montero v Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 183. Justice Olney referred to an earlier Federal Court decision, *Broussard v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 21 FCR 472, which concerned the question of whether a Catholic priest was in breach of a visa condition which prohibited ‘employment’. In that case, Justice Gummow held (at 45–76) that ‘employment’ encompassed not only ‘regular employment as a member of the general workforce, involving receipt of a wage or salary, but also pursuit of any business or occupation’, and concluded that the priest had breached the condition of his visa in carrying out his vocation. Justice Olney considered (at [55]) that Justice Gummow’s decision was precedent simply for the proposition ‘that a person who engages in the pursuit of his regular business or occupation may be regarded as being engaged in employment and this whether or not he receives any wage or salary in return’.
- 7.7 In *Montero’s* case counsel argued before Justice Olney (at [52]) that ‘work’ should be interpreted as ‘personal exertion not exclusively for domestic, social or recreational purposes’. In coming to the decision that it was not open to the officials to have concluded that Mr Montero would engage in his regular occupation, Justice Olney said (at [57]):

Without in any way intending to give credibility to the respondent’s suggested definition as an exhaustive definition of the term ‘work’, I think it is fair to say that whatever the applicant may have intended to do for his sister, it was essentially of a domestic and social nature. It was no more than any visitor may do for his host. It cannot be sensibly said that by helping his sister at home by way of showing her how to cook certain special recipes the applicant would be engaging in his regular

occupation any more than a visiting motor mechanic could be said to engage in his occupation by helping his host, or indeed a stranger, start his car.

This reasoning was not, as Justice Olney admitted, without its difficulties. He elaborated (at [54]) on this through several hypothetical examples:

if a professional musician from overseas were to 'busk' in the Smith Street Mall in Darwin (or in any of the other similar places which can be found in cities and towns throughout Australia) he could be said to be engaging in his regular occupation as a musician, but a visiting factory worker doing exactly the same thing would not be. And what of the professional investor who during a visit to his family in Australia buys and sells shares on an Australian stock exchange?

- 7.8 The Full Court of the Federal Court agreed that there could be no test such as that proposed by counsel, as this would be to introduce words that were not in the Act, and in any event would require judgments no less difficult to make. However, in relation to this point the Full Court added (at [28]):

On the other hand the domestic, social or recreational purpose of an activity might, in association with all the facts of a case, provide, as Olney J said some guide to what activities do not constitute work.

The Full Court agreed (at [29]) with Justice Olney that in all the circumstances, including the extent of the proposed activity, the purpose of the visit, the circumstances of family support during the stay, and the limited nature of the sister's market stall, it could not be said that Mr Montero intended to work or engage in a regular occupation in Australia.

- 7.9 After the *Montero* case, the definition of work in regulation 2 of the Migration Regulations was amended. In *Braun v Minister of Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 152 Justice French in the Federal Court considered the correct interpretation of the new regulation 2, which was in all relevant respects identical to the current regulation 1.03. It provided that: 'Work in relation to a visitor visa or a visitor entry permit means an activity that in Australia normally attracts remuneration.'

- 7.10 *Braun's* case concerned a young German woman who was in Australia on a tourist visa, which was subject to a terminating condition that she not 'work'. After travelling in various parts of Australia Ms Braun visited friends living on a station in the north of Western Australia, who in turn introduced her to people on the neighbouring station of El Questro. A few days after she arrived at El Questro the cook resigned. Ms Braun, having met a young man and wanting to spend more time

at the station, offered to do the cooking from time to time for no pay. Later when immigration officers visited the property, Ms Braun argued that she was not working within the meaning of the regulation, but undertaking 'work experience'.

- 7.11 Justice French rejected that argument. He indicated (at [11]) that the fact that the activity was done without remuneration did not of itself place it outside the category of work contemplated by the regulation:

It is necessary and sufficient that it be an activity which normally attracts remuneration. In this case Miss Braun had taken up work which was previously done by the cook who had resigned. Although she said that she was doing it for the purpose of getting work experience on the station, that does not take it out of the definition. That characterisation aligns what she was doing with the activity of other people who enter into occupational activity of a kind that would normally attract remuneration in the hope of getting experience for the purpose of taking up remunerative work.

However, Justice French continued (at [11]):

It may be that circumstances can arise in which persons engage in activity of a domestic or social character which for the reasons expressed in the *Montero* case should not be seen as falling within the notion of work as used in the *Regulations*. The assessment of work-like activity as purely domestic or social is a matter of evaluation and degree. But this case does not approach what might be called a domestic or social characterisation. The applicant's own description of what she was doing as work experience takes it out of that category.

- 7.12 Similar issues arose in the case of *Kim v Witton* (1995) 59 FCR 258, where it was argued that there had been no breach by Mr Kim of the condition not to work in Australia attached to his original Class 670 tourist (short stay) visa, because the activity was undertaken on a volunteer basis and for the public benefit. Mr Kim was a cartoonist and illustrator. While in Australia he had been requested by the NSW Department of School Education to produce some graphics for a project entitled 'Korean Using Innovative Technology'. He did so, he claimed, on a voluntary basis. His involvement in the project lasted over a 28 week period and during that time he worked for two to three days per week for about fifteen weeks. While he did receive some recompense for his graphics, Mr Kim said this amounted to a reimbursement for expenses. While Justice Sackville indicated that the Tribunal had accepted this and thus so did he, he did intimate that the description of the payments made by the Education Department did not totally accord with this (and he also calculated that the amount paid, \$3,306, was equivalent to approximately \$88 per day, the implicit

suggestion being that this was a more significant payment than the mere recompense of expenses). At the end of the project Mr Kim was provided with a glowing reference regarding the quality of his work and contribution to the project by the Department of School Education.

- 7.13 In relation to the requirement that the activity ‘normally attract remuneration in Australia’, Justice Sackville first referred to Justice French’s decision in *Braun*. He then emphasised (at [33]):

The test is not whether the individual performing the activity receives remuneration for it, nor whether he or she performs the activity for commercial motives or for some other reason. The test to be applied is an objective one, namely whether the ‘activity’ performed by the individual normally attracts remuneration in Australia.

In rejecting Mr Kim’s argument, Justice Sackville said that it focused on the particular aspects of the arrangement between the parties and especially the remuneration arrangements rather than on the nature of the activity. In this instance, His Honour described (at [35]) the activities as not performed on ‘rare and sporadic occasions, but on a regular and systematic basis over a period of seven months’, thereby invoking words identical to those used for some time in Australian employment and labour legislation to describe certain casual employees. Indeed, the conclusion which Justice Sackville reached (at [35]) pointed to the similarity of modern day (and often precarious) employment with the way in which Mr Kim worked:

the only difference between the applicant’s activities and paid part-time employment in a regular occupation was that he did not receive a wage or salary.

- 7.14 The argument that the purposes of the activity were not the same as ordinary work contracts, and that it was done for the benefit of the community did not, in Justice Sackville’s judgment (at [37]), make any difference to his interpretation of the regulation:

The fact that the applicant’s activities benefited the community does not alter this conclusion. Nor does the fact that the Department of School Education requested the applicant to undertake the graphic artwork for the purposes of its schools project. Many kinds of work are intended to promote important community purposes, such as welfare or educational objectives. They are nonetheless activities that normally attract remuneration. Similarly, it is often the case that a person with special skills is invited to undertake a task because of those skills. This is quite consistent with a conclusion that the activity performed by that person normally attracts remuneration.

However, he added immediately afterwards (at [38]) that:

None of this is to suggest that the voluntary nature of a particular activity, nor that the purposes for which it is undertaken, are necessarily irrelevant in determining whether the activity is one ordinarily that attracts remuneration.

7.15 This issue of the relevance of the purposes of the work was specifically addressed in *Dib v Minister for Immigration and Multicultural Affairs* [1998] FCA 415. In this case Justice Einfeld commented:

the primary motive in *Kim* for performing the activity, as in *Braun*, was commercial – the gaining of work experience or the chance to demonstrate skills in the hope of obtaining paid employment.

It is worth being reminded here that this may be a common aspiration of many migrants in undertaking unpaid work in Australia. It is especially true of international students undertaking internships, as discussed in Chapter 3 and also later in this chapter. However, *Dib's* case was different to that of *Braun* and *Kim*: here, so the Court held, the motives for undertaking the various activities related to family loyalty, moral obligation and support. They were, said Justice Einfeld, 'purely compassionate and domestic'. He thus held that the activities undertaken by Mr Dib did not come within the definition of 'work' in regulation 1.03 of the Migration Regulations.

7.16 In this case, Mr Dib had initially come to Australia on a Subclass 673 close family visitor visa which precluded him from working. While in Australia he spent a considerable amount of time visiting his sister, who had young children and also a husband who suffered from severe health problems. The family operated a tyre business, and were struggling given the other pressures in their lives. In order to assist his family, Mr Dib had often driven his brother-in-law to his business, and sometimes drove by himself to the business to collect tyres. When his brother-in-law was hospitalised, Mr Dib spent time at the business supervising, although the nature of this supervision activity was not clear. However, there was evidence that the business could not afford to hire someone else and would be in difficulties without the assistance of Mr Dib. Nonetheless, in the end Justice Einfeld considered:

The circumstances peculiar to this case thus place the assistance given by the applicant in the grey area between work done for the purpose of gaining remuneration or a livelihood and activities that are purely in the pursuit of personal satisfaction or compassion.

In addition, the judge concluded that Mr Dib was already a successful administrative technician and had a set of skills not relevant to the tyre business.

- 7.17 Justice Einfeld reiterated that the particular circumstances of the case are always critical in determining whether or not a person has undertaken ‘work’ that ‘ordinarily attracts remuneration’.

In my opinion, the definition in regulation 1.03 is capable of a variety of interpretations depending upon what factors are taken into consideration and therefore cannot be applied without additional qualification. In other words, commercial, social, domestic or altruistic motivations may, in the context of all the facts of a case, assist in determining whether a particular activity undertaken voluntarily is one that ordinarily attracts remuneration.

To illustrate the point various hypothetical situations were given:

For example, a person visiting his brother and family may help in painting his brother’s house. Because house-painting is often ‘work’ performed for remuneration does not mean that it is not also undertaken as a domestic activity by the owners of the house being painted or by their relatives or friends. Similarly, a son or daughter of the owner of a car may receive pocket money or some assistance in kind, such as the periodic use of the car, in return for washing it every week, or may receive nothing other than the gratitude of the relevant parent. Gardening or other household tasks may be done on the same basis. That this type of activity may also be done for reward by a professional car washer, gardener or domestic assistant where it is undoubtedly ‘work’ does not mean that when done by the sons or daughters, it is ‘work’ in the relevant sense by them.

The examples provided by the judge are those typically found in contract law textbooks which are proffered as examples of the presumption of a lack of intention to create legal relations within families² – although no reference to those legal principles was made.

- 7.18 The above cases illustrate that where migrants are undertaking unpaid work – be it work experience, unpaid trial work or an unpaid internship – there is a strong possibility that such work falls within the definition of ‘work’ in the Migration Act and Migration Regulations. That is not always the case, however, and all the facts of the situation need to be taken into account, including an examination of the purposes and context of the activities undertaken.

² See eg J Paterson, A Robertson and A Duke, *Principles of Contract Law*, 4th ed, Lawbook Co, Sydney, 2012, pp 122–6.

7.19 The cases also make it clear that ‘work’ may include periods of inactivity, in the sense that it involves time spent doing things that are not always immediately obvious as being what might be described as productive activity. Thus, for example, in *Al Ferdous v Minister for Immigration & Citizenship* [2011] FCA 1070 the spouse of an international student, who had worked as a taxi driver for a period longer than that permitted by the condition applicable to his visa, tried unsuccessfully to argue that the periods of time spent returning to base, logging on and off, handing over to the next driver, or waiting for a fare were not time spent at work. Unsurprisingly, Justice Stone in the Federal Court confirmed the earlier finding of the Migration Review Tribunal that all those activities were in fact integral to the work of a taxi driver.

The Regulation of International Students and Work in Australia

7.20 In order to demonstrate the way in which conditions restricting work attached to visas may operate, the next section of this chapter examines the situation of international students as an example of a particular group of migrants in Australia probably more likely than any others to be exposed to the types of unpaid work that are the subject of this report. International students may enter Australia on a variety of different visas according to their enrolments and course of study. For example, broadly stated these include sub class 570 – Independent English Language Intensive Course for Overseas Students (ELICOS); sub class 571 – Schools; sub class 572 – Vocational Education and Training; sub class 573 – Higher Education; sub class 574 – Postgraduate Research; sub class 575 – Non-Award sector; and sub class 576 – AusAid and Defence sector.³

Conditions 8104 and 8105

7.21 International students, and members of their family accompanying them, are usually permitted to work while they are in Australia, albeit in most cases there are restrictions governing that work. Conditions 8104 and 8105, which are contained in Schedule 8 of the Migration Regulations, are the relevant conditions relating to work for most international students, while Condition 8104 is usually applicable to any dependent members of their family who accompany them.⁴ Condition 8105 is mandatory for student visas granted after 26 April 2008 and discretionary for those with visas which were issued with a permission to work at an earlier date.

³ For full details of the sub classes of visa, see Schedule 2 of the Migration Regulations.

⁴ See also Condition 8101, Schedule 8 Migration Regulations.

7.22 Condition 1805 provides as follows:

- (1A) The holder must not engage in any work in Australia before the holder's course of study commences.
- (1) Subject to subclause (2), the holder must not engage in work in Australia for more than 40 hours a fortnight during any fortnight when the holder's course of study or training is in session.
- (2) Subclause (1) does not apply:
 - (a) to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students; and
 - (b) in relation to a Subclass 574 (Postgraduate Research Sector) visa if the holder has commenced the masters degree by research or doctoral degree.
- (3) In this clause:

'fortnight' means the period of 14 days commencing on a Monday.

7.23 Condition 8104 provides:

- (1) Subject to subclauses (2) to (6), the holder must not engage in work for more than 40 hours a fortnight while the holder is in Australia.
- (2) If the holder is a member of the family unit of a person who satisfies the primary criteria for the grant of a student visa, the holder must not engage in work in Australia until the person who satisfies the primary criteria has commenced a course of study.
- (3) If the holder is able to engage in work in accordance with subclause (2), the holder must not engage in work for more than 40 hours a fortnight while the holder is in Australia unless subclause (4) or (5) applies.
- (4) Subclause (3) does not apply if:
 - (a) the visa for which the primary criteria were satisfied is:
 - (i) a Subclass 573 (Higher Education Sector) visa; or
 - (ii) a Subclass 574 (Postgraduate Research Sector) visa; and
 - (b) the course of study is a course for the award of a masters or doctorate degree that is registered on the Commonwealth Register of Institutions and Courses of Overseas Students.
- (5) Subclause (3) does not apply if:

- (a) the visa for which the primary criteria were satisfied is a Subclass 576 (AusAID or Defence Sector) visa; and
 - (b) the course of study is a course for the award of a masters or doctorate degree.
- (6) In this clause:

'fortnight' means the period of 14 days commencing on a Monday.

- 7.24 The website of the Department of Immigration and Citizenship (DIAC) contains information for international students regarding their visas, including mandatory and discretionary conditions.⁵ The conditions for dependent family members accompanying are also summarised on the DIAC website.⁶
- 7.25 There are a number of elements of Condition 8104 and Condition 8105 which are particularly relevant to our consideration of various forms of unpaid work.

Time constraints for commencement of course and course 'in session'

- 7.26 First, there are requirements in both Conditions 8104 and 8105 concerning a restriction on doing any work before the student's course of study commences. Under section 22 of the *Education Services for Overseas Students Act 2000* (ESOS Act) institutions are required to state the length of each study period for their course in a written agreement with each international student. This is also relevant to the restriction in Condition 8105 relating to the number of hours during a fixed period (now a fortnight, but formerly a week) that can be worked by the international student when their course of study is 'in session'. However, when a course is not in session there are no such restrictions applicable to international students whose visas are subject to Condition 8105. A course is considered to be 'in session' during advertised semesters, including periods when exams are being held, and if the studies have been completed as long as the confirmation of enrolment is in effect.
- 7.27 Condition 8104(1) and Condition 8105(1) restrict the visa holder to working no more than 40 hours per fortnight during the relevant period. Any unpaid work that comprises 'an activity that, in Australia, normally attracts remuneration' will be included in the calculation of these hours. The law relating to comparable clauses in

⁵ DIAC, 'Student Visa Conditions for the Primary Visa Holder', <http://www.immi.gov.au/students/visa-conditions-students.htm> (accessed 23 October 2012). See also DIAC 'Working while studying', http://www.immi.gov.au/students/students/working_while_studying/ (accessed 23 October 2012).

⁶ See <http://www.immi.gov.au/students/visa-conditions-family.htm> (accessed 2 November 2012).

Conditions 8104 and 8105 demonstrates that that they have been strictly enforced, and followed by the drastic consequence of cancellation of visa where breached.⁷

- 7.28 Previously, clauses in the Conditions imposed a restriction on working more than 20 hours in a week. Many of the decided cases illustrated the way in which this type of condition could operate inflexibly, and, therefore, harshly in its consequences for international students or their dependent family members. This could occur where, say, they were unexpectedly delayed for a short time at work for reasons beyond their control, or where they were requested at the last minute to work a few extra hours to assist at their workplace, or because the standard length of a shift (7, 8 or 12 hours) did not fit neatly into the 20 hour stricture. The following cases illustrate these situations.
- 7.29 *Al Ferdous v Minister for Immigration & Citizenship* [2011] FCA 1070 concerned a visa holder who was the dependent spouse of an international student and worked as a taxi driver. On one occasion he worked 51 minutes in excess of the stipulated 20 hours restriction in Condition 8104 because he had to chase a fare-evading passenger. He argued, unsuccessfully, before Federal Magistrate Nicholls that those hours were to be averaged over the whole period of the visa. Later, in the Federal Court, Justice Stone merely noted (at [12]–[13]) that this argument was rejected and that the Magistrate referred to the earlier precedent established by a Full Court of the Federal Court in *Islam v Minister for Immigration and Citizenship* (2007) 158 FCR 579.
- 7.30 In *Islam's* case the relevant wording in Condition 8104, clause 1, then as now, indicated that the hours restriction applied 'while the holder [of the visa] is in Australia'. This is slightly different to the comparable restriction in Condition 8105(1), which referred (then as now) to a period 'during any week [now 'any fortnight'] when the holder's course of study or training is in session'. Evidence before the Tribunal initially hearing the case was that Mr Islam genuinely believed that he could work more than 20 hours in the weeks when his wife's course was not in session. It is easy to see why the spouse of an international student might think that the conditions applicable to both the primary and the secondary visa would be identical. It was alleged that he had done so in three periods each of a week during December and January.

⁷ See *Migration Act 1958* s 116(3); *Migration Regulations 1994* reg 2.43(2)(b).

- 7.31 The averaging argument presented in the case focused on the wording ‘*while* the holder is in Australia’ in Condition 8014, especially when contrasted with the different wording of ‘*during*’ the specified measure of time in Condition 8105. The Full Court of the Federal Court in *Islam* rejected (at [16]) that argument, pointing to its ‘irrational consequences’ and the uncertainty it would create not only for the visa holder but also for those enforcing the law.⁸ The difference between the relevant wording in the two conditions was a consequence, the Full Court held (at [17]), of the fact that Condition 8104 was applicable to a dependent of an international student who is the primary visa holder, the dependent family member being permitted to remain in the country only because of their status as such.
- 7.32 The second argument in *Islam* concerned the meaning of a ‘week’, in particular its timing because this was not then defined in Condition 8104 (as it is now in relation to ‘fortnight’). After referring to *Minister for Immigration and Multicultural and Indigenous Affairs v Alam* (2005) 219 ALR 629 and the fact that it had not been found necessary there to determine whether a week commenced on a Sunday, or Monday, the Full Court opined that the meaning of the term should be consistent in Schedule 8. Furthermore, given that Condition 8104 may be applicable to a wide range of visa types (then, for example, various Bridging visas, Investor Retirement visa, Retirement visa, and Humanitarian visa), consistency was also an important aspect of certainty. Certainty of application was, as the Full Court held, ‘self evident’: a visa holder needs to be able to know how to organise their working commitments, just as certainty is also important to enforcing bodies. The Court reasoned (at [24]) that the prospect of having the week determined by the place of employment and its arrangements for pay would likely be unworkable, especially where there were multiple employers as is not uncommon where a person has casual work. The Full Court identified (at [27]) Monday as the commencement of a week ‘because that is the ordinary and current meaning of that word in a work context’, and this was also consistent with the definition of ‘working day’ in section 5 of the Migration Act.
- 7.33 In *Al Ferdous v Minister for Immigration & Citizenship* [2010] FMCA 824 Federal Magistrate Nicholls had commented (at [59]) that the lack of flexibility in the application of visa conditions ‘can only reflect poorly on our self-proclaimed image as an open society committed to the notion of a ‘fair go’’. However, as Justice Wilcox pointed out in *Minister for Immigration and Multicultural and Indigenous Affairs v Alam* (2005) 145 FCR 345 at [13]–[14], there will always be a line to draw when the

⁸ This decision was then immediately applied in *Hossain v Minister for Immigration and Citizenship* [2007] FCAFC 67.

hours that can be worked are limited by a Condition attached to a visa, and so from that point of view it was not so much the actual limit that caused concern. Rather it was the stringency of the consequence:

a drastic, non-discretionary penalty ... No leeway is given, no discretion is conferred. ... it does not matter what the extent of the non-compliance or what were the relevant circumstances.

The strictness of the consequence to cancel the visa was confirmed by the Full Court of the Federal Court in that case, although its facts demonstrated the importance of calculating the period accurately.

- 7.34 In *Alam* an international student had extended his shift in response to a last minute request from his employer because another employee had called in sick. The facts revealed that, when undertaking a search of the student's home, migration officials had seized upon a payslip which they interpreted as indicating that Alam had worked for 22¼ hours in a week. However, the period covered by the payslip (Wednesday to Tuesday) did not align with the interpretation the Court gave to the term 'week' as it then was in the regulations. The phrase 'week when the institution is in session' must be determined in relation to the course in which the person was enrolled and thus a week commenced either on a Monday, or according to its natural meaning on a Sunday; though (as noted above) the judges did not find it necessary to decide between the two.
- 7.35 Today revocation of a visa remains as the automatic consequence of breach of conditions regarding work because of the non-discretionary, mandatory provisions of the legislation.⁹ In 2011 the Government signalled its intention, following recommendations of the Knight Review,¹⁰ to amend the legislation to remove the automatic cancellation of a student visa, including for breach of a condition relating to work. In March 2012 the *Migration Legislation Amendment (Student Visas) Bill 2012* was introduced into the Commonwealth Parliament, and was agreed to by the Senate on 1 November 2012. While this legislation did remove automatic cancellation of student visas in relation to some matters, it did not do so in relation to breaches of work conditions. Changes were introduced by the Government in March 2012 to the Conditions relating to permitted work attached to visas for international students and their family members, but these relate only to flexibility in the way the hours are calculated.

⁹ See *Migration Act 1958* s 116(3); *Migration Regulations 1994* reg 2.43(2)(b).

¹⁰ M Knight, *Strategic Review of the Student Visa Program*, Australian Government, Canberra, 2011.

- 7.36 The current requirements of Condition 8104 and 8105 refer to 40 hours work per fortnight, rather than 20 hours per week as was formerly the case. The greater flexibility could have assisted some of the visa holders in the cases cited above. Although there is as yet no case interpreting this new provision, it would seem, given the definition of a 'fortnight' and the reference in clause 1 to 'any fortnight', to be calculated probably on a rolling basis. This is the interpretation that is assumed in the fact sheet prepared by DIAC to provide information about the implementation of the recommendations of the Knight Review.¹¹ Thus for example, where a student works 15 hours one week they may work 25 hours in the next. However, the following week the student would be limited to a maximum of 15. If in fact they only worked 13 hours, then the following week they would be entitled to work up to 27 hours. While the greater flexibility is no doubt welcome, it also introduces a need for students to be particularly vigilant in monitoring their hours each week to see that they never exceed 40 hours by the end of the second week in any two week period. Keeping count of the exact number of hours worked every week in order to ensure that a rolling total never exceeds 40 hours in a fortnight is something that many students may find difficult both to understand and to track accurately.
- 7.37 The wording of the Condition 8105 may be open to an alternative, although probably less likely, interpretation because the condition relates to the period when the student's course of study or training is 'in session'. If one counted the fortnights from the first Monday of the commencement of the session, and understood 'any fortnight' to refer to any one of those fortnights, then there would be a different result. Such an interpretation would allow, for example, a student to work 15 hours and then 25 hours in the first fortnight and then 25 hours and 10 hours in the second fortnight, despite the fact that in weeks 2 and 3, ie the middle fortnight, the student actually worked more than 40 hours. Such an interpretation may make it more difficult for the student to remember at any particular week whether it was in the first or second in the fortnight. In interpreting the condition, the courts will hopefully favour the interpretation which gives the most certainty and guidance for those who are bound by the condition and the one that is workable from an enforcement perspective.

¹¹ See 'More Flexible Work Conditions (Recommendations 7 and 28)', www.immi.gov.au/students/pdf/2011-flexible-work-conditions.pdf (accessed 7 October 2012).

7.38 Whichever interpretation is accepted as authoritative by the courts the change from 20 to 40 hours, while welcome in some respects, does not eliminate the problems that can arise in relation to breach. As Alex Reilly has noted of this change:¹²

[it] provides a minimal increase in flexibility in students' work arrangements, and simply delays the possibility of breach by a week. It does not address the core concern that students might, nonetheless, find themselves in circumstances of minor or inadvertent breach.

Exemption for work that is a 'requirement of the course'

7.39 Under clause (2)(a) of Condition 1805, clause (1) does not apply

to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students.

Information regarding this Register is available at its website,¹³ which makes clear that the terminology of 'course' is not used in the same way as it is in many institutions of higher education as the equivalent of a subject studied. Rather a 'course' refers to the award for which a student enrolls: for example, a vocational Graduate Certificate, a Diploma, a Bachelors degree, or a Masters degree.¹⁴ These are matters governed by the ESOS Act, as is made clear from the definition of 'registered course' in regulation 1.03 of the Migration Regulations, referring to 'a course of education or training provided by an institution, body or person that is registered, under section 9 [of the ESOS Act]'; although 'course' is defined in section 5 of the ESOS Act self-referentially (and therefore rather unhelpfully) as 'a course of education or training'.

7.40 The exemption in clause (2)(a) of Condition 1805 indicates that the requirement of the course must have been specified 'when the course particulars were entered' in the Register. Hence not all course-related unpaid work will necessarily meet this definition and thus be exempted from inclusion in the calculation of the 40 hours per fortnight that the student can work. To be exempted, the 'work' according to the wording of clause (2)(a) needs to be specified as a 'requirement of the course' itself. Considering the many opportunities for unpaid internship work related to courses or

¹² A Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 188 at 200.

¹³ See <http://cricos.deewr.gov.au/> (accessed 3 November 2012).

¹⁴ See <http://cricos.deewr.gov.au/Course/CourseSearch.aspx> (accessed 3 November 2012).

subjects studied by international students, this definition is quite narrow. Where an unpaid internship is, say, merely part of an elective subject, and perhaps even added as such to the options available to be studied in the course after the course was originally entered in the Register, it will not come within the exemption. That is also certainly the case for unpaid internships that are offered more generally, including through institutions at which the student is studying. From this perspective the opportunity for international students to undertake unpaid internships offered as part of a subject (or alongside a course) is likely to be far more constrained than is the case for domestic, Australian, students, simply because of the constraints on them in terms of the hours they are permitted to work.

- 7.41 The issues raised by this exemption are especially complex when considered alongside the ‘vocational placement’ provisions in the Fair Work Act (see 4.10–4.11), because the wording there does not precisely align with the phrase ‘work that is a requirement of a course’ as expressed in Condition 8105 of Schedule 8 of the Migration Regulations.
- 7.42 Even where the requirement of work is included as part of a course entered in the register, care must nonetheless be taken by both students and the businesses in which they are placed.
- 7.43 In *Kamely v Minister for Immigration and Citizenship* [2011] FCA 1071 the applicant, who was undertaking a course leading to an Advanced Diploma of Hospitality Management (Commercial Cook) at the Perth Institute, argued unsuccessfully that she had not breached Condition 8105 of her visa because, although she had worked more than the permitted (then) 20 hours in two separate week periods, the work was part of an industry placement for her course. However, the evidence of the placement records from the Perth Institute did not accord with those provided by the applicant to the Migration Review Tribunal, either in respect of timesheets or the identity of the business, and the Tribunal gave greater weight to the former. In the Federal Court Justice Stone held there was no jurisdiction to review those findings.
- 7.44 In an earlier case, *Komiatis v Education Training and Employment Australia Pty Ltd* [2008] VMC 29 a registered training provider set up a nurse educator program and brought a number of Chinese nationals to Australia on the Occupational Trainee Subclass 442 Visa Scheme.¹⁵ The education program consisted of about 30% class room training and 70% supervised clinical placement, and was intended to train the

¹⁵ After 24 November 2012 this class of visa will no longer be open: see www.immi.gov.au/visas/temporary-visa (accessed 4 November 2012).

Chinese nurses in aged care qualifications and in training and assessment so they would return to China as nurse educators. As part of the approval process, DIAC had required the trainees to be employees of Education Training and Employment Australia (ETEA). During the period they were in Australia, the Chinese nurses were sent by Nurse Bank, a company related to ETEA, to various health care operators, including aged care facilities and hospitals. There they worked, and were not in fact provided with any training or supervision. Indeed, there was evidence that the receiving businesses in which the Chinese nurses were placed always understood that they were being supplied with 'staff'. The nurses had not received the level of supervision they needed in order to qualify for the Certificate IV for which they had paid, and as a result DIMIA referred the case to the Office of Workplace Services (a predecessor of the FWO) which prosecuted ETEA for not paying the migrant workers the correct wage as required by the *Workplace Relations Act 1996*. Thus what could be described as a sham arrangement took the placement out of the exception.

- 7.45 An exemption from clause 1 of Condition 1805 is also extended by clause (2)(b) to international students on a subclass 574 visa to undertake a postgraduate research degree, PhD or Masters. There is a similar exemption under clauses (3) and(4) from the 40 hours per fortnight stricture in Condition 8104 for those who are family members of international students, who are on a subclass 573 or 574 visa and undertaking a masters or doctoral research degree registered on the Commonwealth Register of Institutions and Courses for Overseas Students.

Temporary Skilled Graduates and the Professional Year

- 7.46 After completing their studies, many international students are interested in remaining, or extending their stay, in Australia. One of the ways in which this can be done is if they are successful in applying for a Temporary Skilled Graduate (sub class 485) visa. This visa is for those who have completed studies in Australia within the six months prior to their application for the visa and their qualification is closely related to their nominated skilled occupation.¹⁶ There are no conditions restricting work generally for those who have a 485 visa, which enables the holder to remain in Australia for 18 months to work or study, including the completion of what is known as the 'Professional Year'.

¹⁶ See *Migration Regulations 1994* Sch 2 sub item 485.213.

7.47 The Professional Year, which has already been touched on in Chapter 4, is described on the DIAC website as follows:¹⁷

The Professional Year is a structured professional development program combining formal learning and workplace experience. A Professional Year will:

- familiarise participants with the norms and values in the Australian workplace as well as the Australian employment market and workplace culture
Example: Write resumes and interview skills.
- teach participants how to communicate effectively and professionally in the Australian workplace with colleagues, managers and clients
- include an internship (work experience) to educate participants about all aspects of work practices in an Australian company

7.48 As can be seen, the Professional Year aims to make students work-ready and includes an internship. The 5 points allocated for the Professional Year can then be incorporated into the total relied upon when seeking to apply for one of the skilled migrant visas. In 2011–2012 DIAC is undertaking a review of the Professional Year program, which commenced in 2008, to see if it is achieving its aims and to determine what, if any improvements need to be made to it.

7.49 The Professional Year program operates only in the professional areas designated by the Minister. To date these are Engineering, Accounting and Computing and Information Technology. While the Professional Year is aimed particularly at international students, Australian students can also enrol in it on a fee paying basis. In each of the specified skills areas, the designated providers set out the detail of the year long program.¹⁸ Generally, the internships incorporated in the program are about 12 weeks long, but may be undertaken on a full-time or part-time basis, and are described as ‘hands on’. As noted in 4.28, the program is likely to fall within the Fair Work Act’s vocational placement exception.

¹⁷ See <http://www.immi.gov.au/skilled/general-skilled-migration/professional-year.htm> (accessed 4 November 2012).

¹⁸ Details are available from CPA Australia at <http://www.cpaustralia.com.au/cps/rde/xchg/SID-5FC290FF-1D1AFF01/cpa-site/hs.xsl/about-migration-skilled-internship-program.html>, or the Institute of Chartered accountants Australia at <http://www.charteredaccountants.com.au/The-Institute/Migration-assessment/Skilled-Migration-Internship-Program.aspx>; from the Australian Computing Society at <http://www.acs.org.au/migration-skills-assessment/professional-year-program>; and from Engineers Australia at <http://www.eeaust.com.au/professionalyear> (all accessed 5 November 2012).

Tourist Temporary Stay Working Holiday Visas

- 7.50 There are of course many other visas which permit migrants to work in Australia. Consideration of all of them is beyond the scope and resources of this project.
- 7.51 However, two examples which are useful to consider in the context of this report are the Working Holiday Visa (sub class 417) and the Work and Holiday Visa (sub class 462).¹⁹ In broad terms these visas enable young people to work in Australia, even though their main purpose for travel is to holiday. They must be between the ages of 18–30 years, and come from one of 28 designated countries with which Australia has reciprocal agreements. The program is one that, as noted in Chapter 3, has proved enormously popular.
- 7.52 Those on Working Holiday visas are permitted to do any kind of work while in Australia, but are limited to working for any one employer for a maximum of 6 months (Migration Regulations, Schedule 8, Condition 8547). However, part of the aim of the Australian Government is to encourage many of these young workers to live and work in regional Australia. For this reason a young worker may on application be granted a second Working Holiday visa where they have a ‘reasonable prospect of obtaining employment’ and have already ‘carried out specified work in regional Australia for a total period of at least three months’ (Migration Regulations, Schedule 2, clause 417.211(4)(c) and (5)). Clause 1225(5) in Schedule 1 to the Migration Regulations enables the Minister to stipulate by written instrument the kind of work that is ‘specified work’ and what counts as ‘regional Australia’.
- 7.53 The definitions of ‘specified work’ and ‘regional Australia’ are now to be found in IMMI 08/048 –Working Holiday Visa – Definitions of ‘Specified Work’ and ‘Regional Australia’, which revokes the earlier IMMI 08/046.²⁰ Under IMMI 08/048 the specified work includes various types of plant and animal cultivation, fishing and pearling, tree farming and felling, mining and construction. The latest update of this instrument in 2008 added work in the construction industry, and was intended according to its *Explanatory Memorandum* (at [3]) ‘to encourage Working Holiday visa holders to undertake casual work in the identified industries, which have critical labour shortages’.

¹⁹ See *Migration Regulations 1994* Sch 2 for detailed provisions relating to these visas.

²⁰ IMMI 08/048–Working Holiday Visa – Definitions of ‘Specified Work’ and ‘Regional Australia’ and *Explanatory Memorandum* are available at www.comlaw.gov.au/Details/F2008L02264/Download (accessed 3 November 2012).

7.54 In explaining the Working Holiday Visa (Subclass 417), the DIAC website first outlines in general terms ‘specified work’. This is then followed by a section headed ‘Specified Work in Disaster affected areas’,²¹ and refers in broad terms to the need for construction work in flood or bushfire affected areas. It states (emphasis added):

Working holiday visa holders who conduct construction work in eligible regional areas of Australia following disasters can count the work as specified work. This work may be paid *or unpaid*.

There are several other references to unpaid work in relation to working holiday visas on the DIAC website, including that ‘specified work in a voluntary capacity or for payment in kind’ may prove more difficult to verify than paid work.²²

7.55 During the course of our research we were also told by the Construction, Forestry, Mining and Energy Union (CFMEU) that schemes such as the Willing Workers on Organic Farms (WWOOF) have been identified as examples of the kind of unpaid work available to satisfy the requirements of specified work for those on working holiday visas.²³ The WWOOF website advertises opportunities around the globe to live and work on organic farms in exchange for meals and accommodation, usually in a family home.²⁴ The website indicates that participants usually undertake about 5–6 hours work a day and a book is available for purchase in order to access participating hosts. It is not difficult to imagine that many young people who care passionately about the environment would be eager to gain some experience in organic farming. The Wikipedia web entry regarding WWOOF lists at least one well known Australian business, the Knappstein Winery in the Clare Valley of South Australia, as being amongst those participating in the program.²⁵ While we acknowledge that Wikipedia is not always a reliable source of information, the WWOOF website does not do anything to suggest that many of the host participants would be other than ordinary commercial businesses.

7.56 In so far as the definition of ‘work’ in the Migration Act can cover both paid and unpaid work, as discussed earlier, the comments quoted above from the DIAC website are perhaps unexceptional. However, such statements may, without more,

²¹ See www.immi.gov.au/visitors/working-holiday/417/specified-work.htm. (accessed 3 November 2012).

²² See <http://www.immi.gov.au/visitors/working-holiday/417/specified-work.htm> (accessed 5 November 2012).

²³ Email from Bob Kinnaird, CFMEU, dated 7 May 2012 on file with the authors.

²⁴ See <http://www.wwooof.com.au/> (accessed 4 November 2012).

²⁵ See <http://en.wikipedia.org/wiki/WWOOF> (accessed 4 November 2012).

suggest that it is acceptable to undertake unpaid work in Australia and could well mislead migrants with these visas about their workplace rights. Further, such statements can also raise a concern that they may go further and actually encourage those on the Working Holiday Tourist visa to undertake work that is ordinarily remunerated in Australia for no payment at all. Where a person is anxious to be able to extend their visa a second time they may also be more vulnerable to unscrupulous employers who would exploit their situation.²⁶

- 7.57 During the course of our research we were also told that there is a view, held by at least some in DIAC, that working unpaid through schemes like WWOOF is unproblematic as the activity is usually in the interests of the wider Australian community, rather than for personal gain.²⁷
- 7.58 However, as Justice Sackville observed in *Kim v Witton*, discussed earlier in this chapter, no doubt much work could be so described. In the case of WWOOF, it can be noted that many commercial businesses these days are recognising a whole range of benefits from producing organic products, including that the market for such products is growing. Furthermore, if there is a band of workers willing to do work for no payment, then this may be seen to undermine the integrity of the Fair Work legislation. For instance, the tourist cook in *Braun's* case (discussed above at 7.9-7.11) would no doubt have been entitled to award rates of pay and conditions set under the then equivalent of the Fair Work Act. The CFMEU has already expressed its concerns about unpaid work in the construction sector, in a letter dated 24 August 2012 to the Minister for Immigration, the Hon Chris Bowen MP.²⁸
- 7.59 As a matter of balance, it should also be pointed out that another section of the DIAC website concerning Working Holiday Visas (Subclass 417) contains information indicating that:

²⁶ In any system where workers may seek to extend their visas and need to have performed certain work in order to do so, there is always a risk that they may work unpaid or for less than their legal entitlements in order to ingratiate themselves to their employers and improve their chances of an extension of their visa or, indeed, permanent residence. See email from Bob Kinnaird on 23 May 2012 on file with the authors. See also Dave Noonan (National Secretary of the CFMEU Construction Division), 'No mantra justifies this employer takeover of immigration policy', *Sydney Morning Herald*, 8 May 2012, <http://www.smh.com.au/opinion/politics/no-mantra-justifies-this-employer-takeover-of-immigration-policy-20120518-1yuh3.html> (accessed 23 November 2012).

²⁷ Email to Bob Kinnaird, CFMEU, dated 7 June 2012 on file with authors.

²⁸ Copy on file with the authors.

People working in Australia on a Working Holiday visa are entitled to the same pay and conditions as Australian residents and citizens. There are a number of obligations that employers must be willing to meet.²⁹

And it goes on to list a number of workplace rights. Furthermore, under a heading 'Working Conditions' it states:

Australian law sets pay rates and conditions of employment which cannot be undercut through informal agreements or unregistered contracts

Readers with concerns are directed to the FWO or the Department of Education, Employment and Workplace Relations (DEEWR) for further information. However, taking into account all of the statements on the DIAC website relating to combining working with holidaying in Australia, the overall impression may well be, at best, one of confusion in relation to the law relating to unpaid work in Australia.

Unpaid Work and DIAC's Role in Enforcing the Migration Legislation

7.60 DIAC is the government department responsible for the enforcement of the Migration legislation. Undoubtedly, this is a role that requires prioritisation in the allocation of limited resources. Given the controversial nature of many matters in the Migration portfolio, decisions as to where resources are best directed can doubtless be particularly difficult at times and may often be the subject of criticism. However, with one exception of a DIAC officer who was able to provide some helpful information regarding the situation in respect of international students, during the course of our research we found it very difficult to gain a more complete understanding of how DIAC approaches the problem of dealing with migrants who are working unpaid and/or perhaps contrary to their visa conditions, or indeed issues relating to migrant workers and unpaid work generally. While DIAC does have monitoring compliance and integrity units, we note that there appears to be little in the legislatively established structure that allows for a systematic oversight of these issues. Often, it appears, it is only through individuals 'dobbing' in other workers that these matters are drawn to its attention.

7.61 The potential for abuse of migrant workers is demonstrated in the case (also discussed in Chapter 3) initiated by the FWO in July 2012 concerning two Fijian workers who were allegedly working eight hours per day and seven days a week at

²⁹ See at <http://www.immi.gov.au/visitors/working-holiday/417/working-0in-Australia.htm> (accessed 6 November 2012).

Port Adelaide in return for a 'living allowance' of \$100 per day.³⁰ According to the FWO, the two men were in Australia on a sub-class 456 Short Stay Business visa. Sub item 456.212 of Schedule 2 of the Migration Regulations stipulate that an applicant for this visa:

does not intend to engage in activities that will have adverse consequences for employment or training opportunities, or conditions of employment, for Australian citizens or Australian permanent residents.

Condition 8112 set out in Schedule 8 of the Migration Regulations is also applicable to a sub class 456 visa. It states:

The holder must not engage in work in Australia that might otherwise be carried out by an Australian citizen or an Australian permanent resident.

- 7.62 It is not known whether DIAC was aware of the activities or proposed activities of these Fijians, or if it was, how it would make a judgment that there was compliance with the Migration Regulations. In any event, the allegation of the FWO is that the men were working as part of a purported unpaid training program provided by the 'Adelaide Nautical College'. This body was not a registered training provider and the work was not part of any formal vocational placement course under the Fair Work Act. While the case is yet to be heard, if the allegations are proved it would appear to be a strong example of the vulnerability of many migrant workers to unpaid work.
- 7.63 Enforcement of Migration legislation is recognised as a difficult area. In 1999 the then Government Department responsible for immigration produced a report entitled *Review of Illegal Workers in Australia: Improving Compliance in the Workplace*.³¹ The review led directly to the introduction of the *Migration Amendment (Employer Sanctions) Act 2007*. This legislation applied criminal sanctions to those employing migrants who did not have permission to work in Australia. The key new provisions were sections 245AA–245AK of the Migration Act, which required proof that someone had knowingly or recklessly employed, or referred for employment, a migrant not authorised to work. The legislation was harsh, with a maximum penalty of 5 years imprisonment. Breach of the legislation was aggravated where the worker was exploited and the person knew of or was

³⁰ See FWO, 'Fijian workers allegedly underpaid \$25,000 whilst working at Port Adelaide docks', media release, 25 July 2012, <http://www.fairwork.gov.au/media-centre/media-releases/2012/07/pages/25072012-devine-prosecution.aspx> (accessed 12 September 2012).

³¹ Department of Immigration and Multicultural and Indigenous Affairs, *Review of Illegal Workers in Australia: Improving Compliance in the Workplace*, Commonwealth of Australia, Canberra, 1999.

reckless to that circumstance. There was also a civil penalty for workers who worked without lawful permission.

- 7.64 As discussed in Chapter 3, in 2010 Stephen Howells undertook a review of the operation of the 2007 amendments for DIAC.³² The evidence examined by Howells showed that the *Migration Amendment (Employer Sanctions) Act 2007* had not been effective. DIAC files indicated that while more than 100 cases had been investigated since 2007, only four had been referred to the DPP; and of those, only one had been able to be pursued to the point of conviction. According to Howells, DIAC files showed abuse of workers including sexual exploitation, unsafe work practices, underpayment, taxation and welfare fraud, and associated crime.
- 7.65 The findings of the Howells Report have led to the recent introduction of the *Migration Amendment (Reform of Employer Sanctions) Bill 2012*, currently before the Federal Parliament. This proposed legislation introduces a more nuanced regulatory approach of graduated sanctions for dealing with the problem of those who employ or refer to employment migrant workers in breach of their visa status or conditions. The enforcement regime under the Migration Act will continue to focus primarily on ensuring voluntary compliance (through education and deterrence) under existing administrative measures. However, where they fail it aims to ensure that effective sanctions are available, and the enforcement powers for DIAC are in this respect enhanced. The proposed legislation thus amends the criminal offences and introduces new civil penalty provisions applicable to those who allow or refer unlawful non-citizens (such as those who have over stayed their visa) to work or migrants to work in breach of visa. The scheme is also proposed to allow, through amendment to the Migration Regulations, for the issue of an 'Illegal Worker Warning Notice', through which a person can avoid court proceedings. However, repeated infringements will result in a civil penalty or criminal prosecution. There is a strict liability approach with a no-fault civil penalty; however, a defence is provided if the person can demonstrate they took 'reasonable steps' to ensure compliance with the law (see proposed section 245AB(2)). For instance, the expectation is that an employer will check a migrant's entitlement to work with the Visa Entitlement Verification Online (VEVO) system.³³ The proposed legislation also amends the provisions relating to aggravated offences which apply, for instance, where a worker

³² S Howells, *Report on the Review of the Migration Amendment (Employer Sanctions) Act 2007*, Commonwealth, 2011, <http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/> (accessed 11 November 2012).

³³ See <http://www.immi.gov.au/e-visa/vevo.htm> (accessed 3 November 2012).

is or will be exploited and the person recommending them knows or is reckless in relation to this. Finally, the proposed legislation extends criminal and civil liability to officers of corporations, partners, and members of an unincorporated association's committee of management. As the *Explanatory Memorandum* puts it:³⁴

In order to address the illegal practices of sham contracting, informal labour hire and use of illegal workers by various entities within a conglomerate, the application of the criminal offences and civil penalty provisions will be broadened so that a person who participates in the chain of events that results in a non-citizen allowed or referred to work without the required permission can be held liable for contravening the work-related offences and work-related provisions. In addition, the Bill will extend both criminal and civil liability, in certain circumstances, to executive officers of bodies corporate, partners in a partnership and members of an unincorporated association's committee of management.

- 7.66 Despite the many useful elements to this proposed legislation, there will no doubt remain some difficult areas of enforcement. For instance, where there are time restrictions included in the conditions attached to a visa, such as there are in relation to the visas of international students and their dependents, VEVO will be of no assistance in letting an employer know whether the visa holder is also working for another employer. In this respect it will remain the primary responsibility of the international student to understand the way in which the conditions attached to their visa operate and ensure they are not in breach of them.

Enforcement of the Workplace Rights of Migrant Workers

- 7.67 Where a migrant has been working without permission in breach of the conditions of their visa there is some conflicting case law as to their entitlement to the protection of the law.³⁵ While some cases suggest that no such protection will be available to a migrant working without permission, the better view is that the workplace rights of such workers should be upheld.³⁶

³⁴ See *Explanatory Memorandum, Migration Amendment (Reform of Employer Sanctions) Bill 2012*, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation%2Fbill%2F4889%22;rec=0> (accessed 3 November 2012).

³⁵ This case law is usefully summarised by Alex Reilly, above, at 192–5 and 205–7.

³⁶ See R McCallum, 'Australian Labour Law, Migration and the Performance of Work' in M Crock and K Lyon (eds), *Nation Skilling: Migration, Labour and the Law in Australia, Canada, New Zealand and the United States*, Desert Pea Press, Sydney, 2002, p 127; B Creighton and A Stewart, *Labour Law*, 5th ed, 2010, pp 177–8; although cf G Orr, 'Unauthorised Workers: Labouring Beneath the Law?' in C Arup et al (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006, p 677 at p 690.

- 7.68 Even so, the enforcement of workplace rights for migrant workers can be particularly difficult, often because these workers are amongst the most vulnerable workers, as discussed in Chapter 3. Furthermore, as Reilly has also noted, many may have come from countries where government is often considered repressive rather than protective, thus making them suspicious of government authorities and more reluctant than others in the community to access the resources of enforcement agencies such as the FWO.³⁷
- 7.69 When dealing with vulnerable groups in the workplace, such as international students and other migrant workers, the educative functions of an agency such as the FWO are particularly important, especially the production of fact sheets targeted at such groups. The FWO, for instance, already has a fact sheet targeted to inform international students about their workplace rights,³⁸ and there are many instances of the FWO taking action against those who were unlawfully underpaying foreign workers (including international students).³⁹ In cases such as *Fair Work Ombudsman v Go Yo Trading Pty Ltd* [2012] FMCA 865, the courts have also made it clear that, given the vulnerability of these workers, the penalties are intended as a strong deterrent, including for small businesses because their employees have the same right to basic minimum standards.
- 7.70 However, specific enforcement of an individual's rights often depends on an initial complaint from a worker, and then their co-operation in providing evidence. Migrant workers will be less likely to complain to, or co-operate with, the enforcement agency where they fear that the facts of the case may also indicate that they are in breach of the conditions attached to their visa. They may fear that a consequence of any such complaint will be that their situation will be brought to the attention of immigration authorities and thereby jeopardize their ongoing presence in the country. As noted earlier in this chapter, the risks for international students are particularly high, as breach of visa conditions relating to work leads to revocation of

³⁷ See Reilly, above, at 188.

³⁸ See the FWO's information for international students 'International Students – Study your workplace rights!' Fact Sheet available at <http://www.fairwork.gov.au/resources/fact-sheets/workplace-rights/Pages/international-students-fact-sheet.aspx>, See also FWO's information for international workers generally, including Fact Sheets 'Hiring International Workers' and 'Foreign Workers – Know your Rights', available at <http://www.fairwork.gov.au/media-centre/latest-news/2012/10/Pages/20121004-international-workers-rights.aspx> (all accessed 15 October 2012).

³⁹ See eg 'Fruit and veg shop allegedly underpaid international students \$14,000', FWO media release, 31 July 2012; 'Company fined for underpayment foreign workers' FWO media release, 21 August 2012, regarding underpayments recovered for a group of cleaners who included a number of international students, working holiday visas and recent immigrants, many of whom spoke little English and 6 of whom were aged under 21 years.

their visa. The consequences are severe because revocation of their visa will also usually result in a failure to complete their studies, which in turn may have a significant economic impact on their families, quite apart from causing them shame.

- 7.71 It is because of such issues that international standards on effective enforcement of workplace rights make clear that workplace inspectors should not undertake responsibilities incompatible with their primary function. Thus the ILO *Convention No 81 concerning Labour Inspection in Industry and Commerce* (1947), which Australia has ratified, provides in Article 3(2) that:

Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers.

In the most recent *General Survey on Labour Inspection* from the ILO, it was pointed out that co-operation with migration authorities should be carried out 'cautiously, keeping in mind that the main objective of the labour inspection system is to protect the rights and interests of all workers and to improve their working conditions'.⁴⁰ For the FWO this means that, while it might reasonably hope or expect that DIAC would provide it with information regarding suspected breaches of labour legislation, DIAC should not generally expect that FWO would in return focus on examining or establishing the elements of a case which concern compliance with visa conditions regarding work and then pass on any such information to DIAC. The integrity of the system of labour inspection means that all workers must be able to be confident that the primary focus of the agency is compliance with labour legislation.

⁴⁰ ILO, *General Survey of the reports concerning the Labour Inspection Convention, 1947 (No 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, and the Labour Inspection Recommendation, 1947 (No 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No 82), the Labour Inspection (Agriculture) Convention, 1969 (No 129), and the Labour Inspection (Agriculture) Recommendations, 1969 (No 133)*, Report IIIB (Part IB), International Labour Conference, 95th session, 2006, p 54.

8

International Perspectives

Introduction

- 8.1 This chapter provides perspectives from outside Australia in relation to unpaid work experience. The focus is predominantly upon internships, and in particular their prevalence, their legal status under workplace laws, and policy responses to them, because it is this form of unpaid work which is presenting perhaps the greatest contemporary challenge in relation to unpaid work experience in developed economies. This has already been noted, as we saw in Chapter 2, by the International Labour Organisation (ILO).
- 8.2 First, the practice of internships at international organisations is noted, for such internships are usually highly prestigious and, therefore, can operate as a model for those elsewhere. This is followed by a section which examines unpaid work/internships in several countries comparable to Australia – viz, Canada, New Zealand, the United Kingdom, and the United States of America. The purpose of this examination is to identify recent developments, to highlight common issues and concerns regarding unpaid work/internships, and to consider the various approaches or solutions taken in respect of any problems identified in those other jurisdictions, with a view to exploring whether this material could throw light upon the issues of unpaid work experience in Australia and, therefore, be of assistance in formulating the final recommendations of this report.

Internships at International Organisations

- 8.3 Internships at international tribunals or organisations affiliated with the United Nations and at the major non-government organisations (NGOs) operating at the international level have long been considered to be some of the most prestigious. These internships are highly competitive and generally awarded to students or graduates with strong academic records, who are able to demonstrate commitment to the ideals of the organisation and its work, and who perhaps aspire to a career in similar work. To have such an internship on a CV generally carries significant weight. Given this, it is perhaps not unreasonable to suggest that, because of their prestige, these international internships have often served as a model for others and have had

a significant influence on the arrangements adopted by others organising internships, be they government at national, regional or local level, or educational institutions, or commercial enterprise, NGOs and charities.

8.4 As part of this research project we undertook a survey of internships advertised by various international tribunals or organisations affiliated with the United Nations and at the major NGOs.¹ In summary this survey revealed:

- Nature of the work – all the internships offered by these agencies involved the successful applicants undertaking real work for the organisation.
- Location – a broad geographic distribution of placements: while some of these internships were available to be taken up in Australia, others were in European cities such as Geneva, Strasburg and The Hague, and yet others were in various countries, including those with developing economies.
- Duration – varied between 2 and 12 months, but often with set minimum and maximum periods.
- Qualifications – most required completion of a first degree, and some enrolment in a postgraduate degree
- Future employment – in some advertisements it was made clear that an internship was not a guarantee of entry to paid work at the agency. However, others qualified this by pointing out that many of the current employees of the organisation had previously held internships.
- Remuneration – while some organisations provide either a stipend for basic subsistence for all interns, for example the ILO and Red Cross International, or some support for those most in need, such as the International Criminal Court, most internships were advertised as unpaid. Advertisements often emphasised that interns were also responsible for their own travel, living and accommodation, and medical insurance costs. Only in a few instances did they promise some reimbursement for those costs.

8.5 There are now a number of websites and social networking sites established to provide interns past and present, as well as those hopeful of gaining an internship, an opportunity to discuss their experiences. Amongst these websites are those of the

¹ A more complete summary table can be found in Appendix I to this report.

Hague Interns Association,² and the Geneva Interns' Association (GIA),³ which is associated with UN and Swiss unions and with the European Youth Forum. Both are largely devoted to improving the situation of interns. Another website, 'Unpaid is Unfair',⁴ invites people to sign a petition calling for fair access to UN internships. From these websites it is clear that access and equity at the level of international organisations is a significant issue.

- 8.6 In 2009 a review of UN internship programs, examining 18 UN organizations, was conducted by the United Nations Joint Inspection Unit.⁵ While various recommendations were made concerning improvements in the management and effectiveness of programs, the main findings of the report concluded (at p iii) that:

[t]he overall assessment of the internship programmes is overwhelmingly positive for all the parties involved: organizations, supervisors and interns. It is seen as a win-win experience.

However, a number of problems were identified in relation to access and equity. In particular, there was an under-representation of interns from developing countries, and the report made various recommendations (at p iii) to ensure improving the geographical distribution and outreach strategies, including:

the use of partnerships with academia and private or public organizations willing to support these programmes, in particular for candidates from non developed countries.

- 8.7 On the subject of remunerating interns, the Report noted (at p 14) the opposing arguments on this point:

There are different views on the rationale behind the provision of a stipend to interns. On the one hand, those in favour of introducing compensation for their work believe that this is a fair recognition of the qualified work and their contribution to the organisation. On the other hand, others consider that an internship is not an employment and should not be seen as such, and therefore a stipend is not the proper way to acknowledge the value of the work.

² See <http://hagueinternsassociation.wordpress.com/advocacy/> (accessed 24 October 2012).

³ See <http://www.internsassociation.org/> (accessed 24 October 2012).

⁴ See <http://unpaidisunfair.org/> (accessed 24 October 2012).

⁵ M D Wynes and I Posta, *Internships in the United Nations System*, Joint Inspection Unit, Geneva, 2009, available at https://www.unjiu.org/en/reports-notes/JIU%20Products/JIU_NOTE_2009_2_English.pdf (accessed 24 October 2012).

However, the Report concluded (at p 14), interns also received substantial benefits from the programme:

While recognising that the contribution of the interns is in the interest of the organisation, it is also considered that the interns receive returns of a different kind in the form of resumé-building, professional networking, internal experience of the United Nations system organisation, prestige by having been selected for the internship programmes...

Nonetheless, it was clear that the problem of financial support for internships had arisen in the course of their inspection, for the authors reported (at p 14) that:

Compensation measures were proposed during the view both by the supervisors and the interns, involving supportive measures to reduce the daily life-cost during their internship. While not recommending the introduction of any stipend, the Inspectors are of the view that assistance could be provided by the organisations in the form of daily meal-tickets during the length of their internship, a transportation pass for the local area of the duty station, and/or contributing towards insurance costs. This would be offered only to those interns lacking any other kind of sponsoring and funding from other institutions or to interns not from the local area itself.

- 8.8 The report thus recommended only reimbursement of costs rather than a wage or stipend as appropriate recompense, while also noting (at p iii) the need to find additional 'supportive measures' to address the 'resources constraints of those not coming from the local area and not benefiting from any sponsorship'. Nonetheless, it is clear that the review could not capture the full extent of the impact which lack of remuneration involves for interns, because it is reasonable to assume that many would not apply for a place in the first instance through lack of capacity to support themselves over an extended period without adequate external financial support.
- 8.9 Finally, the Inspection Unit's report recommended (at p iii) eliminating restrictions on applications for future employment during the internship, so that interns can apply as any other candidate to posts in the organisations of the United Nations system for which they could compete. This recommendation is likely to reinforce the impression, accurate or not, that an internship with its opportunities for networking and inside knowledge would enhance a person's prospects of gaining employment in a UN agency.
- 8.10 Undertaking an internship in an international public organisations or non-government organisations is not the only reason for young people to travel around

the globe in search of work experience. Travelling internationally to participate in an internship in a commercial business is also becoming more common. For example, a recent article in the *Sydney Morning Herald* reported that a group of young interns from the University of Sydney and the University of New South Wales are to travel to India to undertake up internships at Infosys, India's largest technology vendor.⁶ The report also indicated that the interns will have the opportunity to take up employment with Infosys, which also employs about 2,400 in Australia. According to the newspaper, this internship scheme has received public support from the NSW Premier. However, it was also criticised by some local operators in the same area of businesses, including a Sydney-based start-up, Big Commerce, which was also reported as employing about 200 interns, and another company, Freelancer.com, which was said to employ 'several interns'. No doubt there are many benefits from such opportunities, and so the internships at Infosys were said to be encouraged by the Australian Computer Society which noted the global marketplace in which IT businesses operate.⁷ While the newspaper report noted that the scheme was funded by Infosys, it contained no details of the conditions that would be applicable to the interns. However, the very use of the description of these young students as interns might suggest at the very least that they would not be paid in the same way as they would had they been taken on as employees.

Canada

- 8.11 Internships are currently the most topical of the various types of unpaid work experience in Canada today, so much so that some are asking whether they represent the 'new normal' in young people's working lives.⁸
- 8.12 In Canada internships are now an established feature of youth employment. There are many examples of well established government programs for interns. Some of these are clearly intended to be taken up by students, generally those in post-secondary education, and are highly competitive. The various Parliamentary

⁶ S Pennington, 'First we off-shored work, now graduates', *Sydney Morning Herald*, 2 November 2012 available at www.smh.com.au/action/printArticle?id=3764301 (accessed 4 November 2012).

⁷ The Australian Computer Society is an approved provider of the Professional Year in Computing/ICT: see 4.28. It is not apparent from the above article whether these internships were to be undertaken as part of a Professional Year.

⁸ See A Langille, 'State of Exceptionalism: Interns and the Exclusionary Nature of Workplace Law' unpublished paper kindly provided by the author on 22 April 2012 and on file with the researchers.

Internship programs are perhaps some of the best examples.⁹ However, many other internship programs in the public sector are more concerned with what might ordinarily be described as entry level positions, lasting anything up to two years.¹⁰

- 8.13 Some of the provincial Governments also provide support for internship programs in the private sector. For example, in British Columbia small businesses employing fewer than 500 employees may apply for support for up to 75% of the wage of an intern for a period up to 12 weeks to develop an online and e-marketing strategy. This program has been designed specifically to assist small business to enhance its online competitiveness. Eligibility for this program is restricted to those under the age of 30, engaged in study at a post-secondary institution to which they will return to study after their internship, and who have ‘advanced knowledge and use of online technologies in the small to medium sized business environment’.¹¹ Internship programs are also to be found in other sectors of society – for instance, there is a Co-operative Career Internship Program offering 21 week internships targeted at under- or un-employed youth, and intended also to enable them to learn more about the Co-op movement.¹²
- 8.14 While government sponsored internship programs generally appear to be transparent in their recruitment processes and offer wages in line with the legislated minimum standards, there has also been reported extensive growth of internships in the private sector, not all of which have those characteristics.
- 8.15 Perhaps influenced at least in part by Ross Perlin’s exposé of internships in the United States of America,¹³ the issue of unpaid internships has become a matter of growing concern in Canada, as evidenced by items in conventional media outlets as

⁹ See information about, for example, the British Columbia Legislative Internship program available at <http://www.leg.bc.ca/info/bclip/index.asp> and the Ontario Legislature internship Program available at <http://ontariointernshipprogram.com/> (accessed 24 October 2012).

¹⁰ See eg the Ontario Internship Program at <http://ontariointernshipprogram.com/>, the Ontario Internship Program in the Public Service at <https://www.internship.gov.on.ca/mbs/sdb/intern.nsf/LkpWebContent/ePublishedHOME>, and the BC Public Service Internships and Aboriginal Youth Internship program at <http://www.leg.bc.ca/info/bclip/index.asp> (accessed 24 October 2012).

¹¹ See eg the Small Business Internship Program in British Columbia <http://www.smallbusinessbc.ca/general-business/small-business-internship-program-renewed-201112> (accessed 24 October 2012).

¹² See information about the Co-operative Career Internship Program in British Columbia available at <http://bccca.coop/content/co-operative-career-internship-program> (accessed 24 October 2012).

¹³ R Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*, rev ed, Verso, London and New York, 2012. This work is also discussed below in the section on the United States of America.

well as on the internet and in social media.¹⁴ The Canadian Intern Association has instituted a campaign against unpaid internships.¹⁵ Several blog sites developed by academics and lawyers have posted material regarding the legality of unpaid internships.¹⁶ These sites have also begun to target universities which post advertisements for unpaid internships.¹⁷

8.16 In his blog ‘Generation Free: Are Universities perpetuating inequality by promoting unpaid, precarious work?’,¹⁸ Andrew Langille has said of the role of universities:

Whether they like it or not, universities are increasingly being called upon to prepare students for entry into the labour market; this is a role that universities have not traditionally played and one that institutionally they are not prepared to handle in any meaningful way. Perhaps unpaid internships represent a policy stopgap of sorts as universities struggle to find ways to assist students entering the new economy, especially with governments unwilling to implement ameliorative labour market interventions that could ease the school-to-work transition for youth amid calls for austerity measures rooted in the ideology of neoliberalism. This problematic situation represents a failure of key institutions in society to remedy the very real challenges facing the current generation entering the workforce, including: the disappearance of entry level positions, the rise of precarious forms of employment deviating from the standard employment relationship, and creeping credentialism. What is sorely needed is the creation of a sustained youth labour market strategy that takes a holistic and nuanced approach to creating sustainable jobs for young people in Canada. Universities clearly have a role to play in such strategies, and a good start would be taking a principled stance against the exploitation of their own students.

¹⁴ See eg ‘Lawyer says Unpaid Internships are Exploitative, Illegal’ Huffington Post, Business Canada, 28 October 2012, (first posted 25 June 2011, and updated 25 August 2011) available at http://www.huffingtonpost.ca/2011/06/25/lawyer-says-many-unpaid-internships-are-illegal_n_884493.html; ‘The Legality of Unpaid Internships in Ontario’ available at <http://www.youthandwork.ca/2011/07/unpaid-internships-in-ontario.html>, and ‘Unpaid Interns: Working for Free’, The Globe and Mail, 19 July 2011 available at <http://www.theglobeandmail.com/globe-investor/personal-finance/unpaid-interns-working-for-free/article590498/>. (All accessed 24 October 2012).

¹⁵ See <http://www.internassociation.ca/> (accessed 24 October 2012).

¹⁶ See Professor David Doorey’s Workplace Law Blog available at <http://www.yorku.ca/ddoorey/lawblog/?s=internships&x=2&y=4>, and Andrew Langille’s Work and Youth Blog available at <http://www.youthandwork.ca/> (all accessed 24 October 2012).

¹⁷ See Langille’s blog, above, and his reference to unpaid internships listings at York University (<http://internsheep.wordpress.com/2011/08/23/snapshot-of-unpaid-listings-york/>) (accessed 24 October 2012).

¹⁸ Available at <http://youthandwork.ca/2011/09/generation-free-and-universities.html> (accessed 31 October 2012).

- 8.17 The number of interns in Canada is not known, and may even be impossible to determine. It is not just that there is no agreed definition of the phenomenon, but, as in other countries, there are no official statistics recorded by Statistics Canada. However, since the Global Financial Crisis the employment rate has fallen for all groups of young people whatever their educational attainment (ie, for those without a high school diploma, with only a high school diploma, with a trade certificate, or with a bachelor's degree).¹⁹ The participation of young people in the labour market is tracked, and as reported on the website of the Canadian Internship Association, the official statistics show that the situation is bleak: in June 2012, 13% of Canadians aged 15–29 were neither students nor in paid employment; 15% of those in their early 20s were jobless; and 17.2% of students were unemployed over the whole summer period. In this context pressure for, and concern at, various forms of unpaid work experience is likely to become more acute.
- 8.18 In August 2012 The Law Commission of Ontario released *Vulnerable Workers and Precarious Work: Interim Report*,²⁰ in which 'youth' was identified as one of the categories of vulnerable workers. The Interim Report said (at p 25):

Ontario youth (aged 15 to 24) have a significantly higher unemployment rate than older workers. In January 2012, this rate was 16.6% as compared to 6.6% for workers 25 years and over. The difficulty youth experience entering the labour force has caused many youth to accept non-standard forms of employment such as temporary, seasonal or part-time employment and unpaid internships. In 2011, over 50% of young workers were in part-time employment in comparison to just under 14% of workers aged 25 and over. Youth are also over-represented in temporary forms of employment. Of course, many youth continue to pursue education in addition to working and this partly explains their tendency to accept nonstandard employment.

It is not suggested here that young people are the only ones caught up in issues relating to unpaid work experience in Canada (as the cases discussed below demonstrate). However, as in other developed economies it is highly likely they are overrepresented in the category of unpaid work experience through internships.

¹⁹ Statistics Canada, 'Study: Economic Downturn and Educational Attainment, 2008-2011', released at 8.30am Eastern time in *The Daily*, Thursday, June 21, 2012.

²⁰ Available at www.lco-cdo.org (accessed 21 August 2012).

Canadian law regulating work

8.19 In Canada it is the provinces that are responsible for much of the legislation regulating work.²¹ This report briefly examines only the statutes outlining the minimum standards for employment and only the position in two provinces, British Columbia and Ontario. These provinces have been selected in part because it is there that are found the more numerous population centres and in part because their legislative provisions on minimum standards may be taken as broadly representative. The *Employment Standards Act* regulates minimum standards at workplaces in British Columbia. Legislation with the same title does likewise in the province of Ontario. However, the legislation of the two provinces is not identical in its provisions.

8.20 The British Columbia *Employment Standards Act* applies to ‘employees’ and ‘work’. Each of these terms is defined in section 1. While the term ‘employee’ as such is not elaborated further, the definition section makes clear that it includes:

- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, and
- (c) a person being trained by an employer for the employer’s business.

‘Work’ is defined as ‘the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere’. An examination of these definitions suggests that an intern or a person asked to perform ‘trial work’ will be covered by the legislation, especially given (b) and (c) respectively.

8.21 In Ontario the relevant legislation governing minimum standards applicable to employees and employers in relation to work performed in Ontario (or work elsewhere that is a continuation of work performed in Ontario) is the *Employment Standards Act 2000* (ES Act). This Act was amended in 2000 to insert new definitions relevant to internships. Section 1(1) now defines the term ‘employee’ to include:

- (b) a person who supplies services to an employer for wages,
- (c) a person who receives training from a person who is an employer, as set out in subsection (2) ...

Section 1(2) then defines a ‘person receiving training’ as follows:

²¹ There is a plethora of legislation in Canada that may be applicable to those undertaking unpaid work. It includes at the provincial level, for instance, human rights codes, occupational health and safety legislation, employment standards and labour relations legislation. However, where a business operates in a federal area of responsibility, federal workplace laws govern.

For the purposes of clause (c) of the definition of 'employee' in subsection (1), an individual receiving training from a person who is an employer is an employee of that person if the skill in which the individual is being trained is a skill used by the person's employees, unless all of the following conditions are met:

1. The training is similar to that which is given in a vocational school.
2. The training is for the benefit of the individual.
3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.
4. The individual does not displace employees of the person providing the training.
5. The individual is not accorded a right to become an employee of the person providing the training.
6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training.

8.22 The Ontario ES Act also spells out certain other exceptions in section 3(5), including:

1. A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled

and

2. An individual who performs work under a program approved by a college of applied arts and technology or a university

This latter subsection immediately excludes many, but not all, interns from seeking the protection of the legislation.

8.23 As will be seen later in the chapter, section 1(2) of the Ontario ES Act adopts language used by the US Department of Labor's Wage and Hours Division to determine whether an intern should be paid (see 8.130).

8.24 Soon after the introduction of the amendment incorporating section 1(2) into the Ontario ES Act it was reviewed by the Employment Standards Work Group in Toronto, which also condemned the changes it introduced. The Group observed of section 1(2):

While this subsection places the onus on the employer to establish that all six conditions are met before a trainee is excluded from the definition of employee (and thus the protections and entitlements of the E.S.A.) it opens up a loophole that was not in the old E.S.A. In effect, it allows for private or public sector employers (and

not simply schools or community colleges) to provide training to individuals who perform services. Essentially, it takes a pernicious legal interpretation under the old E.S.A. and legislates it. It also mirrors the law in the U.S., where trainees are excluded from employee status. This is an important and negative change.²²

More recently, the incorporation of section 1(2) into the ES Act of Ontario has been criticised by Andrew Langille as confusing for employers, discriminatory and using language that is imprecise.²³

- 8.25 In Canada, guides to employment legislation are often provided by the relevant provincial Ministry of Labour. They deal in varying detail with the issues of internships and training, as can be seen again from the examples here drawn from Ontario and British Columbia.
- 8.26 Although the heading ‘Internships in Ontario, What You Need to Know’ seems to promise material of relevance, in fact the website of The Ministry of Labour, Ontario, provides little information beyond the wording of the legislation.²⁴ However, the material as arranged is apt to mislead. ‘There are no regulations relating to unpaid internships’, the webpage first proclaims, quickly followed by the statement that the ES Act ‘regulates paid employment relationships between employees and employers’. At this point it would not be surprising if those undertaking unpaid internships inferred that the legislation had nothing to say about their situation and stopped reading further. What follows on the remainder of the webpage is a very brief summary of the relevant provisions of the ES Act which define ‘employee’ and exempt those in ‘training’. Given the 2000 amendments, it is disappointing that the opportunity to elaborate further in relation to them was not taken up in this Guide.
- 8.27 The *Interpretation Guidelines Manual for British Columbia Employment Standards Act and Regulations*²⁵ is more helpful. The *Interpretation Guidelines* indicate that while a practicum is not considered to be ‘work’, apprenticeship training or an internship is. Each of these terms is then further elaborated. A practicum is stated to be:

²² The Employment Standards Work Group, *Out With the Old and In with the New: An Analysis of the ESA 2000 (Bills 147 and 57)*, October 2001, p 3 (references omitted), available at <http://www.atkinson.yorku.ca/ace/publications/ESA%20Review.pdf> (accessed 24 October 2012).

²³ Langille, ‘State of Exceptionalism’, above, p 10.

²⁴ See, Ministry of Labour Ontario available at http://www.labour.gov.on.ca/english/es/pubs/is_unpaidintern.php (accessed 24 October 2012).

²⁵ Available at <http://www.labour.gov.bc.ca/esb/igm/esa-part-1/igm-esa-s1-work.htm> (accessed 24 October 2012).

part of a formal education process for students enrolled in a public or private post-secondary institution that involves the supervised practical application of previously classroom taught theory related to course study. The students are usually engaged in studies to obtain a degree so as to pursue a career in education, medicine, or engineering. A practicum is 'hands-on' training that is required by the curriculum, and will result in a certificate or diploma. It is not considered to be 'work' for the purposes of the Act.

A practicum is contrasted with an internship, which is described by the *Interpretation Guidelines* in the following way:

An 'internship' is on-the-job training offered by an employer to provide a person with practical experience. Often internships are offered to persons who have completed a diploma or degree program and are seeking employment. Completing an internship does not itself result in an academic certificate or diploma. If the duties performed by interns fall within the definition of 'work' contained in the Act, the intern falls within the definition of 'employee', and the agency using the services of an intern falls within the definition of 'employer', internships will be considered 'work' for the purposes of the Act.

It is the latter part of this description that indicates that ultimately the best guidance must come from the decisions of courts.

8.28 The *Interpretation Guidelines* of British Columbia also elaborate on the matter of payment for persons who are being trained. First, they describe when training time is considered 'work' for the purposes of the legislation in the following way:

Employers are required to pay for the training an employee needs in order to learn how to do their job at the employer's business. Training directed by the employer, or on the employer's behalf, which is related to performing the employment duties the employee has been hired to do is considered work. For example, an employee must be paid while he or she is being trained how to do such things as use tools and equipment, follow procedures in the workplace, assist customers and handle money and other forms of payment.

However, according to the *Interpretation Guidelines* training time will not be considered to be work in the following circumstances:

Training to obtain or maintain a permit, licence, certificate or ticket which enables the holder to seek employment with any number of employers is not considered to be 'work'. Therefore, an employer is not required to pay for time spent by an employee to obtain and maintain 'portable' permits issued, certified or mandated by

the government. Some examples are a driver's licence, a 'FOODSAFE' food handling certificate or a security guard licence.

- 8.29 The *Interpretation Guidelines* also make clear that employees are considered to be at work when they attend meetings organised by the employer and providing information or instruction serving a 'business purpose'. They do not, however, touch on the issue of pre-employment trial work, in the sense of work undertaken in order to demonstrate to an employer that an applicant has the skills to undertake the work.

Selected Canadian case law

- 8.30 There has been a small number of cases concerning the exemption for persons in training as set out in section 1(2) of the Ontario ES Act.
- 8.31 The words prefacing the subsection require that 'the skill in which the individual is being trained is a skill used by the person's employees'. In *Swift Trade Securities Training Inc v Pace* 2004 CanLII 18595 (ON LRB), although argument centred on proof of the six factors in section 1(2), the Ontario Labour Relations Board considered that it was unnecessary to deal with them, as the words at the beginning of the subsection were not satisfied because the claimant was being trained as a trader in securities by Swift Trade Securities Training Inc, which itself employed no traders but only trainers of traders.
- 8.32 The leading case discussing the six conditions in section 1(2) of the ES Act is *Girex Bancorp Inc v Hsieh & Sip* 2004 CanLII 24679 (ON LRB). Here the company argued that Ms Hsieh and Mr Sip were voluntary trainees and therefore not entitled to the wages they were claiming. Girex was an e-commerce company which had previously hired several employees to develop a software program, but they had since departed. Girex lacked the finances at the time to hire more staff. However, it anticipated a change of circumstances and that more funding would soon become available after a public share offering. Its director, therefore, decided to make 'training opportunities' available to Ms Hsieh and Mr Sip, both of whom were in the final stage of their studies, with the intention of later offering them employment. When the anticipated funding failed to materialise, they were both offered work, but only as independent contractors. They instituted claims for wages during the training period.

- 8.33 The Ontario Labour Relations Board held that the claimants had not been promised they would be taken on as employees after training, nor that they would be paid for the training. In many instances, these two conditions will be similarly easily satisfied in the case of interns. However, there is a degree of circularity in the reasoning here: a promise not to take on someone as an employee is hardly of relevance if an objective consideration of the facts indicates that they are already an employee. Likewise, the fact of non-payment of remuneration can hardly be to the point if the person is otherwise entitled to remuneration. Nonetheless in *Girex* the company was not able to prove four of the six conditions necessary to show that the claimants were persons in training and thus could not resist their claims for payment of wages.
- 8.34 On the question of the similarity of the training to that given in a vocational school, the evidence in *Girex* showed that the Director had supervised in a general way, telling the claimants what he wanted done and what the system was all about. However, he did not tell them how to do the job because, he argued, he wanted them to experience ‘the real office environment’. The Board determined (at [13]–[15] and [27]) that this lack of formal instruction, supervision, or evaluation meant that the training could not be characterised as ‘similar to that which is given in vocational school’. This condition regarding the nature of the training must inevitably require a focus on the supervision provided and the activities that are undertaken. Thus, for instance, the less direct the supervision or the more an intern/trainee is required to undertake tasks not related to the profession or skill in which they are supposed to be trained, the less likely it is that the condition will be satisfied.
- 8.35 The decision in *Girex* indicates that this condition may set a comparatively high threshold – and therefore is more likely to allow the exclusion of those who are, for example, work shadowing. In *Reyhani v 1391367 Ontario Inc* 2011 CanLII 1831 (ON LRB) the claimant sought wages for a period of two weeks spent training prior to commencing work as a dental assistant. The Ontario Labour Relations Board determined that this was a process of familiarisation with the dental practice and therefore not training that could be described as similar to that provided for in a vocational school. The training was held not to fall within the exemption in section 1(2), although because the claim was made out of time Ms Reyhani was not successful in recovering the wages. In *Infosys Canada v Shourjeh*, 2007 CanLII 5943 (ON LRB), Ms Shourjeh was held to be entitled to payment for time spent in on-the-job training, including serving customers, completing simple sales transactions, counting the cash at the end of the day, and cleaning. She had undertaken these tasks for a week before starting in a position as part-time counter help in a coffee

shop. These cases illustrate that under the Ontario ES Act, persons required to undertake pre-employment training must generally be paid wages.

- 8.36 In determining whether the training was for the benefit of the individual and the person providing the training derived little benefit from it, the Labour Relations Board in *Girex* held that despite the argument that the work would enhance their ‘employability’, there was no apparent benefit to the claimants aside from the letter of reference they received. Indeed, the Board determined (at [16] and [28]) that the primary beneficiary of the work done was the company, for which the software program was critical. The decision in *Girex* indicates that it may not be adequate for employers to claim general exposure to work place culture as adequate to satisfy this condition. Likewise, while it may not always be the case that an intern is working on something as critical to the employer’s business as was the case there, nonetheless employers frequently benefit in some way from any ‘real work’ done by the trainee or intern. For example, in *Reyhani* the Board held (at [21]) that it was certainly to the employer’s benefit to ensure that Ms Reyhani was familiar with the dental practice. In other circumstances, where the work done by the trainee or intern links to an output or product that is eventually provided to a customer or client for payment, it would seem obvious that there is a benefit to the business. The issue may, of course, often be one of degree in determining if the activity of the person doing the work is of ‘little, if any benefit’. However, setting the bar too high in relation to this condition is not logical – for the reality is that often work done by relatively new entrants to the labour market needs additional input from others in the workplace before it meets the standard required to pass on to a customer or client.
- 8.37 Finally, while the claimants in *Girex* did not displace any employees, the Board found (at [18] and [29]) that previous employees had initially done this work, indicating that this factor was also not proved by the employer. The interpretation of this condition should be a matter of commonsense. Thus where ‘new’ work is provided for an intern or group of interns to do, it seems clear that if the business wanted the work done it would need to employ someone else do it, were it not for the interns.
- 8.38 *Hakimi v Canadian Aesthetic Academy Inc* 2002 CanLII 27778 (ON LRB) is another case examining the interpretation of section 1(2). It concerned a woman who was undertaking courses at the Academy. It was held ultimately that the claimant was not an employee, but a student undertaking a course which was in the nature of a practicum, conducted entirely as ‘hands on training’ under the instruction of an assigned teacher. The claimant, as part of the practicum, delivered services to the clients of the Academy.

- 8.39 In deciding the case, the Labour Relations Board first referred to the US Supreme Court case of *Walling v Portland Terminal Co* 330 US 148 (1947) (see 8.131), in which the six conditions were originally identified. The Board determined that the first condition was satisfied as the practicum conducted under supervision was similar to that provided by a vocational school. Secondly, the claimant was also found to have benefited from the training in learning and practicing new skills, which would give her additional qualifications. Thirdly, because reduced fees were charged to clients for the services provided by those undertaking the course, and because the Board accepted that this merely amounted to a set-off of costs incurred by the organisation, it also concluded that the business derived little, if any advantage, from the activity. Fourthly, there was no evidence that the trainees displaced other employees. Rather it indicated that if the trainees did not do this work the service would simply not have been offered. Fifthly, prior to her commencing the course there was no firm commitment made to take the claimant on as an employee – that came after she had enrolled in the program. The Board found that although she was given a job at the end of the course, she was not entitled to one for having enrolled in the course. Finally, the claimant had understood from the outset that she would not be paid for undertaking the course.
- 8.40 As has been noted by Andrew Langille on his ‘Youth and Work’ blog, the six criteria are ‘fairly stringent’, intended no doubt to exclude from the protection of the legislation only those in genuine vocational-style training. When the criteria are applied to interns it ought be the rare case in which they can all be proved by a host business, thus resulting in exclusion from the protection of the legislation.
- 8.41 However, a case from British Columbia, *Sarmiento v Gavin Wilding & Rampage Entertainment* [2008] CanLII BCPC 232, demonstrates the way that courts and tribunals often do not recognise interns as employees in the first instance. Ms Sarmiento claimed that she was hired as Head of Department of Mr Wilding’s company, Rampage, which was a producer of independent film. Indeed, Rampage openly advertised her role as such in its promotional material. Sarmiento came to work at Rampage after completing her Associates Degree in Creative Writing and a program in digital film production, making her (as she noted to the Court) more academically qualified than either the company president and film producer, Mr Wilding, or Ms Carrie Wheeler who also worked at Rampage. Sarmiento worked at Rampage for six months and in evidence indicated that she undertook a variety of tasks including: reading all the scripts that came in, writing a review of them, and later working more on them by writing and editing; undertaking some research duties; and she also put together applications for funding. In relation to the latter,

there had been an agreement between Sarmiento and Wilding that she would be paid a flat fee for applications that were successful. There was conflicting evidence about the number of hours she worked: Sarmiento claimed she worked 3–5 days a week, but Wheeler indicated that she had spent more like between 2 and 12 hours a week at Rampage.

- 8.42 On the other hand, Mr Wilding argued that Ms Sarmiento was not an employee but an unpaid intern, a student-in-training, who was given the opportunity to learn on a day by day basis. He indicated that every year he received on average 50 résumés from students every summer. Indeed, this was how Ms Sarmiento came to his attention. He told the Court (at [4]) that he had assisted and mentored about 15–25 such students:

the students gain experience in the film business by assisting with office administration, answering phones, reading scripts and generally being around the office to see what a film production company does.

A large part of Mr Wilding’s evidence was the nature of his business and its financing, which came predominantly from foundations for creative work. The company was never paid until a film was actually produced and only about 10% of the projects were actually realised in this way. His evidence was that some of the interns Rampage took on were capable and his practice was to offer them a share of the development funding the company received. Although the company website referred to Sarmiento as Head of Department, Wilding testified (at [10]) that this was in order to:

create the illusion that Rampage was a bigger company than it was in order to attract writers to Rampage.

Evidence from Carrie Wheeler, the other worker, was that she always invoiced the company for work done, but only after funding for the relevant project had been received.

- 8.43 Judge Phillips held (at [72]) that Ms Sarmiento was not an employee but an intern: the claimant failed to prove a contract of employment existed between her and Rampage. In setting out reasons, the judge focused on the nature of the business and the way it was run. A large point was also made of the fact that it was Sarmiento who had sought out Mr Wilding and they had met at a coffee shop but, the judgment stated (at [59]), this was not a job interview, there was no discussion of wages, and Rampage was not hiring staff at the time. The Judge continued (at [59]):

Sarmiento did not have experience carrying out the type of work she wound up performing ... the work was designed to provide her experience in the film industry to enable her to bring her own productions under the company umbrella, like Wheeler had done before her. Sarmiento was not asked to keep track of her time and her hours were not recorded nor was much supervision provided to Sarmiento. I find that all of these factors make clear that Sarmiento was an intern not an employee of Rampage.

In coming to his decision the judge indicated (at [55]–[58]) that the relevant law was to be found in precedents concerning the requirements for the creation of a binding contract;²⁶ the features of an arrangement that indicate whether a person is an employee or a volunteer;²⁷ and the principle regarding the objective nature of the test to determine the terms of a contract.²⁸

- 8.44 In other cases the issue of the employment status of interns has frequently been glossed over and not determined by the court. *Lee v School District No 39 (Vancouver)* 2011 BCHRT 197 (CanLII), concerning an intern’s application under the *Human Rights Code RSBC 1996*, is one such example. In that case Ms Lee alleged she was discriminated against on the basis of disability when a recognition dinner for a program in which she had participated was held at a venue inaccessible by wheelchair. Ms Lee was described in the decision of the Tribunal as an ‘intern/volunteer’. In this case, interns were recruited from post-secondary institutions and volunteers from schools to help deliver programs that were about eight weeks in duration. Ms Lee was in a post-secondary institution. It was argued that section 13 of the Code dealing with discrimination in employment might not be applicable. However, the tribunal held (at [58]) that this is not an appropriate case to consider the argument, and determined the matter on other grounds.
- 8.45 In recent years there has been an enormous amount of academic and policy work and discussion regarding the position of vulnerable workers in Canada and the emergence of the non-standard employment relationship or precarious work.²⁹

²⁶ Citing *Evard v University of BC (Alma Mater Society)* [1995] BCI No 1392 and *Hospital Employees Union Local 180 & Cranbrook and District Hospital and Selkirk College* 42 Cdn LRBR at [32].

²⁷ Citing *Hospital Employees Union, Local 180 & Cranbrook and District Hospital and Selkirk College* 42 Cdn LRBR at [32].

²⁸ Citing *Punjab Foods Centre Ltd v Bailie* [1999] BCI No 2331 at [16].

²⁹ See most recently Law Commission of Ontario, *Vulnerable Workers and Precarious Work Interim Report*, August 2012. See also L F Vosko, *Managing The Margins: Gender, Citizenship, and the International Regulation of Precarious Employment*, OUP, 2010 (refer to Canada in index); and J Fudge, ‘Beyond Vulnerable Workers: Towards a New Standard Employment Relationship’ (2005) 12 *Canadian Law and Employment Journal* 151, and the works cited therein.

Despite this there has been apparently little attention to these cases or the issue of unpaid work experience or internships in particular. For the most part, as noted earlier in this chapter, it has been left to a small group of academics, lawyers and young people to raise their concerns via the internet and social media. It is they who have pointed out the problems of displacing and/or replacing other workers, supervision issues, disguised probationary periods, mischaracterisation of interns as employees, the national importance of general skills building rather than simply developing skills in an ad hoc fashion focused around individual businesses that decide to take on interns, and the complex issue of identifying the beneficiaries of the work that is done in the process.

- 8.46 In a comprehensive submission to The Law Commission of Ontario following the publication of its *Interim Report*, Andrew Langille has written that there needs to be a holistic approach to the problem of youth employment, especially unpaid internships, by a range of measures: statutory reform; enhancement of the organisational capacity of the Ontario Department of Labour to deal with issues relating to youth employment; adoption of a range of responses to incentivize compliance; the adoption of a much more proactive enforcement strategy; and systematic data collection to provide a sound basis for understanding the scale and scope of unpaid internships and for future reform.³⁰
- 8.47 Because the law can be controversial, Andrew Langille's 'Youth and Work' blog has a 'non-exhaustive' list of tips for young people who take up unpaid internships. These include: to keep all documentation; keep a record of all hours worked and the work performed; ensure any payments (honorarium, travel expenses etc) are paid by direct deposit or cheque and not in cash; keep copies of any work produced; ask at the initial meeting/engagement what your rights are in relation to future employment; and seek advice from the Ministry of Labour or a lawyer.

New Zealand

- 8.48 There does not appear to have been anything like the same level of debate in New Zealand about the prevalence or regulation of unpaid work experience as in the other countries considered in this chapter – or indeed as there has been in Australia over the past year. But from what little material we could find, it would appear that labour market pressures are having the same effect as elsewhere in the developed

³⁰ Letter to Dr Patricia Hughes, Executive Director of the Law Commission of Ontario, 1 October 2012 (copy on file with the researchers).

world, even if not (yet) to the same extent. There is certainly the same combination of youth unemployment and an oversupply of graduates in certain occupations that have created the conditions elsewhere for unpaid internships to flourish.³¹

8.49 A 2010 article in the *New Zealand Herald* discusses the experiences of three young unpaid interns. Their situations have a familiar ring: the 19-year old ‘volunteer’ at radio station 95bFM who is not paid for her work, despite producing one show and hosting another; the 20-year old event management graduate helping to run Oxfam’s Fairtrade campaign; and the 17-year old working two to three days a week for fashion label Lonely Hearts. The first two in particular comment on the difficulty of making ends meet without being paid for their work, but all stress the ‘good experience’ they are getting and their hopes of using the internships as a springboard into their chosen occupations.³²

8.50 According to a recent article in *HRM Online NZ*, ‘tougher economic times and higher unemployment have resulted in the increased use of unpaid internships’. The authors refer to recent cases in the US – discussed later in this chapter – that have seen disgruntled interns taking court action over their treatment. They note that:³³

Their cases have prompted heated debate on whether internships are really just unpaid work by new graduates or the long-term unemployed who are desperate for work. In New Zealand the use of interns is far less regulated than it is overseas and such questions are also relevant as reports of interns being expected to work for lengthy periods without pay, or recompense, are growing in number.

The Employment Relations Act

8.51 The main labour statute in New Zealand is the *Employment Relations Act 2000*, which among other things deals with collective bargaining, requirements for ‘individual employment agreements’ (that is, agreements made where no collective agreement applies), and personal employment grievances. It essentially applies to ‘employees’, as defined in section 6. That definition also governs the application of

³¹ See eg S Collins, ‘Tragic skills mismatch shuts rising generation out of jobs’ *New Zealand Herald*, 19 December 2012, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10848317 (accessed 19 November 2012).

³² Z Walker, ‘New Kids on the Block’, *New Zealand Herald*, 1 December 2010, http://www.nzherald.co.nz/career/news/article.cfm?c_id=141&objectid=10691214 (accessed 4 November 2012).

³³ M Bell and S Zillman, ‘Making Unpaid Internships Functional not Exploitative’, *HRM Online NZ*, 3 September 2012, <http://www.hrmonline.co.nz/article/making-unpaid-internships-functional-not-exploitative-143350.aspx> (accessed 4 November 2012).

other labour statutes, such as the *Minimum Wage Act 1983* and the *Holidays Act 2003*.

- 8.52 As a general rule, section 6(1)(a) defines an ‘employee’ to mean ‘any person of any age employed by an employer to do any work for hire or reward under a contract of service’. As with similar definitions in Australian labour statutes, this effectively imports the common law definition: see *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 at [31]. But section 6(2) states that in deciding whether or not a person is employed under a contract of service, the Employment Relations Court or Authority must ‘determine the real nature of the relationship’. Section 6(3) goes on to require consideration of ‘all relevant matters, including any matters that indicate the intention of the persons’; though at the same time, the Court or Authority ‘is not to treat as a determining matter any statement by the persons that describes the nature of their relationship’. According to the New Zealand Supreme Court in *Bryson* (at [32]):

‘All relevant matters’ certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law.

- 8.53 Section 6 extends the definition to cover ‘homeworkers’ who might not otherwise fall within the common law test, but also excludes certain workers. Most relevantly for present purposes, section 6(1)(c) excludes a ‘volunteer’ who :

- (i) does not expect to be rewarded for work to be performed as a volunteer; and
- (ii) receives no reward for work performed as a volunteer ...

- 8.54 The question – only partly answered by the case law considered below – is how widely both the common law-based definition and the ‘volunteer’ exclusion should be applied when it comes to unpaid work experience. The New Zealand Ministry of Business, Innovation and Employment appears to harbour few doubts on the matter.

In a section on its website dealing with ‘different kinds of employment’, it has the following to say:³⁴

What is work experience?

‘Work experience’ normally means that someone is performing duties in a workplace as a ‘trial’, but there is no expectation of payment or of employment. Because this is not deemed to be a contract of service, employment laws do not apply.

It is interesting to contrast with this with the views expressed in Australia by the FWO, especially in relation to unpaid trials: see 6.87.

Case law

- 8.55 There appear to have been only a few cases that have considered the employment status of unpaid work experience, or indeed unpaid work in general. In *MacGregor v Les Mills Ferrymead Fitness Ltd* (unreported, Employment Relations Authority, CA 1/03, 9 January 2003), the applicant lodged a personal grievance over his dismissal, arguing that he was employed by a gym. The gym had advertised for one-on-one personal trainers to be engaged as ‘self employed licence holders’ who would be allowed to use the gym to provide training to gym members, for which the trainers would charge. MacGregor responded to the advertisement but was not offered a licence; instead he was offered and accepted a position as an unpaid trainee at the gym while he undertook further training at the Christchurch Polytechnic that might make him ‘suitable’ for appointment. He and the gym’s manager both signed a standard form Casual Employment Agreement, which (at [10]):

made provision for hours of work, duties, general obligations such as professional conduct at work, confidentiality regarding the respondent’s business during and after employment, restrictions regarding other business interests and termination ... [but] ... did not include anything about payment..

According to the Employment Authority (at [11]):

Ordinarily, the existence of the written agreement would be enough to establish employment. However, there is the common evidence that the parties agreed that

³⁴ <http://www.dol.govt.nz/infozone/myfirstjob/employees/prior/kinds-of-employment.asp> (accessed 19 November 2012). Note that the *Employment Relations Amendment Act 2008* introduced the concept of a ‘trial period’ of up to 90 days, during which an employee cannot bring a personal grievance. But such a ‘trial’ worker remains an employee for other purposes under the Employment Relations Act.

Mr MacGregor would work on an unpaid basis as a trainee. Consistent with that, Mr MacGregor was not paid for his efforts ... The absence of any reward actually paid or owing means that Mr MacGregor was not an employee; rather, he was a volunteer.

The Authority rejected McGregor's argument that the 'reward' necessary to bring him 'within section 6(1)(a) and outside section 6(1)(c) of the Act' could be found in his 'prospective self-employment', noting that there was 'no settled agreement' about that. The possibility that the experience itself of working as a trainee might be considered sufficient reward does not appear to have been either suggested or discussed.

- 8.56 A more recent case dealing with the demarcation between 'voluntary' work experience and employment is *Strachan v Moodie* [2012] NZ EmpC 95. The plaintiff, then a postgraduate law student, was taken on in December 2004 by the defendant lawyer in a voluntary capacity to undertake legal research, assist the defendant with the preparation of his files, and act generally as a clerk. The plaintiff, who was also employed elsewhere as a nurse, 'saw her involvement in his practice as a way of gaining experience in her new profession that allowed her to undertake a transition from nursing to legal practice'. The defendant regarded it as a 'mutually beneficial' arrangement (at [11]). The understanding was that the plaintiff would be reimbursed for out of pocket expenses in relation to the practice and that 'if, from time to time, her contribution was material to a client's success, she might expect a modest gratuity reflecting this although that was not a contractual obligation' (at [17]). The plaintiff entered into this arrangement in part because she believed the defendant to be acting on an entirely *pro bono* basis. In fact the defendant, a crusading if somewhat eccentric lawyer who had made a career out of acting for 'underdogs' in complex cases, received a substantial income from the practice. Over the course of 2005 the plaintiff began to work more regularly for the practice. The parties subsequently came to an agreement that the plaintiff would be paid but were in dispute as to the terms of that agreement.
- 8.57 For the purpose of establishing jurisdiction in the Employment Court, the plaintiff had to show that she was the defendant's employee. According to Chief Judge Colgan (at [38]–[39]), the plaintiff was not initially an employee:

The initial agreement in December 2004 between Mr Moodie and Ms Strachan was that although she would undertake work for him, she would not be paid. Despite the fact that remuneration (including minimum remuneration under the *Minimum Wage Act 1983*) is usually an integral element of an employment relationship, it is not essential to the formation and maintenance of such a contract. However, people

can be employed for experience, effectively as volunteers in the sense of willing but unpaid employees. I am satisfied that was the arrangement between Ms Strachan and Mr Moodie in 2005.

... There was no obligation on either party to, respectively, provide observation experience or to undertake observation or have other input into cases undertaken by the practice. The nature of the 'work' undertaken for the practice at this time was commensurate with a legal observation arrangement rather than with any more formal sort of relationship including an employment relationship.

8.58 However, the Chief Judge noted (at [43]) that:

the position changed significantly in early 2006 when Ms Strachan made arrangements to both work full time for the practice and was given substantial, if not complete, responsibility for its administration as well as working as a solicitor, albeit under supervision.

From that time on she began to be held out to others as an employed solicitor, and she also began to be paid under an agreement that she receive a share of the firm's profits. Thenceforward there was 'really no doubt that Ms Strachan was an employee of the Moodie legal practice' (at [59]).³⁵ Accepting the plaintiff's version of the profit-sharing agreement – that she receive half of the profits, rather than whatever share the defendant might allocate in his sole discretion – the Chief Judge ordered that she receive unpaid remuneration of nearly NZ\$58,000, together with a further NZ\$30,000 by way of compensation for unjustifiable dismissal. An attempt by the defendant to challenge the decision was subsequently struck out by the Court of Appeal: see *Moodie v Employment Court* [2012] NZCA 508.

8.59 From our perspective, what stands out in this case is the determination that for the first year the plaintiff was an unpaid volunteer. Just as in *MacGregor*, it appears to have been assumed that since the parties had agreed the work was to be unpaid, that was effectively an end to the matter. In neither case was there any attempt to consider whether the 'real nature of the relationship' (to quote section 6(2) of the Employment Relations Act) might have been at variance from what had been agreed;

³⁵ For another case in which an agreement to pay a volunteer a regular wage was considered to change their status to that of an employee, see *Kaur v Sri Guru Singh Sabha Auckland Inc* [2012] NZERA Auckland 52, involving a teacher and administrator at a Saturday school run by a Sikh community. But compare *Hambly v Museum of Transport and Technology Board* [2011] NZERA Auckland 33, where an increase in the 'honoraria' paid to museum volunteers and a more formal approach to their engagement were not considered to have the same effect. Unlike *Kaur*, in which an intent to create legal relations was inferred from the objective evidence, including the size of the payment (which was above the minimum wage), here there remained 'no mutuality of obligation in terms of an obligation on MOTAT to provide work and remuneration and on the applicants to accept that work and undertake it to a satisfactory standard' (at [77]).

or whether – on an expansive view of the concept of ‘reward’ – the plaintiff worker might have been deriving something valuable from the arrangement.

Other legislation

- 8.60 The *Health and Safety in Employment Act 1992* (NZ) provides protection for both employees and volunteers, though to different extents.³⁶ ‘Employee’ is generally defined in section 2 to mean ‘any person of any age employed by an employer to do any work (other than residential work) for hire or reward under a contract of service’. However, section 3E goes on to provide that ‘when a person who is not an employee is in a place of work for the purpose of receiving on the job training or gaining work experience’, they are taken for the purposes of most of the Act to be ‘an employee of the person who has agreed to provide the on the job training or work experience’. They are also specifically excluded from being treated as a ‘volunteer’, a term otherwise defined by section 2 to mean a person who does not expect to be rewarded, and does not receive any reward, for work to be performed as a volunteer.
- 8.61 Part 2 of the *Human Rights Act 1993* (NZ) deals, among other things, with unlawful discrimination by employers against employees or applicants for employment. The term ‘employer’ is broadly defined in section 2 to include ‘the person for whom work is done by an unpaid worker’. Even though there is no corresponding definition of ‘employee’, it appears to be assumed that unpaid workers will be likewise treated as employees under the Act.³⁷

United Kingdom

Context

- 8.62 In Britain, as in many other developed economies, the situation of young people has been long identified as an especially critical aspect to the social, economic, and cultural well being of the community. The issue of youth employment has been a matter of particular concern over recent decades, and especially following the onset of the Global Financial Crisis in 2008–2009 and the deepest recession experienced in

³⁶ As to the Act’s application to volunteers, see the Department of Labour factsheet available at <http://www.osh.dol.govt.nz/order/catalogue/pdfs/volunteers.pdf> (accessed 5 November 2012).

³⁷ See eg the Employment page on the Human Rights Commission’s website: <http://www.hrc.co.nz/enquiries-and-complaints-guide/areas-of-public-life/employment> (accessed 5 November 2012).

the UK since the 1930s. Young people and those without qualifications have been identified as faring particularly poorly since the onset of the recession.³⁸ The most recent statistics for the period August–October 2012 show that, although the unemployment rate for young people had fallen slightly from its previous high point, there were still 20.3% of young people aged between 16–24 years unemployed. Disaggregation of that figure reveals that the problem was even more acute for those in the 16–17 year old age range (36.3% of whom were unemployed) than for those aged between 18–24 years (of whom 18.2% were unemployed).³⁹ These statistics are based on the standard international measure,⁴⁰ which includes everyone looking for and available for work, and thus also includes those who are in full-time education. However, when this latter group is excluded the unemployment rate for 16–24 year olds was still 18.9%.⁴¹

- 8.63 In times of recession, it is particularly difficult for young people to break into the labour market and to get jobs without experience, even where they have relevant qualifications. Not surprisingly then in Britain, as in other developed economies, the issues of work experience through internships has been on the political, economic, social and cultural agenda, and has become a hot topic in all forms of the media, including social media.
- 8.64 From all the available evidence it appears that over the last decade (and perhaps longer), there has been a significant growth in internships and unpaid work in Britain. As elsewhere, this growth is difficult to chart precisely, because there is no official or accepted definition of, and certainly no official statistics relating to, internships. The Report of the Low Pay Commission on the National Minimum Wage in April 2011 described an internship as ‘a form of work experience, often unpaid, that is designed to help young people get started in the labour market’.⁴² However,

³⁸ Low Pay Commission Report 2012, *National Minimum Wage*, p x. All reports of the Low Pay Commission on the National Minimum Wage are available at http://www.lowpay.gov.uk/lowpay/rep_a_p_index.shtml (accessed 24 October 2012). The Low Pay Commission was established to advise the Government under the *National Minimum Wage Act 1998* (UK).

³⁹ SeeD Hough, *Youth Unemployment Statistics*, Library of the House of Commons, Briefing Note, (SN/EP/5871; last updated 13 December 2012), available at www.parliament.uk/briefing-papers/sn05871.pdf (accessed 16 January 2013). A fuller analysis of the fragile labour market position of young people in Britain, including youth unemployment, is provided in the annual Low Pay Commission Reports on the *National Minimum Wage*: see Low Pay Commission Report 2011, pp 69–81; Low Pay Commission Report 2012, pp 73–85.

⁴⁰ See ILO Standards and Guidelines on Labour Statistics available at <http://www.ilo.org/global/statistics-and-databases/standards-and-guidelines/lang--en/index.htm> (accessed 1 November 2012).

⁴¹ Low Pay Commission Report 2012, *National Minimum Wage*, at px.

⁴² Low Pay Commission Report 2011, *National Minimum Wage*, p 67.

the elements of an internship are usually stated to include benefits to both the intern and their employer. Thus, the Gateways to the Professions Collaborative Forum has defined an internship in part as follows:

An internship is where an individual works so as to gain relevant professional experience before embarking on a career. Well managed, high quality internships should be beneficial to both employer and intern. The intern should develop professional skills and an understanding of a profession by undertaking work of value for an employer. Employers can use internship programs to identify and recruit motivated and capable individuals.⁴³

Documentation developed by the National Council of Voluntary Organisations and the British Government has indicated that an internship provides 'a short term resource to deliver meaningful work which is of value to the organisation', in return for 'a satisfying learning experience'.⁴⁴

- 8.65 In 2011 and 2012, the Low Pay Commission received submissions and evidence on internships in preparing its annual reports for those years on the national minimum wage. As an indicator of the massive growth in internships, it was noted that between its commencement in July 2009 and July 2011 the government sponsored Graduate Talent Pool (GTP) website⁴⁵ advertised 24,000 internship vacancies, one third of which were unpaid, and that by 2012 an additional 11,000 vacancies were added, bringing to 35,000 the total internships advertised.⁴⁶ However, by late October 2012 there was a drastic change in these proportions, with the GTP website indicating that of the 2,162 internships then available, 2,110 were paid.⁴⁷ The Low Pay Commission in 2011 also observed that the 'Labour Market Outlook' prepared by the Chartered Institute of Personnel and Development (CIPD) indicated that between April and September 2010, 21% of employers planned to hire interns, whereas in the previous year only 13% had done so. In 2012, the Low Pay Commission reported that this increase had in fact occurred.⁴⁸ It also pointed to further evidence drawn from

⁴³ See Gateways to the Professions, *Common Best Practice Code for High-Quality Internships*, 18 July 2011, p 7, available at <http://www.bis.gov.uk/assets/BISCore/higher-education/docs/C/11-1068-common-best-practice-code-for-quality-internships.pdf> (accessed 24 October 2012).

⁴⁴ See <http://www.ncvo-vol.org.uk/sites/default/files/files/graduate-internship-template.pdf> (accessed 24 October 2012).

⁴⁵ See http://graduatalentpool.direct.gov.uk/cms/ShowPage/Home_page/p!ecaaefg (accessed 24 October 2012).

⁴⁶ Low Pay Commission Report 2011, p 81; Low Pay Commission Report 2012, p 86.

⁴⁷ Website accessed 24 October 2012. This dramatic change is best explained by reference to the policy debate and developments discussed below in 8.77-8.101.

⁴⁸ Low Pay Commission Report 2012, p 86.

surveys of university graduates, which showed that 1.7% of graduates were volunteering or working unpaid in the 6 months following graduation in 2009/10, showing a small change from just a year earlier when the comparable figure was 1.6%, but a relatively large increase over the 2002/03 figure which was just 0.7%.⁴⁹

- 8.66 Just as gathering precise information about the number of internships has proved difficult, so too it has been difficult to build comprehensive and reliable information about the nature of internships and their intersection with the labour market in the United Kingdom. In 2011 the Low Pay Commission drew upon⁵⁰ information gathered by groups, such as from Interns Anonymous,⁵¹ which was established as a forum for interns to discuss their experiences and the ethics of unpaid internships. Interns Anonymous conducted an online survey to which they received 235 responses. This survey found that the sectors in which internships were most common were: politics and public affairs (20%); charities and NGOs (20%); and arts or heritage (14%). About half of respondents indicated that internships lasted between one to three months. It was common for a person to have more than one internship; indeed over 37% had 3 or more. For the great majority (82–83%) of respondents, undertaking an internship did not lead to a job, and nor did the employer assist the intern in finding one. Amongst the respondents to this survey, it was only rarely that an internships actually led to a job in their chosen field, and where the internship did not lead on to a job in their chosen field more than 40% were then unemployed, while 23% found employment in another field.
- 8.67 In order to understand trends regarding payment of interns, the Low Pay Commission in 2012 gathered and relied upon various data from different sources.⁵² An analysis of the vacancies advertised on the GTP website between July 2009 and July 2011 showed that only about 60% were paid. The remaining 40% were either unpaid or offered only to pay expenses. A survey by XpertHR in 2011 covering 74 organisations which employed interns revealed that 44% of these organisations did not pay a wage, 28% always did, while 23% indicated that sometimes they did. Around 38% did not pay expenses, and about 27% of the respondents paid neither wages nor expenses. There were some indications that some of those paying wages may have not met the minimum standard required by legislation: wages ranged from

⁴⁹ These survey results are available from the Higher Education Statistics Agency http://www.hesa.ac.uk/component/option,com_pubs/Itemid,122/ (accessed 24 October 2012).

⁵⁰ Low Pay Commission Report 2011, pp 81–2.

⁵¹ See website <http://internsanonymous.co.uk/> (accessed 24 October 2012).

⁵² Low Pay Commission Report 2012, p 86.

£2.50 to £10.00 per hour (in 2011 the Low Pay Commission had recommended a National Minimum Wage (NMW) adult rate of £6.08 and 16–17 yr old rate £3.68 and Youth Development Rate £4.98). Interns Anonymous' survey indicated that fewer than 13% were paid the NMW and only around 28% had expenses covered, despite the fact that most interns (87%) worked fixed hours or specific days, or performed specific tasks.

- 8.68 The growth in the number of internships in Britain, and especially the number of unpaid internships, has provoked many into using social media to take their own action to draw attention to the situation and demand what they see as their rights. In the UK there are a number of websites aside from Interns Anonymous, such as 'Interns Aware',⁵³ Internocracy⁵⁴ and 'Graduate Fog',⁵⁵ which have provided forums for young workers to express their concern at the plethora of unpaid positions and the expectations that young workers will work without access to pay and rights. The campaign 'Pay your Interns' launched by Graduate Fog on 10 September 2011, and backed by Interns Anonymous, Interns Aware and Internocracy, is a notable example.⁵⁶ The social media campaigns by such groups were also more broad ranging than a focus merely on pay, and covered other issues such as the promotion of fair access to internships. Indeed, the founder of Graduate Fog, Tanya de Grunwald, declared unpaid internships to be 'the big issue for graduates entering the job market in 2011', highlighting that the practice though ostensibly harmless and perhaps even helpful had turned out to be 'extremely damaging'.⁵⁷ The Trades Union Congress (TUC), aware of the growing problems in the area, has established its own website, 'Rights for Interns'.⁵⁸

The Low Pay Commission's agenda

- 8.69 In 2010 the British Government asked the Low Pay Commission as part of its remit to review, *inter alia*, the labour market position of young people, including interns and

⁵³ www.internaware.org (accessed 24 October 2012).

⁵⁴ www.internocracy.org (accessed 24 October 2012).

⁵⁵ www.graduatefog.co.uk (accessed 24 October 2012).

⁵⁶ See <http://graduatefog.co.uk/2011/1555/pay-your-interns-launch/> (accessed 24 October 2012). These campaigns gained added potency following the British Government's efforts to tighten its enforcement regime including in January 2011 introducing a 'naming and shaming' element to it.

⁵⁷ See eg <http://www.linkedin.com/groups/Campaign-Name-Shame-Big-Companies-3904011.S.70398852> (accessed 24 October 2012).

⁵⁸ See <http://www.rightsforinterns.org.uk/> (accessed 24 October 2012).

apprentices.⁵⁹ While the government saw several positive aspects of internships, including as a potential addition to the youth labour market, the best of which incorporated a training element and provided a way of developing workplace skills, it was also concerned that many were, inappropriately, unpaid (especially in the entertainment industry), that enforcement of the NMW needed to be effective, and that there was a need for greater access to internships by those from disadvantaged backgrounds.

- 8.70 In 2011, the Low Pay Commission received a number of submissions on the issue.⁶⁰ There was extensive evidence of strong concern in the community regarding the fact that many internships were unpaid. Trade unions argued that internships in fact inhibited labour market access by many young people from disadvantaged and poor backgrounds, and that, in industries where extended periods of unpaid work was becoming the norm, many were excluded altogether and skills gaps were exacerbated. The Government's own Graduate Talent Pool website showed abuse of unpaid interns, according to the TUC. There was even some evidence of 'auctioning the more prestigious internships'.⁶¹ On the other hand, the Chamber of British Industry (CBI), while acknowledging that there was some abuse, stressed that internships provided valuable access to experience and employability skills, and indicated that some employers considered that internships were not a substitute for entry level jobs but a bridge between study and work, and that mere 'work shadowing' did not achieve this.
- 8.71 Stakeholders had identified the issue of enforcement, and adequate resources to make it effective, as particularly important. Making the perhaps obvious point that it was of little use to rely on evidence from interns, trade unions and other advocacy groups favoured intervention at an early stage such as the point of advertisement – although as the Low Pay Commission pointed out, until there was some form of agreement, there was no actual breach of the law. The need for an improvement in the official guidance to the law was also noted.
- 8.72 There were also views presented to the Low Pay Commission in 2011 that there should be a special rate of pay for interns. The Chartered Institute of Personnel and

⁵⁹ See Low Pay Commission Report 2011, p vii. The Low Pay Commission has previously published research on the National Minimum Wage and Protecting Young Workers (2004) – available at http://www.lowpay.gov.uk/lowpay/rep_research_index.shtml (accessed 24 October 2012).

⁶⁰ Low Pay Commission Report 2011, pp 98–100.

⁶¹ Information provided by the National Council of Work Experience: see Low Pay Commission Report 2011, p 82.

Development argued for pay at the apprenticeship wage. Interns Anonymous rejected the setting of an apprenticeship wage for interns, pointing out that most interns were already graduates.⁶² The British Chamber of Commerce (BCC) favoured the creation of a new category of intern worker not entitled to the NMW, where the work was limited to a maximum of three months, and the intern entitled to be provided with on the job training and a certificate or reference letter. To prevent abuse it suggested a 12 months break between internships.⁶³

8.73 Having considered the various submissions the Commission reached its conclusions.⁶⁴ In so doing it also stated:

While we are in no doubt of the value of internships and wish to ensure that such opportunities continue to be available, there are serious issues around intern pay that need to be addressed.⁶⁵

Unpaid interns were especially common, it found, in the cultural, media and political sectors. However, the Commission did not favour the amendment of the legislation to insert a new exemption from the NMW, in part because it would need a new and agreed definition of interns and in part because it was likely to add to regulatory complexity. It took the view (at p98) that, although the law was quite specific about who was entitled to the NMW, in recent years there was evidence that the labels of ‘interns’ and ‘volunteer’ have been applied to work for which minimum wage should in fact be paid.⁶⁶ Its final recommendation was thus as follows:

We recommend that the Government takes steps to raise awareness of the rules applying to the payment of National Minimum Wage for those undertaking internships, all other forms of work experience, and volunteering opportunities, In addition we recommend that these rules are effectively enforced by HMRC [Her Majesty’s Revenue and Customs] using its investigative powers.⁶⁷

The Commission also noted that the Government had a few months earlier introduced a ‘naming and shaming’ policy (discussed below at 8.95) as an additional enforcement mechanism to expose those wilfully (ie, seriously and deliberately) in breach of their obligations under the *National Minimum Wage Act 1998* (UK) (NMW

⁶² Low Pay Commission Report 2011, p 83.

⁶³ Ibid, p 100.

⁶⁴ Ibid, pp 100–1.

⁶⁵ Ibid, p 92.

⁶⁶ Ibid, p 98.

⁶⁷ Ibid, p 101.

Act). Finally, the Commission indicated that it would continue to monitor the situation of internships over the coming year, 2012, when part of its focus would be the informal economy.

8.74 Once again in 2012, part of the Low Pay Commission's remit from Government was to examine the 'labour market position of young people, including those on apprenticeships and internships'. The evidence and submissions it received indicated both the interest in, and importance of, the issue, on the part of government, stakeholders and the wider community.

8.75 In its 2012 report the Low Pay Commission again reaffirmed its view that there were positive aspects to internships. However, as the majority of evidence received by it had emphasised, there were also profoundly damaging consequences, especially to social mobility, where many interns were not receiving the NMW to which they were entitled. It said:

We continue to recognise and support the value of work experience opportunities to young people. However, the evidence has again highlighted the potentially damaging impact of unpaid internships on social mobility by inhibiting labour market access for particular groups who cannot afford to undertake them. We are also concerned that labelling opportunities as internships may be seen as a loophole to undermine the minimum wage.⁶⁸

Because there was some evidence that improving guidance to the law and strengthening enforcement were leading to an improved situation, the Commission recommended that time be provided to enable these strategies to take full effect:

We raised our concerns in this area in our last report and recommended action by the Government. It has responded and is addressing our recommendations. In evidence for this report some stakeholders have urged further action to be taken. We judge that time should be allowed for the new guidance to have an effect and for the targeted enforcement to take place. However, we also note the continued evidence of the apparent breaking of the NMW rules, including possible abuse of the voluntary workers' exemption. In addition, we have received initial feedback from some stakeholders on the revised guidance. While generally welcomed, this has highlighted concerns which should be considered as part of our general call for a revision of the overall guidance on the NMW ...

⁶⁸ Low Pay Commission Report 2012, p 98.

We ask the Government to report to us on progress with its enforcement campaign in time for our next report, and we will then be in a better position to judge whether further measures are needed.⁶⁹

- 8.76 The issues of youth employment and internships continue to be a key one for the Low Pay Commission. The Commission has now launched its consultations on the National Minimum Wage for 2013, and has been asked again by government to focus on the issue of youth employment.⁷⁰

The wider debate and policy developments

- 8.77 The focus of the Low Pay Commission in 2011 and 2012 on the situation of young people and the labour market, and other more specific issues such as the increase in the number of internships, and their growth and nature, must be set in context. It is one part of a much broader policy debate and concern about the situation of young people generally in society and, in particular, their access to and participation in the labour market. Government, trade unions, business organisations, the not-for-profit ‘third sector’, educationalists, and young people have been variously active participants in a conversation that has traversed, *inter alia*, issues of social inclusion, social participation through volunteering, and labour market participation.
- 8.78 Volunteerism for young people as a way of promoting social engagement has been supported by successive governments in the UK. In more recent times this has included various widely publicised programs. In March 2005, the Russell Commission presented its report to Government, *A National Framework for Youth Action and Engagement*.⁷¹ It called for the creation of ‘a national framework for youth action and engagement to enhance the diversity, quality and quantity of volunteering opportunities for young people.’ A group of seven Founding Partner businesses pledged £3.5m to fund a program to enable the engagement of more than 1 million young people in volunteering work. In 2009 ‘v’ Talent year was launched, as a £10.5 million national full-time volunteering program for young people, offering them placements in children’s and young people’s services, with the aim of providing an

⁶⁹ Ibid, p 110.

⁷⁰ See at www.lowpay.gov.uk (accessed 24 October 2012).

⁷¹ For information on the Russell Commission see its archived website: <http://webarchive.nationalarchives.gov.uk/20050301192907/russellcommission.org/> accessed on 24 October 2012. See also I M Russell, *Commission Report A National Framework for Youth Action and Engagement*, Executive Summary, available from this site.

opportunity to influence public sector services and gain employability skills.⁷² The principle of volunteering and citizens playing an active role in their community was a central plank in the policy manifesto of the Conservative Party prior to the general election in 2010.⁷³ In 2011, the Conservative-Liberal Coalition Government introduced a National Citizenship Service program, which is being piloted for 2 years as a voluntary 8 week summer program for 16 year olds. Expected to provide 30,000 places in 2012, the program aims to develop skills and attitudes fostering stronger community engagement by young people and to provide opportunities to build teamwork amongst participants.⁷⁴

- 8.79 Perhaps not surprisingly it became evident that the promotion of volunteering had the potential to result in, and in some cases indeed had developed into, some confusion regarding the boundaries of voluntarism and work to which employment standards (including obligations to pay the NMW) were applicable.
- 8.80 As far back as January 2007 the then Labour Government had announced a review of the exemption under section 44 of the NMW Act from requirements to pay the NMW to 'voluntary workers', and in June 2007 it issued a consultation document, 'National Minimum Wage and Volunteer Workers'.⁷⁵ Views were invited regarding exempting from the NMW those who would be 'participating in a new national framework for youth volunteering':

We are proposing to make use of existing powers in the Act, which enables exclusions to be made from the national minimum wage in certain specified circumstances. The exclusion would apply to people who participate in the national framework for youth volunteering, a framework recommended in the Russell Commission's report (p5).

⁷² For information about the program, see <http://vinspired.com/about/vtalent-year> (accessed 24 October 2012).

⁷³ The 'Big Society' was the organising idea in the 'Invitation to Join the Government of Great Britain, The Conservative Manifesto 2010' available at http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf (accessed 24 October 2012). Rowan Williams, the Archbishop of Canterbury, labelled it 'aspirational waffle' abdicating responsibility for the vulnerable: see T Helm and J Coman, 'Rowan Williams pours scorn on David Cameron's Big Society', *The Observer*, 24 June 2012, available at <http://www.guardian.co.uk/uk/2012/jun/23/rowan-williams-big-society-cameron> (accessed 24 October 2012).

⁷⁴ For information about the pilot and program see <http://www.education.gov.uk/childrenandyoungpeople/youngpeople/nationalcitizenservice> (accessed 24 October 2012).

⁷⁵ Department for Trade and Industry, 'National Minimum Wage and Voluntary Workers, Consultation Document', June 2007, available at <http://www.bis.gov.uk/files/file39857.pdf> (accessed 24 October 2012).

In its response to the consultation, the Government concluded that it considered that section 44 was working as intended, that the definitions of worker and voluntary worker exemption were clear, but that new guidance regarding them was needed. In addition, it stated that while there might be a good case for exempting the placements for young volunteers, what was most needed was a very clear framework for the program, including clarity for participating organisations, time limits on such placements, the benefits for participants, the age of participants and the criteria recommended by Russell.⁷⁶

- 8.81 As part of the consultation, concerns were raised about internships, especially by the TUC which reported that volunteering and internships were being used to avoid payment of the NMW. The Government's response simply reaffirmed that:

The National Minimum Wage is now a well established feature of the labour market, and there is no reason why employers – regardless of the sector – should not be aware of the statutory obligation to pay their workers.⁷⁷

The Government did, however, pledge that it would prepare an updated guidance on internships and that the penalties regime for the NMW would be strengthened.

- 8.82 The issue of internships has refused to go away. In part this is because their growth has continued so strongly, with government itself encouraging internships as part of a legitimate pathway along which young people can gain the skills and experiences needed to make them more employable.
- 8.83 For example, the Graduate Talent Pool website commenced under the auspices of the Government in July 2009 with the aim of connecting graduates and UK employers offering internships and thereby improving the employability of British graduates. In January 2011 an evaluation of the first six months' operation of the service, based on an online survey conducted in March 2010 and subsequent interviews, was published.⁷⁸ It revealed that during that early period about 22% of respondents, numbering about 1440 persons, had successfully applied for and taken up internships, while approximately 40% of respondents had been unsuccessful in

⁷⁶ Department for Business Enterprise and Regulatory Reform, 'National Minimum Wage and Voluntary Workers, Government response to consultation', November 2007, available at <http://www.bis.gov.uk/files/file42602.pdf> (accessed 24 October 2012).

⁷⁷ Ibid, p 15.

⁷⁸ R Mellors-Bourne and E Day, 'Evaluation of the Graduate Talent Pool Internships Scheme', BIS Research Paper No 28, Department for Business Innovation and Skills, January 2011, available at <http://www.bis.gov.uk/assets/BISCore/higher-education/docs/E/11-668-evaluation-of-graduate-talent-pool-internships.pdf> (accessed 24 October 2012).

applying for an internship, and the other 40% had registered with the scheme but did not make an application. Those who had been successful reported a positive experience, with about one third gaining long term employment with their internship employer and another third reporting positive assistance in gaining long term work with another employer. Interestingly the evaluation reported that the issue of payment was not as significant to interns as press and other media reports had suggested. However, those who were successful tended to be high achievers, with First or 2.1 Honours degrees from the Russell Group and similar universities, thus casting doubt on whether those who might be more in need of internship experience were actually being helped. While the overall conclusion of the evaluation was that the GTP provided a sustainable model of promoting internships, it recommended a number of improvements were needed, such as a greater geographic spread of internships and in a wider range of industries. Issues of equity and access thus continued to be problematic.⁷⁹

- 8.84 Problems of equity and access have also been a core concern of the British policy agenda over the past decade, because both are central to ensuring social mobility, which is the idea that each generation should be able to enjoy more and better opportunities than those enjoyed by the previous generation.
- 8.85 In 2005, the British Government set up the Gateways to the Professions initiative to tackle issues of talented students from low income families and access to enter professions.⁸⁰ Its first report, prepared under the leadership of Sir Alan Langlands,⁸¹ was presented to the Secretary of State for Education and Skills in 2005. In response, the Government promised funds to address the identified needs. Between 2006 and 2008, £4million was provided for projects.
- 8.86 Subsequently, the Gateways to the Professions Collaborative Forum was established. The Forum was an *ad hoc* advisory committee and included representatives from approximately 60 professional bodies, related organisations and the TUC. Recognising the need to work closely with the Government to deliver on the recommendations of the Langlands Report, the Forum's Executive Group was chaired by the Minister for Universities and Science. Its brief was to identify and

⁷⁹ Ibid, pp 3–8.

⁸⁰ The history of the initiative can be found at <http://www.bis.gov.uk/policies/higher-education/access-to-professions/gateways-to-professions> (accessed 24 October 2012).

⁸¹ A Langlands, *The Gateways to the Professions Report*, July 2005, available at http://www.bis.gov.uk/assets/biscore/corporate/migratedd/publications/g/gateways_to_the_professions_report.pdf (accessed 24 October 2012).

expand routes into the professions, including, *inter alia*, through internships. In 2009, the Forum worked closely with the Panel on Fair Access to the Profession, which was chaired by the Rt Hon Allan Milburn MP and comprised 18 representatives from the professions. In July 2009, the Panel presented its report, entitled *Unleashing Aspiration: Final Report of the Panel on Fair Access to the Professions*.⁸²

- 8.87 In *Unleashing Aspiration* the Panel observed that, after the opening up of the professions post-WWII, access to them had since in fact become more not less socially exclusive, thus stifling social mobility. *Unleashing Aspiration* observed that there was some evidence that internships were becoming a necessary point of access to, and led to more chance of securing a professional position. However, it also identified some barriers to access in the form of socio-economic factors, geographic factors, and information factors, all of which produced, or had the potential to produce, significant inequalities in the way in which internships currently operated.
- 8.88 Additionally, *Unleashing Aspiration* also expressed concern that internships were of variable quality and that a significant number of internships did not provide high quality work experiences. In order to address this, the Panel recommended that the professions, government, trade unions and the third sector work together to prepare a code of practice, and that each profession then take responsibility for disseminating the code to its members. An Internship Quality Kitemark scheme was also recommended, as a useful and independent, external quality assurance process. As inspiration for this it pointed to the work of the National Council for Work Experience (NCWE) and the quality mark based on six elements and created by it for work experience.⁸³
- 8.89 In mid-July 2011, carrying out the recommendation of *Unleashing Aspiration*, the Gateways to the Professions Collaborative Forum released its Common Best Practice Code for High-Quality Internships.⁸⁴ This Code also drew upon the Chartered

⁸² Available at www.cabinetoffice.gov.uk/media/227102/fair-access.pdf, esp ch 7 (accessed 24 October 2012).

⁸³ This scheme is no longer operated. See <http://www.work-experience.org/> for general information about the National Council for Work Experience (accessed 24 October 2012).

⁸⁴ Available at <http://www.bis.gov.uk/assets/BISCore/higher-education/docs/C/11-1068-common-best-practice-code-for-quality-internships.pdf> (accessed 24 October 2012).

Institute of Personnel and Development's 2009 publication, *Internships that Work: A Guide for Employers*.⁸⁵

- 8.90 The Common Best Practice Code for High-Quality Internships outlines what an internship is: its purpose and value to both internees and their employers; its length, ranging anywhere from 6 weeks to 12 months, but typically 3 months; and that it can be taken up by undergraduate, graduate or postgraduate placements, students in further education or adult education institutes, or adults wishing to make a career change. Importantly the Code also identifies what an internship is not: for example, a compulsory component of a course of study or work experience/work shadowing, vacation work unrelated to professional career, or ordinary employment undertaken while a student.
- 8.91 The Code also makes clear that that employers must comply with the requirements of the National Minimum Wage legislation, unless the work falls within the specific exemptions under the legislation. The most relevant of those exemptions concern students undertaking placements of up to 12 months as part of a required course of study; and volunteers who are under no obligation to perform work or carry out instructions, have no contract, are free to come and go as they please, have no expectation of reward, and do not receive any reward. The Code also indicates that interns should also be reimbursed for necessary work-related costs, such as travel to attend external meetings.
- 8.92 The remainder of the Code provides detailed guidance through six best practice principles on how to ensure a high quality internship, covering every aspect of the process: preparation, recruitment, induction, treatment, supervision and monitoring, and certification reference and feedback.
- 8.93 Specific sectors where internships are common have adopted similar codes, modified according to their needs. Thus, for instance, organisations like the National Council of Voluntary Organisations⁸⁶ has developed specific information about hosting an intern, and a template designed to provide a guide to employing organisations so that they provide a quality experience to interns.⁸⁷ According to the template the

⁸⁵ Available at http://www.cipd.co.uk/NR/rdonlyres/A12DBDE1-5AA3-41FF-BB3A-0EE89EB31629/0/Internships_that_work.pdf (accessed 24 October 2012).

⁸⁶ See <http://www.ncvo-vol.org.uk/> (accessed 24 October 2012).

⁸⁷ This documentation, co-badged with the Department of Business Innovation and Skills, is available at <http://www.ncvo-vol.org.uk/advice-support/people-hr-employment/hosting-interns-work-experience-placements/hosting-graduate-inte> and <http://www.ncvo-vol.org.uk/sites/default/files/files/graduate-internship-template.pdf> (accessed 24 October 2012).

purpose of internships is to provide ‘a short term resource to deliver meaningful work which is of value to the organisation’ in return for ‘a satisfying learning experience’. Like the Code it identifies some of the elements which go to make a successful internship, such as good structure both in length of time and content, good management and perhaps a buddy system, the offer of opportunities to shadow others or network, and the provision of a reference and reciprocal feedback. On the issue of remuneration the template is softer, indicating that the ideal is for an internship to be paid, but at the very least expenses need to be covered.

- 8.94 In the artistic/cultural sector, often notorious for unpaid internships, there has also been a more concerted effort to ensure quality internships. Websites, such as that of Creative Choices,⁸⁸ encouraging internships as a means to developing a career in the creative cultural industries also provide a significant amount of advice in relation to the legal rights of interns. Creative Choices also provides for organisations links to the material prepared by the Arts Council England and Creative & Cultural Skills, and contained in *Internships in the Arts: A Guide for Arts Organisations*, published in 2011.⁸⁹ This *Guide* expects most interns to have a clear set of objectives, a specific role and formal duties, and to be expected to help the arts organisation to achieve its aims.

As such the majority of interns (as defined by these guidelines) would most likely be classified as a ‘worker’ for the purposes of the National Minimum Wage Act 1998 and its associated regulations. ... An individual with worker status is also protected by all other legislation relating to employees, including the Working Time Regulations, Health & Safety law and rules around Statutory Sick pay (pp7–8).⁹⁰

The *Guide* also explains in some detail the requirements of the NMW legislation and provides a summary of NMW rates.

- 8.95 The British Government itself has also adopted a ‘lead by example’ approach to internships. In April 2011, Deputy Prime Minister Nick Clegg launched the Government’s *Opening Doors, Breaking Down Barriers, A Strategy for Social Mobility*.⁹¹ This policy specifically identifies internships as an important element of

⁸⁸ See <http://www.creative-choices.co.uk/> (accessed 24 October 2012).

⁸⁹ See http://www.artscouncil.org.uk/media/uploads/internships_in_the_arts_final.pdf (accessed 24 October 2012).

⁹⁰ *Ibid*, pp 7–8.

⁹¹ HM Government, April 2011, available at http://www.dpm.cabinetoffice.gov.uk/sites/default/files_dpm/resources/opening-doors-breaking-barriers.pdf. See also <http://www.dpm.cabinetoffice.gov.uk/news/social-mobility-strategy-launched> (both accessed 24 October 2012.)

social mobility across the life cycle, enabling adults to build their skills and get on in work. To this end it not only identifies the need for business to create more opportunities for internships but also indicates that this must be done in a way that is open and transparent to all, and that funding be devoted to internships as a means of promoting fair access to jobs.⁹² The strategy document also called upon business to ensure transparency in the way they provided opportunities for internships and confirmed ongoing funding from Government of the GTP website. In order to encourage appropriate transparency, the Government also signalled a reform of internships at Whitehall, with no more informal internships. A key element in opening internships to all is the provision of financial support, either the NMW or payment of expenses in compliance with the NMW legislation. Failure to comply with NMW for internships will, the Government promised, be taken very seriously. To that end government guidance to employers would be updated, increased resources would be provided to Her Majesty's Customs and Revenue to enforce the law and to target sectors where internships are common, and internees would be encouraged to find out about and pursue their rights.⁹³ As part of this tightened focus on enforcement, since 1 January 2011 those who flout the NMW requirements are being named and shamed in national and regional press.⁹⁴

8.96 As part of the follow-up to *Opening Doors*, in September 2011 the Government launched its revised NMW guidance on work experience, internships and placements.⁹⁵ The guidance issued by the Department for Business Innovation and Skills remains fairly broad brush in approach, explaining that anyone who falls within the definition of a 'worker' in the NMW legislation is entitled to the NMW. Thus it emphasises that there are no special rules for interns, which means that regardless of whether an internship is advertised as being unpaid, if an intern is a 'worker' then they must be paid:

⁹² *Opening Doors*, above, pp 56–8.

⁹³ *Ibid*, pp 7–8, 56–8.

⁹⁴ See Department for Business Innovation & Skills, *National Minimum Wage, Policy on HM Revenue & Customs Enforcement, Prosecution and Naming Employers who Flout National Minimum Wage Law*, January 2011, available at <http://webarchive.nationalarchives.gov.uk/+http://www.bis.gov.uk/assets/biscore/employment-matters/docs/n/11-529-national-minimum-wage-enforcement-prosecutions> (accessed 24 October 2012).

⁹⁵ See generally by searching under relevant headings the British Government's general information portal: www.gov.uk. See especially <https://www.gov.uk/employment-rights-for-interns>; 'Internships and National Minimum wage – Frequently Asked Questions' available at [http://ww2.prospects.ac.uk/downloads/documents/Graduate%20Talent%20Pool%20\(DIUS\)/QandA-InternshipsAndNMW.pdf](http://ww2.prospects.ac.uk/downloads/documents/Graduate%20Talent%20Pool%20(DIUS)/QandA-InternshipsAndNMW.pdf); and 'National Minimum Wage: Worker Checklist' available at http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@employ/documents/digitalasset/dg_199451.pdf (all documents accessed 24 October 2012).

If your advert offers a reward for the work to be performed, either in the form of a monetary payment or in kind, then this would suggest the person is likely to be a worker. The greater the reward the more likely that a worker's contract will be formed and that the person will be a 'worker' and entitled to the national minimum wage.

The Guidance goes on to emphasise that the label given to a job is not to the point, and indicates that volunteers are different from workers:

if you have a contract of employment then you are a worker. Even if you do not have a contract of employment, you are a worker if you are doing work personally for someone else under a worker's contract, such as a contract personally to perform services, and are not genuinely self employed.⁹⁶

- 8.97 In the latter part of 2011, HMRC began targeted enforcement, focusing in the first instance on the fashion and film sector. The Pay and Work Rights Helpline (PWRH) also began fast tracking and referring all calls about unpaid work to HMRC.⁹⁷ In November 2011, *The Guardian* reported that at that time HMRC had only prosecuted seven companies, but that Whitehall lawyers had warned that many unpaid interns would be entitled to compensation.⁹⁸ In October 2011 the Government also introduced a new quality assurance program for advertisements placed on the GTP website, resulting in a dropping in the percentage of unpaid internships from 40% to 26% in the first month.⁹⁹ Now, as indicated in 8.65, only a very small proportion of internships advertised on the site are unpaid.
- 8.98 The effectiveness of these latest reforms is still to be evaluated. In 2012 the Low Pay Commission again received submissions regarding interns and the NMW. While some, such as Inspiring Interns, an internship recruitment agency, continued to argue that paying interns had negative consequences, there was general support, for example from the National Union of Students (NUS) and others, for the approach

⁹⁶ 'Internships and National Minimum wage – Frequently Asked Questions' available at [http://ww2.prospects.ac.uk/downloads/documents/Graduate%20Talent%20Pool%20\(DIUS\)/QandA-InternshipsAndNMW.pdf](http://ww2.prospects.ac.uk/downloads/documents/Graduate%20Talent%20Pool%20(DIUS)/QandA-InternshipsAndNMW.pdf) (accessed 24 October 2012).

⁹⁷ See Low Paid Commission Report 2012. See also S Malik, 'UK Fashion labels warned about unpaid internships: Nick Clegg welcomes move by HM Revenue and Customs after it sent warning letters to 102 fashion houses including Burberry', *The Guardian*, 8 December 2011, available at <http://www.guardian.co.uk/fashion/2011/dec/08/fashion-labels-warned-unpaid-interns> (accessed 24 October 2012).

⁹⁸ See S Malik and J Ball, 'Interns work – and should be paid, lawyers warn Ministers', *The Guardian*, 4 November 2011, available at <http://www.guardian.co.uk/money/2011/nov/04/interns-work-paid-lawyers> (accessed 21 November 2011).

⁹⁹ See Low Paid Commission Report 2012, p 109.

adopted by the Low Pay Commission in 2011. However, in 2012 the Commission also heard that there continued to be many unpaid internships, from evidence provided by the Graduate and Interns Alliance (GAIA), comprising Interns Anonymous, Intern Aware and Internocracy, and trade unions such as Unite's Parliamentary Branch, BECTU and Equity. Nonetheless, the Low Pay Commission concluded that, although some advocated the need for further reforms and even stricter enforcement, it was appropriate to allow the government to report on progress with its efforts for the 2013 report.¹⁰⁰

- 8.99 The momentum around the issue of failure to pay interns has not ceased. In early November 2012 significant publicity was given to the decision to pay interns in Tony Blair's profit making businesses.¹⁰¹ This news came 'hot on the heels' of an exposé by Graduate Fog¹⁰² of the practice in those businesses of using unpaid internships and the announcement of an investigation by HMRC.¹⁰³ As noted in 8.97, HMRC had taken a more proactive approach to enforcement of the NMW in relation to interns since the Low Pay Commission raised the issue in 2011.
- 8.100 The work to date seems also to have resulted in significant changes in practice amongst institutions working with students in the UK, especially after the preparation of advice regarding internships by the NUS and the University and College Union (UCU).¹⁰⁴ Thus, it was also reported that the London School of Economics, which had once played a role in connecting interns with the Blair companies, no longer did so because it did not deal with any organisations providing unpaid internships, only those prepared to pay their interns.¹⁰⁵

¹⁰⁰ Ibid.

¹⁰¹ See S Malik, 'Tony Blair's companies agree to pay interns', *The Guardian*, 1 November 2012, available at <http://www.guardian.co.uk/politics/2012/nov/01/tony-blair-companies-pay-interns/print> (accessed 1 November 2012).

¹⁰² Graduate Fog Exclusive, 'Tony Blair Intern: 'I was rejected because I couldn't work full-time unpaid', Irony Alert as 'Mr Minimum Wage' offers expenses only internship at his private office', available at <http://graduatefog.co.uk/2012/2263/tony-blair-intern-rejected-couldnt-work-fulltime-unpaid/> (accessed 1 November 2012).

¹⁰³ See S Malik, 'Tony Blair's office could face investigation over the use of unpaid interns', *The Guardian*, 31 October 2012, available at <http://www.guardian.co.uk/politics/2012/oct/31/tony-blair-office-unpaid-interns> (accessed 1st November 2012).

¹⁰⁴ See 'UCU and NUS Internships: advice to student unions and UCU members', available at <http://www.nus.org.uk/PageFiles/24282/NUS%20unpaid%20internships%20advice.pdf> (accessed 24 October 2012).

¹⁰⁵ See Shiv Malik 'Tony Blair's office could face investigation over the use of unpaid interns', *The Guardian*, 31 October 2012, available at <http://www.guardian.co.uk/politics/2012/oct/31/tony-blair-office-unpaid-interns> accessed 1st November 2012. See also the LSE information and advice to

8.101 In conclusion then, it can be seen that any improvements in the situation of unpaid interns and compliance with National Minimum Wage legislation have come not only after formal and more concerted efforts by HMRC, but also as a result of strong stakeholder engagement with the issue, as well as awareness raising through both the conventional media as well as social media.

The common law

8.102 In the United Kingdom the determination of who is an ‘employee’ at common law is undertaken by the courts in a manner broadly similar to that described in Chapter 6 in relation to Australia.¹⁰⁶ That said, it should be noted that there have also always been matters of different emphasis from the Australian approach. For instance, the concept of organisational ‘integration’ has received more attention in the UK than in Australia, as a test for determining employment status. In addition, and as noted in 6.48, the concept of ‘mutuality of obligation’ has also played a larger role. As Deakin and Morris explain,¹⁰⁷ in Britain in the 1970s it acquired a special meaning in the employment law context. It required mutual commitments to maintain the employment relationship, indicating that employment agreements should be more than a bare ‘wages-work’ agreement, and include mutual promises of future performance. This kind of ‘mutuality’ has often proved particularly difficult to satisfy in the context of casual work and other forms of precarious work arrangements in Britain.

8.103 Finally, in this section it can be reiterated that the important UK Supreme Court decision in *Autoclenz Ltd v Belcher* [2011] ICR 117 (see 6.11–6.13) makes very clear that the reality of the work relationship is at the heart of the judicial approach to categorising a work contract. Thus the behaviour or performance of the parties may throw important light on the nature of their arrangement.¹⁰⁸

students regarding internships, work experience and volunteering, available at <http://www2.lse.ac.uk/intranet/CareersAndVacancies/careersService/Internships/Home.aspx> (accessed on 1 November 2012).

¹⁰⁶ See eg S Deakin and G S Morris, *Labour Law*, 6th ed, Hart Publishing, Oxford, 2012, esp pp 159–72.

¹⁰⁷ *Ibid*, pp 164–9.

¹⁰⁸ See also *Carmichael v National Power plc* [2000] IRLR 43.

Selected statute law

8.104 As in Australia, some statutes in the UK provide benefits predominantly to employees.¹⁰⁹ However, there are also some important examples of statute law governing work whose benefits are extended to workers defined more broadly than an employee or those working under a contract of service. The precise wording of these statutes and the statutory purpose is important in determining who is protected under it. Amongst these statutes are the *Equality Act 2010*¹¹⁰ and the NMW Act. It is the latter that will be discussed in some detail in this report.

8.105 The right to be paid according to the NMW Act is granted to anyone who is a 'worker'. The definition in section 54 includes, but goes beyond, an 'employee'. Section 54 sets out the meaning of 'Worker', 'Employee' etc as follows:

- (1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act 'worker' (except in the phrases 'agency worker' and 'home worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under)–
 - (a) a contract of employment; or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.
- (4) In this Act 'employer', in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
- (5) In this Act 'employment'–

¹⁰⁹ See eg *Employment Rights Act 1996* s 230(1)–(2).

¹¹⁰ See *Jivraj v Hashwani* [2011] UKSC 40 for a recent interpretation of an 'employment relationship' under this legislation.

- (a) in relation to an employee, means employment under a contract of employment; and
 - (b) in relation to a worker, means employment under his contract;
- and 'employed' shall be construed accordingly.

- 8.106 Under section 54 all 'workers' (ie all those on a contract of employment or a contract to perform work personally) qualify for the NMW unless, they are covered by one of the exemptions in the legislation.
- 8.107 One of the specific exemptions covers 'voluntary workers', as defined in section 44. While a true volunteer would not be caught within the definition of 'worker' (having no contract at all, and being free to come and go as they please), many (indeed perhaps most) volunteers in fact work in a much more structured or organised way, and necessarily so if they are to be of real assistance to those organisations for whom they work. Voluntary workers, as defined under section 44, must work for a charity, a voluntary organisation, an association or a statutory body as defined. As the Low Pay Commission has noted, this exemption in the NMW legislation was intended to ensure that volunteers could operate in the voluntary and charity sector, be reimbursed for any reasonable expenses, appropriate subsistence or necessary training, and those for whom they worked still be exempt from the obligation to pay the minimum wage. This exception has, as Deakin and Morris note at pp189–190, 'given rise to a growing body of litigation'.¹¹¹ While the cases reinforce the point that a volunteer has no right to be paid under the legislation,¹¹² nonetheless, distinguishing between 'voluntary workers' and others is not always easy.¹¹³
- 8.108 The *National Minimum Wage Regulations 1999* also set out various categories of worker exempted from the NMW legislation, and several of these are especially pertinent when considering internships, unpaid trial work or work experience.
- 8.109 Regulation 12.5 exempts workers who are participants in a scheme, designed to provide them with training, work experience or temporary work, or to assist them in seeking or obtaining work, where the scheme is either provided under arrangements made by the Government, or funded by the European Social Fund. Originally this exemption related to government schemes under section 2 of the *Employment and Training Act 1973*. However, the exemption was widened by regulation 2 of the

¹¹¹ Deakin and Morris, above, pp 189–90.

¹¹² See eg *Murray v Newham* CAB UKWEAT/1096/99.

¹¹³ See eg *Migrant Advisory Service v Chaudri* [1998] UKEAT 1400_97_2807.

National Minimum Wage (Amendment) Regulations 2011, to include work for the dole schemes under section 17B of the *Jobseekers Act 1995* and the associated *Jobseekers Regulations 2011*. This has been criticised for causing some confusion to participating businesses over workers who are under these schemes and others who are undertaking internships.¹¹⁴

- 8.110 Regulation 12.8 exempts students undertaking either a first degree or a teacher training degree who, as part of that course, attend a period of work experience lasting up to one year. The courses and institutions covered by this exemption are defined. Otherwise students aged over 18 are entitled to be paid for any work experience, for instance if studying through a non-UK institution, if the work experience is not a specific course requirement, or if they are doing work as a course requirement but its duration is longer than one year.
- 8.111 Despite the greater attention to specifically defining various classes of workers included or exempted by the legislation, this has not always removed confusion in understanding the application of those terms by members of the community and requires extensive explanatory guidance from government agencies.

Cases concerned specifically with Internships

- 8.112 While it has sometimes been suggested that arrangements with interns are not enforceable contracts, either because there is no intention to create legal relations or because there is no consideration and thus they are unable to satisfy the requirement of mutuality, or because they are under no obligation to work and are more akin to volunteers, there are now two examples of cases brought by young interns where the Employment Tribunal has ruled that they were entitled to statutory rights under the NMW Act to wages and holiday pay.
- 8.113 In the 2008 case of *Vetta v London Dreams Motion Pictures ET/2703377/08* (unreported), Ms Nikki Vetta brought the first successful claim for non-payment of wages at the rate of the minimum wage and failure to pay for her accrued annual leave up to the time of her termination. Ms Vetta had worked as an Art Director's Assistant with the respondent company for several weeks following her application and subsequent interview for the position. The advertisement promised a position that provided an opportunity to show artistic work and make lots of contacts, and

¹¹⁴ See R Rooksby and C Leonard, 'Untangling the Work Experience Web' [2012] (April) *Employment Law Journal* 8.

indicated that an immediate start on a film, likely to last for four weeks, was required. In addition, the advertisement had stated:

Although the position is expenses only there is a great crew on board – this is a great opportunity to get experience on feature with a strong budget.

After she commenced work, Ms Vetta was reimbursed her first set of expenses, but no other payments were made to her, prior to her termination.

8.114 On the basis of the facts, Judge Warren concluded simply (at [14]):

There is no doubt that the Claimant was a worker within the meaning of the definition of worker both in the National Minimum Wage and the Working Time Regulations legislation.

Ms Vetta was not a volunteer, and due to the nature of the work she was in not in a training program. She was awarded a total of £2395.44, being an amount comprising unlawful deduction from wages of £2,108.64 and £65.89, and accrued holiday pay of £220.91.

8.115 In this case the more contentious issue was the identity of the party for whom Ms Vetta worked. Ms Vetta's application for the position had been addressed, as directed in the Advertisement, to Ms Sophie Watt, the production designer, and it was she, along with the Art Director, Ms Katz, who had then conducted the interview. However, Ms Watt was herself engaged as an independent contractor by the respondent company. London Dreams Motion Pictures argued that Ms Watt, and not it, was the employer. However, on the basis of the facts before him, Judge Warren concluded that Ms Vetta did indeed work for the respondent company. The advertisement for the position carried at its head the name of the respondent company, London Dreams Motion Pictures; and there was an exchange of emails between the company and Ms Watt demonstrating that they had discussed the setting up of the team and the department. In the case there was also reference to the fact that other staff members had not been paid salary or expenses, resulting in intervention by the union.

8.116 It has been said that the importance of *Vetta v London Dreams Motion Pictures* is 'the line it placed in the sand of internship culture'.¹¹⁵

8.117 In 2011 another intern was successful in bringing a claim to be paid wages and annual leave pay under the NMW Act. In *Hudson v TPG Web Publishing Ltd*

¹¹⁵ Rooksby and Leonard, above, at 7.

ET/2200565/11 (unreported) a young intern, Keri Hudson was reported as working on the Village website for TPG for six weeks. She worked from 10.00am–6.00pm every day for several weeks, had responsibility for collecting and scheduling articles, and was put in charge of a team of writers and the recruitment of other interns. There was in this case no written contract of employment, although she had had some discussions about pay. This, along with the nature of the work undertaken, indicated the existence of an employment relationship. Ms Hudson was awarded £1024.98 for 5 weeks work, being £913.22 at the NMW rate and £111.76 as pro rata holiday pay.¹¹⁶

- 8.118 The case was widely reported in the media, including comments by the National Union of Journalists, which had supported the claimant as part of a ‘Cash back for Interns’ campaign. Accounts of the case also suggest the judge indicated that, even if a worker was taken on as an intern and agreed to work for free, they would nonetheless be treated as a worker for the purposes of the minimum wage legislation if they were doing a real job and not being trained.¹¹⁷
- 8.119 As well as extensive discussions of these cases in general media outlets and on social media, they have also been discussed in the specialist journals of the legal profession;¹¹⁸ while a Briefing Paper for Westminster Parliamentarians, which also mentioned the case, warned that courts look at the ‘true relationship’, not simply the label given to a worker.¹¹⁹

Other relevant cases

- 8.120 While the above decisions are only at Tribunal level, there is no reason to think that the higher courts would take other than the same approach. This is certainly

¹¹⁶ This account of the case is taken from V Dougan and E Wiseman, ‘Should you be paying your interns?’, *Journal of the Law Society of Scotland*, 13 August 2012, available at www.journalonline.co.uk/magazine/57-8/1, and from a briefing note for Parliamentarians prepared by the Parliamentary Library of the House of Commons at Westminster: J Parker, ‘National Minimum Wage and Volunteers’, Standard Note: SN/BT/697, last updated 17 May 2012, available at www.parliament.uk/briefing-papers/SN00697.pdf (both accessed 24 October 2012). It was reported that the decision would be appealed, but to date the researchers have been unable to locate evidence of that happening.

¹¹⁷ See S Malik, ‘Unpaid website intern celebrates court victory: Online review site My Village forced to pay six weeks’ free work’, *The Guardian*, 23 May 2011, available at <http://www.guardian.co.uk/media/2011/may/23/unpaid-website-intern-court-victory> (accessed 23 October 2012).

¹¹⁸ See Dougan and Wiseman, above; Rooksby and Leonard, above.

¹¹⁹ Parker, above.

suggested by a Court of Appeal case, *Edmonds v Lawson* [2000] 2 WLR 1091, concerning a young barrister undertaking a pupillage. As is common in such cases the pupil accepted an offer of an unpaid pupillage at the chambers after an interview by representatives of chambers (though not those who were ultimately her pupil master). A Code and other regulations governed the master-pupil relationship and required nothing (that is, no work) of the pupil, other than attention to training and the learning of practical professional responsibilities. Where work of value was done for a barrister, the Code required that it be paid where this was warranted.

8.121 In *Edmonds* the pupil barrister made a claim for payment of wages under the NMW Act, and thus the question arose as to whether she came within the definition of ‘worker’ in sections 1(2) and 54(2)(b) of the legislation, there being no argument in the case that she had a contract of service. Delivering the judgment for the Court of Appeal, Lord Bingham found that there was a contract between the parties. This involved finding, first, that there was an intention to create legal relations and, secondly, that there was consideration from the pupil to the chambers.

8.122 In determining whether there was an intention to create legal relations the Court held (at 1099) that ‘context is all important’. Although the content of the arrangement was educational, and regulated by other documents, the Court found (at 1100) that the practical implications for both parties were significant – on the side of the pupil to learn and impress those at the chambers, and on the side of the chambers to attract those that were most able and hardworking. The Court went on (at 1101):

To our mind this arrangement had all the characteristics of a binding contract. It makes no difference that, if the pupil defaulted, the chambers would be most unlikely to sue; the same is true if an employer engages a junior employee under an employment contract, which is undoubtedly binding, and the employee fails to turn up on the appointed day.

8.123 The question of whether there was consideration was more complex because strictly the pupil was only there to learn and was not required to undertake anything beyond what was conducive to her own training. Where work had been done as a barrister, the client, rather than the chambers or pupil master, was the direct beneficiary. However, the Court held that the very act of undertaking the pupillage at the chambers was sufficient consideration. Again it was emphasised that the chambers had an interest in attracting the most talented candidates to form a select pool competing for recruitment as tenants. This point was not undermined by fact that ultimately some would not be regarded as candidates (at 1101):

The process must be viewed in the round, and not on a pupil by pupil basis, and chambers may well see an advantage in developing a close relationship with pupils who plan to practice as barristers or to practice overseas. On balance we take the view that pupils such as the claimant provide consideration for the offer made by chambers such as the defendants' by agreeing to enter into the close and potentially very productive relationship which pupillage involves .

- 8.124 In *Edmonds* it had been argued that this amounted to an apprenticeship which, the Court held, involved a special type of contract where the servant 'bound himself to serve and work for the master'. Given that there was already full documentation regarding the pupil's obligations and duties regarding training, the Court was not prepared to imply anything further. While noting that pupils may feel obliged to commend themselves to their pupil master by doing work requested of them, the Court commented (at 1104) that 'this has no bearing when the issue relates to the content of a contractual arrangement'. In conclusion, the Court held, there was no agreement to work under a contract of apprenticeship or an equivalent contract (presumably a contract of service).
- 8.125 As can be seen from the above facts, there are a number of similarities between the nature of the pupillage arrangements and those of internships arrangements (save that there is no overarching regulation precluding work being done by interns). It might be said that the intern is taking an internship primarily to learn in furtherance of a career that is yet to commence. Nevertheless, just as with the chambers' interest in offering an unpaid pupillage, it is very difficult to conclude that there is not also value to the employing business if it can recruit enthusiastic, intelligent, hard working and willing young intern workers who may ultimately be competing for a job. Of course not all interns will fit that description – but as the Court of Appeal pointed out, that is not to the point. Of course if an intern works for a business, then in the ordinary course of working arrangements, the intern is likely to be quite different from a barrister providing an opinion for or representing a client – they are much more likely to look like and to be an employee, even if only a casual employee.
- 8.126 A different conclusion regarding *Edmonds* appears to be drawn by a recent Parliamentary Briefing Paper discussing volunteers and internships.¹²⁰ In relation to interns the paper states that they:

are generally under no obligation to perform work or provide services nor are they employed under a contract of apprenticeship, which is covered by the definition of

¹²⁰ See Parker, above.

contract of employment in section 54(3) and, as such, are unlikely to be considered workers under the National Minimum Wage Act.

After discussing *Edmonds*, the Briefing Paper continues:

There may be a similar lack of mutuality of obligation in the relationship between internees and those who engage them such that they would not be defined as ‘workers’ under the Act. Internees often request an internship to spending [sic] time in their sponsor’s office and to accompany them on their duties for reasons purely in their own self interest ... Thus the internees main purpose for entering into the relationship are often educational and purely personal rather than to provide services to another; and the sponsor will often not be entering into the arrangement for the purposes of being provided with services, rather to assist the internee in his/her personal development. Indeed, when considered objectively there may be very little that the sponsor gains from the relationship. The internee would be a volunteer in the truest sense if they do not expect to be paid and the sponsor does not expect to pay them. These factors may be evidence that neither party enters into a contract to perform work or provide services in return for a payment of wages and hence the internee is not a ‘worker’ under the Act and also that no mutuality of obligation exists in the circumstances.

While it may be true that some internships involve only shadowing at the workplace, the evidence in Britain and elsewhere suggests that this is no longer the norm, if it ever was. Importantly, however, the Briefing Paper does conclude that courts and tribunals will consider the true nature of the relationship.

United States of America

Unpaid work experience in the United States

- 8.127 The publication in 2011 of Ross Perlin’s book *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* was referred to in Chapter 2. It brought to prominence the issue of unpaid work in the form of internships in the United States. What is initially so striking in Perlin’s revelations is the scale of unpaid internships in that country. Of the approximately 9.5 million people undertaking a college degree in the USA, Perlin estimates that a large majority – ‘perhaps as many as 75%’ – undertake at least one internship. And that figure does not include the many others who undertake internships, for example after graduation. The ‘explosion’ of internships has seen their adoption from the medical arena in the 1950s to almost every other area of activity. Perlin’s account describes in detail, for example, the way

in which some of the ‘corporate titans’, such as Disney, have gradually rebranded ordinary jobs into internships, cleverly shaping them into a structured program that enables them to tap into the hopes and aspirations of young people, while at the same time crafting something that is understood by the rest of the community, including in particular parents and educators. According to Perlin (at p 61):

In certain for profit industries – fashion, publishing, entertainment, journalism to name a few – demanding unpaid internships dominate, with illegal situations possibly constituting a majority of all available opportunities.

But internships are no longer confined to the ‘corporate titans’, nor limited to the private sector. They are just as preponderant in the public sector and not-for-profit organisations. They are, in the title of the fourth chapter in Perlin’s book, ‘a lawsuit waiting to happen’. When the beneficiaries of unpaid internships are also law and policy makers, convinced that it is a privilege to allow young people to work for them, instituting transformative change is likely to become quite difficult. Unsurprisingly, Perlin’s book has elicited an enormous number and variety of reactions.

The Fair Labour Standards Act

- 8.128 In relation to unpaid internships, perhaps what is most surprising about the USA (given what might be labelled a general reluctance there to reform workplace laws) is that it has in place quite strong guidance relating to the position of interns under the federal *Fair Labour Standards Act 1938* (FLSA). The FLSA, which is now found in Chapter 8 of Title 29 to the US Code, is applicable to employers operating within a federal area of responsibility, which includes the regulation of trade and commerce.
- 8.129 The FLSA covers ‘employees’, defined simply in section 203(e)(1) as ‘any individual employed by an employer’. The legislation further clarifies the meaning of the term, in relation to those employed by a ‘public agency’. It also specifically excludes certain workers who would otherwise fall within the definition of ‘employee’, such as some postal service workers, those employed by a State, workers in a family business, and certain volunteers (s 203(e)(2)–(5)). The definition of the word ‘employ’ includes ‘to suffer or permit to work’ (s 203(g)). It is this latter aspect of the definition that has been taken to extend the meaning of ‘employee’. All who are within the definition of ‘employee’ must be accorded the minimum wage and overtime compensation for hours worked in excess of 40 in a work week.

8.130 There is no specific definition in the FLSA that refers to interns. Nonetheless, the Wage and Hour Division of the Department of Labor (DOL), which administers the FLSA, has developed a six-point test to determine whether an intern in the for-profit private sector is an 'employee' and so entitled to workplace benefits under the legislation. These six criteria are:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

8.131 The background to the establishment of these criteria is to be found in the case of *Walling v Portland Terminal Co* 330 US 148 (1947), which was decided by the Supreme Court in 1947. The case concerned workers undertaking a preliminary course of practical training, which was offered to professional brakemen over a period of about a week. The course of training involved observation of certain tasks and then an opportunity to perform them under close supervision. As noted in Justice Black's judgment, the trainees did not displace any of those supervising them during the training. Indeed, as the Court noted (at 150), the work done by the trainees 'does not expedite the company business, but may and sometimes does actually impede it'. The evidence in the case was that no-one was taken on as a brakeman without first satisfactorily undertaking the training. Completion of it meant that the trainee's name was placed on a list to which the railroad company then referred when wanting to employ a brakeman. While they were undertaking the course the trainees received no wage or allowances, save for during the Second World War when a retrospective payment was made once a trainee was actually taken into employment.

8.132 The question in the case was whether these trainees could be considered to be 'employees' within the meaning of section 3(e) of the FLSA and so entitled to the minimum wage it specified. The judgment of the Supreme Court, delivered by Justice

Black, made clear that the term ‘employee’ in the legislation was wider than at common law. Referring to the wording of the legislation, Justice Black opined (at 153) that ‘without doubt’ the Act also covered ‘trainees, beginners, apprentices, or learners’. However, while expressly extending to those groups of workers, he held (at 152) that nonetheless ‘the section only applies to those who are in ‘employment’. It did not extend to those undertaking preliminary training prior to being taken on in employment. According to Justice Black, the consequences of such an interpretation were nonsensical and would mean, for example, that those undertaking similar training at an educational institution would also be covered by the legislation. While this conclusion would seem to be unwarranted, Justice Black also said (at 152) that to decide otherwise would extend the benefits of the legislation to a person who:

without promise or expectation of compensation, but solely for his own personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.

Accordingly, a person ‘whose work serves only in his own interest’ was held not to be an employee under the Act. Justice Black went on to conclude (at 153) that in this case the railroad received ‘no immediate advantage from any work done by the trainees’ and so they were not employees within the meaning of the legislation. It was evident from the concurring judgment of Justice Jackson that the interpretation adopted by the Court also revealed something of an underlying resistance to the statutory specification of minimum terms and conditions of employment in an area which historically was governed by collective agreements. As Justice Jackson opined (at 154), the *Fair Standards and Labor Statute* should not be interpreted in a way that ‘put industry and labor in a legal straitjacket of our own design’.

8.133 In April 2010 the DOL issued a fact sheet as guidance for interns and those employing them in the for-profit sector, ‘Fact Sheet #71: Internship Programs under the Fair Labor Standards Act’.¹²¹ The fact sheet indicates that where all six of the criteria specified in 8.130 are satisfied, then ‘an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern’. The exclusion, it is explained, is necessarily narrow because the definition in the legislation is so wide.

8.134 The DOL fact sheet elaborates further on the criteria, as follows:

¹²¹ April 2010, available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> (accessed 29 June 2012). See also N Bacon ‘Unpaid Internships: The History, Policy, and Future Implications of “Fact Sheet #71”’ (2011) 6 *Entrepreneurial Business Law Journal* 67.

Similar to an Education Environment and the Primary Beneficiary of the Activity

In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit). The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work

Displacement and Supervision Issues

If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek. If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA. Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.

Job Entitlement

The internship should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

As mentioned, Fact Sheet #71 indicates that all six criteria must be satisfied in any particular case. This would seem on the face of it to provide quite strong protection for interns.

- 8.135 There have not been any federal cases in the USA dealing specifically with interns. However, the cases that have dealt with the analogous situation of trainee programs are not all consistent in their approach to the determination of employee status under the FLSA. In some cases a test has been applied which looks at ‘the totality of the circumstances’ of the case.¹²² In others, courts have required strict proof of all six criteria.¹²³ The logic for the former approach relies upon the fact that the determination of whether a person is an employee is a multi-factor test, with no one factor being determinative (similar to the approach under the Australian common law, as discussed at 6.4). In other cases still, courts have more simply applied a ‘primary beneficiary’ test,¹²⁴ while in yet others courts have referred to all of the above tests.¹²⁵

Rights of interns under other US legislation

- 8.136 There has also been concern over a longer period as to the legal position of interns under other statutes in the USA. Title VII of the *Civil Rights Act 1974*, for example, protects employees. However, in cases decided under Title VII the question of remuneration and control has been critical to gaining its protection. For this reason unpaid workers, such as young interns, have sometimes been left unprotected.
- 8.137 This was demonstrated in the notorious case of *O’Connor v Davis* 126 F.3d 112 (1997).¹²⁶ A young woman, as part of her college degree in social work, undertook an internship organised by her college at a hospital for the mentally disabled. There she was subjected to a tirade of inappropriate sexual remarks from one of the psychiatrists. In determining her appeal in relation to Title VII, the Court of Appeals held (at [19]–[21]) that remuneration was an ‘essential condition’ and indeed ‘dispositive in this case’. Ms O’Connor was in the eyes of the Court ‘a volunteer’. She also failed in her claim under Title IX for discrimination under an ‘education program

¹²² See eg *Reich v Parker Fire Protection District* 992 F 2d 1023 (1993).

¹²³ See eg *Atkins v General Motors Corp* 701 F 2d 1124 (1983); *Donovan v American Airlines Inc* 686 F 2d 267 (1982).

¹²⁴ See eg *McLaughlin v Ensley* 877 F 2d 1207 (1989).

¹²⁵ *Archie v Grand Central Partnership Inc* 997 F supp 504 (1998).

¹²⁶ The case is discussed in some detail by C J Ortner, ‘Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern’ (1998) 66 *Fordham Law Review* 2613.

or activity', because the host institution, the hospital, did not have education as its primary purpose.

- 8.138 Other cases regarding sexual harassment have produced a similar result. Although a lower court was willing to extend protection to an intern/volunteer, this was reversed on appeal in *Lowery v Klemm* 845 NE 2d 1124 (2006), when the Supreme Judicial Court of Massachusetts overturned an earlier decision of the Appeal Court.¹²⁷
- 8.139 In some cases interns seeking to take legal action have invoked a range of legal rights in their quest for justice. In *Rinsky v Trustees of Boston University* 2010 WL 5437289 (D Mass), Ms Rinsky, who alleged she had been sexually harassed while on an intern placement that was part of her Master's program at Boston University, sought to assert her rights against the University and the Town of Brookline's Senior Centre, including its supervisor, where she undertook her internship. To this end she pursued claims under the Fourth and Fourteenth amendments of the US Constitution; under the Massachusetts *Civil Rights Code*; under Title IX; and at common law for assault and battery, civil conspiracy, violation of privacy, negligence, intentional infliction of emotional distress, and for breach of contract. While most of these were struck out by the Court for want of evidence, the case does demonstrate the wide range of potential legal risks for those who arrange or supervise internships.

Recent cases

- 8.140 Since Fact Sheet #71 has been issued by the DOL there have been a number of new cases launched in the USA aimed at testing the protection offered by the law to those undertaking internships. Three notable examples are *Wang v Hearst Corporation*; the 'Black Swan' case; and the 'Charlie Rose' case.

Wang v Hearst Corporation

- 8.141 Perhaps the most publicised of these cases is that being brought by Xuedan (Diana) Wang, who is suing the parent company of Harper's Bazaar, Hearst Corporation, in the Federal District Court for the Southern District of New York. The statement of claim filed on 1 February 2012 alleges (at [1]) that hundreds of unpaid interns work

¹²⁷ This case is discussed in J J LaRocca, 'Lowery v Klemm: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protection' (2006-2007) 16 *Boston University Public Interest Law Journal* 131.

for Hearst Corporation as ‘messengers, delivery people, assistants, and secretaries, but receive no compensation’. Wang worked there as an intern, ‘regularly ... over 40 hours a week, and sometimes as many as 55 hours a week’ (at [4]), between August and December 2011. Her duties (as listed in [58]) included co-ordinating pickups and deliveries of fashion samples, assigning a team of interns to carry out such pickups, maintaining records of the sample trunks and fashion closet, providing on site assistance at photo shoots, and processing reimbursement requests for corporate expense reports. The allegation is that there was no training provided, and Wang claims that she and others were misclassified as interns rather than as employees and that this (at [4]):

denied them the benefits that the law affords to employees, including unemployment and workers compensation insurance, social security contributions, and , most crucially, the right to earn a fair day’s wage for a fair day’s work.

The case also alleges that Hearst publications did not keep employee records as required by statute. Ms Wang is seeking compensation and also injunctive relief to halt the practice of using unpaid interns.

- 8.142 Ms Wang’s lawyers (Outten & Golden) successfully sought to widen the case as a class action on behalf of what was initially estimated to be more than one hundred similarly situated interns. However, over 3,000 have since been reported as joining the action.¹²⁸ The claim asserts that had the interns not been working, Hearst publications would have had to hire additional employees.
- 8.143 When the potential numbers of claimants are included, if the case is successful it is anticipated that the compensation and damages will be well in excess of the US\$5m estimated. The case is not expected to be heard until 2013. In the meantime, there have since been reports that Ms Wang is also suing Dana Lorenz and Fenton Fallon, a jewellery company, where she spent time as a press intern.¹²⁹

¹²⁸ See C Bray, ‘Judge Grants Class-Action Status in Hearst Unpaid Intern Case’, available at <http://online.wsj.com/article/SB10001424052702304373804577523353691226294.html> (accessed 23 October 2012). See also H Moss ‘That Intern versus Hearst Corporation Case is now a Class Action’, available at <http://nymag.com/thecut/2012/07/intern-v-hearst-corp-case-is-now-class-action.html> (accessed 23 October 2012).

¹²⁹ See K Schaefer, ‘The Norma Rae of Fashion Interns’, *New York Magazine*, 11 September 2012, available at <http://nymag.com/thecut/2012/09/norma-rae-of-fashion-interns.html>; A Rogers, ‘Intern who accused Hearst of Unfair Labor Practices says she’s Turned Her Back on Fashion’, 11 September 2012, available at <http://businessinsider.com/diana-wang-speaks-out-about-hearst-corporation-2011unfinished>; H Moss ‘The Same Intern suing Hearst Corp is now suing Fenton Fallon’, available at <http://nymag.com/thecut/2012/07/same-intern-suing-hearst-now-suing-fenton-fallon.html> (all accessed 23 October 2012)

The Black Swan case

- 8.144 Media reports indicate that Ms Wang was inspired to undertake her action by reading reports of a similar case concerning interns working on the film *Black Swan*. Outten & Golden are also acting for the former interns in the case *Glatt and Footman v Fox Searchlight Pictures Inc* in relation to work performed as an unpaid intern on *Black Swan* and other films. The claims, filed on 27 September 2011 in the Federal District Court for the Southern District of New York,¹³⁰ are made under both federal (the FLSA) and state (New York Labor Law) legislation, and seek unpaid wages, including for overtime and reimbursement of costs, as well as penalties for failure to keep records. They allege that Fox Searchlight is a very profitable enterprise operating in the financially challenged world of independent film making, with *Black Swan* costing only US\$13 million but grossing a profit of US\$300 million world-wide (at [1]). It is also claimed that unpaid interns are a 'crucial labor force on its productions' (at [2]). The law suit also seeks an injunction barring Fox Searchlight from improperly using unpaid interns in the future.
- 8.145 Glatt claims that he was an accounting intern at Fox Searchlight Pictures between December 2009 and February 2010, during which time he worked 51 full days, five days per week for at least 40 hours a week and sometimes 50 hours a week (at [61]). His responsibilities included reviewing personnel files and creating spreadsheets to track missing documents in personnel files; travelling twice a week to the Manhattan payroll office to deliver timesheets, pick up employee cheques, and/or deliver payments; and preparing documentation to track purchase orders, invoices, petty cash, and travelling to get signatures of authorising officers (at [67]). During the period he was paid for only one day of work. Then from March 2010 to August 2010, Glatt worked as an unpaid post-production assistant, two days a week for at least six hours a day.
- 8.146 Footman, the other named claimant intern, worked similar hours to Glatt between October 2009 and February 2010. Footman worked as an office production intern, preparing coffee for other workers, taking and distributing lunch orders, taking out the rubbish and cleaning the office, collecting receipts and preparing expense reports, running miscellaneous errands and doing miscellaneous secretarial tasks (at [79]). According to the allegations the nature of the work tasks performed were basic and scarcely an educational experience.

¹³⁰ Available at <http://www.wage-hour.net/file.axd?file=2012%2F3%2FGlatt+v.+Fox+Searchlight.pdf> (accessed 13 November 2012).

8.147 As in *Wang's* case, the lawyers for the interns have apparently now expanded the case to include all internships at Fox Searchlight's parent company, Twentieth Century Fox, with newspaper reports indicating that two further named plaintiffs, Eden Antalik and Kanene Gratts, have been added as claimants.¹³¹ They continue to seek compensation in the form of back-payment and a ruling that similar internships should not be offered in future. While the case is yet to be heard, Twentieth Century Fox has indicated that in any event it has already changed its guidelines for internships to ensure that interns are being paid at least \$8 an hour.

Charlie Rose case

8.148 Another case that has received considerable media attention in the USA is the action by Lucy Bickerton, a former intern who worked in an editorial position between June and August 2007 on the US television show 'Charlie Rose' (which airs on PBS). The claim is that Bickerton regularly worked 25 hours per week, unpaid. Her responsibilities included background research for interviews conducted by the host, as well as escorting guests in the studio, and cleaning up the 'green room' after taping. She is suing for unpaid wages.¹³²

The beginning of the end of unpaid internships?

8.149 Reporting on the above three cases, *Time* has considered them collectively under the headline: 'The Beginning of the End of Unpaid Internships'.¹³³ Another report has labelled the *Black Swan* case a 'massive dance of death' and the 'swan song for unpaid labor'.¹³⁴ The decisions in, and subsequent impact of, the above three cases is highly anticipated. The cases are unprecedented in the USA in recent times. What makes them potentially so powerful is the impact of internet communication and social media, with many young people hungry to see a revolution in the way the

¹³¹ See 'Black Swan' Intern Lawsuit Proceeds, Striking Blow Against Unpaid Labour in Film', *Huffington Post*, 24 August 2012, available at http://www.huffingtonpost.com/2012/08/24/black-swan-intern-lawsuit_n_1828206.html ; B Child, 'Black Swan Interns to Sue Twentieth Century Fox', *The Guardian*, 14 August 2012, available at <http://www.guardian.co.uk/film/2012/aug/14/black-swan-interns-sue-fox> (both accessed 8 November 2012).

¹³² D Lieberman, 'Does Charlie Rose Exploit Interns?', *Deadline Hollywood*, 14 March 2012, available at <http://www.deadline.com/2012/03/does-charlie-rose-exploit-interns/> (accessed 14 November 2012).

¹³³ Available at <http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/> (accessed 14 November 2012).

¹³⁴ C Zara, 'Fox Intern Law Suit Could Mean Swan Song for Unpaid Labor in Glamour Industries', *International Business Times*, 14 August 2012, available at <http://www.ibtimes.com/fox-intern-lawsuit-could-mean-%E2%80%98swan%E2%80%99-song-unpaid-labor-glamour-industries-743114> (accessed 14 November 2012).

world of commerce operates (as demonstrated, for example, by the ‘Occupy’ movement in recent times, which was particularly strong in the USA) and disappointed at the lack of outcomes after the DOL’s stated crackdown on unpaid internships when it launched Fact Sheet #71.¹³⁵

- 8.150 Certainly the issue of unpaid work experience is unlikely to go away in the USA. Much of the focus of academic consideration has been around the question of legislative reform and policy development to redress the injustice that is represented by the widespread use of unpaid internships there.¹³⁶ The criticisms of the current system can be grouped under several headings. The first relates to the FLSA test based on the six criteria, their application, and the fact that to date the enforcement of the test has not been effective. Secondly, there is little or no protection for interns in other areas of the law, such as discrimination and occupational health and safety or workers’ compensation. Finally, there are criticisms related to the phenomenon of unpaid work experience itself, including that the growth of unpaid internships continues to be encouraged, and that the internship culture is gradually seeing the replacement of ordinary workers with unpaid workers.
- 8.151 Commentators are almost universally critical of the operation of the current law in the USA and have proposed various amendments or improvements. These have emphasised the need for clarity and a system that can be understood by all relevant parties. The scope of existing protection is one of the issues frequently raised (especially for those interns in the not-for-profit sector). Some have proposed an entirely new approach, while others seek modification of the existing approach as a more realistic option. For instance, Kathryn Ann Edwards and Alexander Hertel-Fernandez have singled out two of the six criteria – ‘is the experience primarily for the benefit of the intern?’ and ‘does the employer directly benefit from the training or internship?’ – which they see as the most important and yet currently the most ambiguous. They propose a new quantitative test in relation to these criteria which ‘would compare the *per hour cost to the employer of an intern* (through supervision and training) relative to the *per-hour benefit to the employer of an intern* (through an

¹³⁵ See S Braun ‘The Obama “Crackdown”: Another Failed Attempt to Regulate the Exploitation of Unpaid Internships’ (2012) 41 *Southwestern Law Review* 281.

¹³⁶ See eg N Bacon, ‘Unpaid Internships: The Policy, History and Future Implications of ‘Fact Sheet #71’ (2011) 6 *Entrepreneurial Business Law Journal* 67; J L Curiale, ‘America’s New Glass Ceiling: Unpaid Internships, The Fair Labor Standards Act, and The Urgent Need for Change’ (2010) 61 *Hastings Law Journal* 1531; D L Gregory, ‘The Problematic Employment Dynamic of Student Internships’ (1998) 12 *Notre Dame Journal of Law, Ethics and Public Policy* 227; D C Yamada, ‘The Employment Rights of Student Interns’ (2002) 35 *Connecticut Law Review* 215.

intern's production)'.¹³⁷ With respect, it is not apparent how such a test would operate as clear guidance to the citizens governed by the law. They would also exempt internships that are formally endorsed and actively monitored by an education institution. However, there are no doubt problems with such an approach too, as issues such as equality and equity of access are not necessarily erased by maintaining educational institutions as the gatekeepers for access to job opportunities through internships.

Conclusion

8.152 This chapter has shown that the issue of unpaid work experience, especially in the form of internships, is significant in other developed countries. While the issues related to such work are playing out differently in different jurisdictions, it seems to us that Australia might learn much from what is happening elsewhere, and that the resolution of such issues in this country will require at the very least a conversation amongst all stakeholders regarding the overseas experience we have documented in this chapter.

¹³⁷ 'Not-So-Equal Protection: Reforming the Regulation of student Internships', Policy Memorandum #160, Economic Policy Institute, April 5 2010, revised April 9 (emphasis in original), available at <http://www.epi.org/publication/pm160/> (accessed 29 June 2012).

Clarifying the Legality of Unpaid Work Experience

A Problem of Uncertainty

- 9.1 As we noted in Chapter 3, we are not in a position to determine how many workers in Australia are undertaking the types of unpaid work experience that are the subject of this study. But we believe it is reasonable to conclude that:
- significant numbers of workers are being asked or required to undertake unpaid job trials;
 - unpaid internships and other forms of work experience are not confined to authorised education or training courses, or to arrangements that involve ‘volunteering’ in the sense described in Chapter 1;
 - in some industries, such as the print and broadcast media, such arrangements are a common prelude to securing paid work;
 - some workers (predominantly international students or graduates) are paying agencies to place them into unpaid internships; and
 - 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.
- 9.2 We do not want to overstate the scale of these practices. While we are fairly sure that they have become common in some industries – a point to which we return later in this chapter – in others, it is probable that they involve relatively small numbers of organisations and individuals at this stage. However, that is the key – *at this stage*. If overseas experience is any guide, especially the United States, we can expect these arrangements to become more common, as competitive pressures force even unwilling organisations to go down this path.
- 9.3 As we indicated in Chapter 3, we believe that further and more systematic research is warranted into the nature and incidence of these arrangements. We ourselves intend to explore the possibilities of gathering further data, and there is no reason why other researchers should not do the same. But we would also recommend that

the FWO itself consider undertaking or commissioning further research. A clear precedent here is offered by the inquiry into ‘sham contracting’ in the construction industry instituted in 2010 by the Australian Building and Construction Commissioner (ABCC). One of the recommendations made by the inquiry report was that ‘the ABCC conduct research to build an accurate picture of sham contracting in the building and construction industry’.¹ In April 2012, it was announced that TNS Social Research had successfully tendered to conduct research that would provide ‘actionable insights into how many contracting relationships are genuine, and how many are misclassifications’ and also help ‘identify the motivation and intentions’ of parties in the industry’.² The results of this research, which should provide significant new insights into work relationships in the industry, is expected to be provided to the ABCC’s successor, Fair Work Building and Construction, by the end of 2012.

- 9.4 If there is some uncertainty about how many Australians are engaged in unpaid work experience, it is more than matched by the uncertainty – at least in many cases – about the legality of their arrangements. The difficulties here are twofold.
- 9.5 First, for those that might potentially come within the vocational placement exception originally introduced in 1996, and retained in the *Fair Work Act 2009*, there is the problem that the exception is not clearly drafted. As we explained in Chapter 4, there are a number of unclear elements in the definition of the term ‘vocational placement’ in section 12: for example, what constitutes a ‘course’, how broadly the term ‘requirement’ should be interpreted, and the extent to which the concept of a ‘placement’ limits the scope of the exception. Unless and until some of the issues we have identified are properly addressed by a court or tribunal, it may be difficult to be sure whether a particular arrangement is or is not covered. This may create risks not just for an organisation that ‘hosts’ a person undertaking unpaid work experience, but for an educational or training institution, private agency or government body that has facilitated the arrangement. If the ‘placement’ turns out not to be lawful, for example because the payment of wages is required by the Fair Work Act, the facilitating body might conceivably be found to be complicit in the breach, or liable for misleading or deceiving the worker.

¹ Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report*, ABCC, Melbourne, 2011, p 24.

² Office of the Australian Building and Construction Commissioner, ‘ABCC progresses sham contracting research’, media release, 12 April 2012, http://shamcontractinginquiry.gov.au/documents/files/20120412ABCCprogressesShamContractingResearch_MR.pdf (accessed 4 December 2012).

9.6 Secondly, where the vocational placement exception either does not or may not apply, it is necessary to consider whether the common law requirements for the formation of a contract have been satisfied. As explained in Chapter 6, for an employment contract to exist in relation to an unpaid work arrangement, it must be established that:

- (a) a reasonable person would infer from the circumstances that the parties intended their arrangement to be legally binding, and there is no clear evidence that they actually intended otherwise;
- (b) each party has agreed to provide valuable consideration, which in the case of the ‘employer’ might be a commitment to offer training or useful experience, or other non-monetary benefits; and
- (c) the requirement for mutuality of obligation is satisfied, in that there is a commitment by the worker to perform work in return for whatever experience or benefits the employer is offering.

As cases such as *Cossich v G Rossetto & Co Pty Ltd* [2001] SAIRC 37, *Nominal Insurer v Cleanthous* [1987] NTSC 51, *Schultz v Vlack* [1996] SAIRC 44 and *Workplace Ombudsman v Golden Maple Pty Ltd* (2009) 186 IR 211 demonstrate, it is possible for workers who are undertaking unpaid trial work or work experience to be regarded as employees. But more often courts have found otherwise, albeit often (as in *Dietrich v Dare* (1980) 54 ALJR 388) in rather unusual circumstances, or without extensive consideration of the policy issues involved.

9.7 In order to assist the FWO in addressing the issues raised by unpaid work experience arrangements, we make some recommendations in the remainder of this chapter as to:

- what approach FWO should adopt in determining the legitimacy of such arrangements;
- how the information and advice currently available on the FWO’s website might be improved;
- what strategies might be considered for improving compliance with the Fair Work Act in this area;

- drawing in particular on overseas experience, how various stakeholders and indeed the broader community might be brought into a debate about the nature, use and regulation of unpaid work experience; and
- what might be done to improve the law in this area.

Assessing the Legitimacy of Unpaid Work Experience Arrangements

9.8 The FWO's functions under section 682(1) of the Fair Work Act include the following:

- (a) to promote:
 - (i) harmonious, productive and cooperative workplace relations; and
 - (ii) compliance with this Act and fair work instruments;including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
- (b) to monitor compliance with this Act and fair work instruments;
- (c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;
- (d) to commence proceedings in a court, or to make applications to FWA, to enforce this Act, fair work instruments and safety net contractual entitlements; ...

9.9 In order to discharge these functions in relation to unpaid internships, unpaid trial periods and other forms of unpaid work experience, the FWO needs in the first instance to form a view as to their legality under the Act. This is not simply a prerequisite to providing 'education, assistance and advice' to employees, employers and other members of the community as to their rights and obligations. It must also inform the FWO's operational decisions as to whether to investigate certain arrangements or, having done so, to take them to court to test out their legality. But there are issues of judgement here not just as to whether the arrangements in question appear to breach the Fair Work Act, but whether they are sufficiently concerning to warrant the regulator's attention and resources. In that sense there is a question here not just of legality in the technical sense, but of *legitimacy*. In effect,

a policy decision must be taken as to whether it is in the public interest for the FWO to adopt a particular stance in relation to these types of arrangement.³

The vocational placement exception

- 9.10 Logically, the first issue to be addressed is whether the vocational placement exception applies. This requires a view to be formed by the FWO as to each of the elements of the exception, as discussed in Chapter 4. In the absence of any obvious guidance as to the original intentions of those who framed the exception, it is appropriate in our view to assume that its purpose is to ensure that where students in an authorised education or training course are placed with a host to undertake unpaid work that will satisfy an element of that course, or be credited towards that course, the relationship between the student and the host is not to be regarded as one of employment.

Identifying a contract of employment

- 9.11 The more difficult issue in practice is likely to be whether, assuming the vocational placement exception does not or may not apply, an arrangement for unpaid work experience can be said to comprise, or be part of, a contract of employment. The principal challenge is the uncertain and unsettled nature of the law. The fact is that, especially in the absence of any test cases to date under the Fair Work Act, it is possible that a court or tribunal dealing with this issue might take either of two very different approaches.
- 9.12 One possible approach is to start from the assumption that if a person is performing productive work for an organisation, under an arrangement whereby they will either gain experience or be considered for an ongoing job, they are doing so under an employment contract – unless there is clear evidence to the contrary. On this view, intention to create legal relations is effectively presumed, consideration can be inferred from the mutually beneficial nature of the arrangement, and mutuality of obligation is apparent so long as there is a clear *expectation* – even if not formally expressed as a *requirement* – that the person will attend work.

³ As to the role of the public interest in determining how the FWO chooses to allocate its resources and/or exercise its powers, see eg ‘Litigation Policy of the Office of the Fair Work Ombudsman’, Guidance Note 1, 2nd ed, July 2011, pp 10–16, available at <http://www.fairwork.gov.au/fwoguidancenotes/GN-1-FWO-Litigation-Policy.pdf> (accessed 29 November 2012).

- 9.13 The alternative is for an adjudicator to begin from the premise that if work is unpaid, and performed on what is presented as a ‘voluntary’ basis, there is no contract unless there is convincing evidence to the contrary. Here it is the absence of any intention to create legal relations that may be presumed, a more narrow approach may be taken to the element of consideration, and mutuality of obligation may be treated as absent unless there is a formally expressed requirement for the person to attend work.
- 9.14 If anything, the balance of the case law reviewed in Chapter 6 may be regarded as exhibiting or supporting the second approach. But, as we pointed out in 6.81, it is the first approach that is more obviously consistent with the objects of the Fair Work Act. For us, there is a fairly simple point of principle here. It is unlawful for a person to ‘volunteer’ to be employed for less than the minimum wage prescribed for the work in question. This principle applies no matter how willing the employee may be to work on that basis, or indeed even if they have initiated the arrangement, or can see personal benefit in it. Nor can they be estopped by their conduct from claiming their statutory entitlements.⁴ From a policy perspective, the justification is simple. Allowing parties to ‘contract out’ of their rights or obligations, no matter how willingly, undermines the integrity of the system of minimum labour standards fixed by statutes such as the Fair Work Act. But if this is accepted, and it is unlawful to work for less than the minimum wage, then it is difficult to see how can it be lawful to agree to work for *nothing at all*.⁵ If the arrangement is in substance one that resembles employment, and no authorised education or training program is involved, then it is appropriate in our view to start from the assumption that it *is* one of employment, unless there is convincing evidence as to the absence of an intention to create legal relations, an absence of consideration, or an absence of mutuality of obligation.
- 9.15 In determining whether an extracurricular work experience arrangement is or is not in substance one of employment, we consider that it may be helpful to have regard to some of the factors identified by the United States Supreme Court in *Walling v Portland Terminal Co* 330 US 148 (1947) (see 8.130). We do not suggest that Australian courts would or should seek to draw the kind of bright line between

⁴ See eg *Textile Clothing and Footwear Union of Australia v Givoni Pty Ltd* (2002) 121 IR 250; *Regional Express Holdings Ltd v Clarke* (2007) 165 IR 251; *Williams v Macmahon Mining Services Pty Ltd* (2010) 201 IR 123.

⁵ Once again, we stress that we are speaking here of a non-altruistic arrangement to gain work experience, *not* ‘volunteering’, in the sense of providing labour for the primary aim of benefiting someone else or furthering a particular belief.

‘employment’ and ‘training’ that was attempted in that case. Nevertheless, we see value in asking to what extent:

- the arrangement is for the benefit of the organisation, more so than the worker concerned;
- the unpaid worker is performing work that would or might otherwise be performed by paid employees; and
- the organisation is deriving an immediate advantage from the activities of the unpaid worker, after taking into account any time spent in closely supervising, training or assessing the worker.

Without wishing to be too simplistic, positive answers to these questions would tend to suggest that the arrangement is substantively one of employment. As an example, we consider that the week-long work experience arrangements typically undertaken by secondary school students would generally lack the characteristics listed above, and thus should not be presumed to involve employment. By contrast, many other of the unpaid internships or unpaid job trials discussed in Chapter 3 would meet these criteria.

9.16 This approach is in fact broadly in accord with the information that is currently found in the FWO Fact Sheet on ‘Internships, Unpaid Work Experience and Vocational Placements’, and (in somewhat more detail) on the FWO website.⁶ In particular, we would generally agree with the following statements on the website:

Generally, the longer the period of placement, the more likely the person is an employee ...

Although the person may perform some productive activities during a placement, they are less likely to be considered an employee if there is no expectation or requirement of productivity in the workplace ...

The main benefit of a genuine work experience placement or internship should flow to the person doing the placement. If a business is gaining a significant benefit as a result of engaging the person this may indicate an employment relationship has been formed ...

Unpaid work experience placements or internships are less likely to involve employment if:

⁶ See <http://www.fairwork.gov.au/pay/student-placement-and-unpaid-work/pages/default.aspx> (accessed 9 November 2012); and see further 6.84–6.93.

- they are mainly for the benefit of the person
- the periods of the placements are relatively short
- the person is not required or expected to do productive work
- there is no significant commercial gain or value for the business derived out of the work.

9.17 On the other hand, we think it is less helpful to ask, as the website material currently does, whether the purpose of an arrangement is ‘to provide work experience to the person or ... to get the person to do work to assist with the business outputs and productivity’. This is because in many instances the answer will not be one or the other, but both. It is more helpful to consider whether, from an objective standpoint, the *primary* aim is to give experience rather than to elicit work or to screen potential employees of the future. We would also disagree with the proposition that if a placement is ‘entered into through a program sanctioned by a university or vocational training organisation ... then it is likely that the arrangement is not an employment relationship’. If an arrangement does not in fact meet the requirements of the Fair Work Act’s vocational placement exception, then there is no reason why the involvement of an educational or training institution should of itself militate against the existence of an employment relationship. Indeed as we pointed out in 6.82, the very creation of the vocational placement exception might suggest an acceptance by Parliament that such arrangements might otherwise involve employment in the common law sense.

9.18 In Chapter 6 we also noted the importance of not overstating the position in relation to unpaid trials, especially those of very short duration. For us, it is important to look at the nature of the work to be performed, and who has been responsible for organising the trial. If the work is relatively unskilled, and the worker can quickly (if not immediately) start performing productive work that assists the business, as would be the case for example in many shops or cafes, then the arrangement may be indistinguishable from the position of a new (paid) employee. It may be different if the worker has taken the initiative to ‘volunteer’ their services for an unpaid trial period – but even then, assuming once again that the worker can quickly move to performing productive work, that should really only hold for the first shift. If the worker is asked to return, this should be taken as a sign that their services are effectively being required. Similarly, if a job applicant is effectively told that they must work unpaid to be considered for an ongoing position, this should not be treated as a ‘voluntary’ exercise.

9.19 Finally, we stress that in accordance with the approach taken in cases such as *Autoclenz Ltd v Belcher* [2011] ICR 1157 (see 6.11–6.13), it may be appropriate to treat with caution any carefully prepared formal documentation that seeks, for instance, to deny any intention to create legal relations or to negate any mutuality of obligation. If the formal terms do not match the reality of the relationship, then it is the latter that should be accorded greater weight.

Discretionary factors

9.20 In determining whether to investigate, and/or take action in relation to, the types of unpaid work experience considered in this report, the FWO will no doubt have regard to the usual factors that influence its decision-making in this area.⁷ There are just two points we would make in this regard.

9.21 The first is that it seems to us that the situation of most concern ought to be where an organisation appears to be *systematically* using unpaid interns or job applicants to perform work that would or could otherwise be performed by paid employees. It is this practice, we believe, that most obviously threatens the integrity of the standards and protections established by the Fair Work legislation. We should add that an organisation should be considered to fall into this category even if it has not actively sought to recruit such labour, but has merely been prepared to respond on a regular basis to requests to provide productive but unpaid labour; although the fact that an organisation advertises for unpaid interns may perhaps make it easier to conclude that it is systematically using ‘work experience’ as a cheap substitute for employment.

9.22 The second point relates to the question of vulnerability, a matter on which the FWO typically places some emphasis in deciding whether to investigate or pursue complaints.⁸ We have already made the point in Chapter 1 that unpaid work experience arrangements tend of their nature to involve the likes of younger workers or visa holders, who may as a class be considered ‘vulnerable’ in the labour market. In practice, of course, not every person agreeing to undertake unpaid work experience may *in fact* appear (or even be) vulnerable, even if they are young or in Australia on a temporary visa. Our experience in conducting research for this report leads us to conclude that a significant number of those who agree to work unpaid in

⁷ See ‘Investigative Process of the Office of the Fair Work Ombudsman’, Guidance Note 8, 2nd ed, December 2011, available at <http://www.fairwork.gov.au/fwoguidancenotes/GN-8-FWO-Investigative-Process.pdf> (accessed 30 November 2012).

⁸ See eg *ibid*, pp 12–13; Guidance Note 1, above, pp 5–6, 11, 12, 18.

order to improve their chances of paid employment, or of a career in their chosen field, or of permanent residence, do so with their eyes open to what is involved. They may understand and accept the risks and consequences of such an arrangement. Indeed they may have initiated it. At an individual level, it may be hard to conclude that they have in any sense been ‘exploited’.

- 9.23 However, there is an important point of principle here, which goes back to the reasons for being concerned about the growth of work experience arrangements that are functionally similar to employment, and that cannot be justified by their connection to an authorised course of education or training. Such arrangements do not just undermine the integrity of labour standards. As noted in Chapter 2, they potentially erect barriers to entry to the labour market, or selected portions of it, for those who do not have the means to spend lengthy periods of time in unpaid work. An intelligent and articulate graduate from a wealthy family who opts to do months of unpaid work in order to break into their chosen profession may not seem very vulnerable. They may not seem to be a ‘victim’ of exploitation. But the point of investigating their situation and (if appropriate) taking action is not necessarily to protect them as an individual. It is to assert a principle – a fair day’s pay for a fair day’s work – that underpins our system of minimum labour standards. And it is to promote the goal of ‘social inclusion’ that is expressly made part of the objects of the Fair Work Act, in the opening words to section 3.

Information and Education

- 9.24 We applaud the FWO for the steps it has already taken to improve awareness of the legal issues relating to unpaid work experience. Nevertheless, there are certain measures we would recommend be taken to improve and extend the general information currently set out in the Fact Sheet and on the FWO website.
- 9.25 In the first place, we suggest setting out more detail on the different types of work experience arrangements, as outlined in Chapter 3 of this report, while making the point that labels can sometimes be misleading. There should be sections, for instance, on school-based, TAFE-based and university-based work experience, government assistance programs, unpaid trials, ‘internships’, and so on.
- 9.26 Secondly, there should be a policy statement that sets out the FWO’s general approach in this area, explaining why it regards certain arrangements as inappropriate or problematic, and others as of lesser concern. This might, for example, outline a presumption that employment-like arrangements will be treated

as falling within the Fair Work Act, unless the context clearly indicates otherwise. Or it might explain that priority will be given to the investigation of organisations that appear to be systematically using unpaid interns to perform work that would otherwise need to be done by paid employees.

- 9.27 Thirdly, in relation to the legality of such arrangements, it should be made clear that whether a particular arrangement qualifies as involving employment for the purpose of the Fair Work Act, involves a two-stage inquiry. The first question is whether the vocational placement exception applies; the second, whether the work is covered by a contract of employment. The essentials for each of these matters can be presented both in summary, and also in extended form. In the extended version, the vocational placement exception should detail each of the elements required by the Fair Work Act definition, and (where there is ambiguity) explain how the FWO interprets those elements. Similarly, the section on the contract of employment should set out the required elements, once again explaining what approach the FWO adopts in determining whether those requirements are satisfied. There could also usefully be a page on the website dealing with FAQs.
- 9.28 Fourthly, consideration should be given to providing information that is specific to particular industries or sectors, or at least to providing an expanded range of hypothetical examples.
- 9.29 Looking beyond the bare provision of information, we would encourage the FWO to continue and expand the steps it has already taken to engage with relevant stakeholder organisations to ensure that they and their members are better educated about the potential impact of the Fair Work Act on unpaid internships, trial periods and other forms of work experience. The question of stakeholder engagement is one to which we return later in this chapter.

Other Strategies to Promote Compliance

- 9.30 We have three broad suggestions as to how the FWO might seek to promote a greater degree of compliance with the requirements of the Fair Work Act, beyond merely providing information and education. The first is to consider instituting one or more *targeted campaigns* around the issue of extracurricular unpaid work experience, or other educational or compliance activities. This is especially

important, given the low rate of complaints that can be expected in this area.⁹ The purpose of targeted campaigns is explained in the following terms in the FWO's *Annual Report 2011–12* (p 37):¹⁰

Each year the Fair Work Ombudsman targets specific industries with national, state and territory based education and compliance campaigns to assist employers to improve their workplace relations practices. Targeted campaigns are a way the Fair Work Ombudsman works collaboratively with industry bodies to promote compliance with the Fair Work Act.

The overarching aim of targeted campaigns are [sic] to 'change behaviour' in the long term by combining education and compliance activities. The nature and function of targeted campaigns are closely aligned with the Fair Work Ombudsman's vision of fair Australian workplaces.

The Fair Work Ombudsman targets employers in industries and regions that are considered a high compliance risk and require intervention. Often these industries employ vulnerable workers, such as migrants and young people.

9.31 Any targeted campaign or other compliance activity should, as is generally the case, include one or more 'compliance audits', directed to a representative sample of the employers who fall within the scope of the selected industry. But it is also important that the FWO not rely solely on employers for information. Existing and former employees should be contacted to see if they started out on an unpaid basis, or are aware of others doing so. It is also quite possible that some of those involved in problematic work experience arrangements may never have been recorded as employees, especially in the case of unpaid trials. Because of that, it may be advisable to find other ways of seeking out job applicants, for example by surveying or speaking to students from relevant university or TAFE courses. It would also be useful to develop or strengthen links with some of the publications or websites where unpaid positions are often now advertised.

9.32 We assume that if the FWO has already allocated what we understand to be an annual quota of four national campaigns,¹¹ it would be feasible to select a particular

⁹ For a review of the use by the FWO of targeted campaigns as an alternative or complement to the investigation of complaints, and of the body of research that supports this approach, see J Howe, T Hardy and S Cooney, 'Complaints, Campaigns and Compliance: The Fair Work Ombudsman and Detection of Fair Work Law Violations', Australian Labour Law Association Conference, Canberra, 17 November 2012 (copy on file with the authors).

¹⁰ Available at <http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2011-12.pdf> (accessed 12 November 2012).

¹¹ See *Annual Report 2011–12*, p 17.

State or Territory in which to conduct a campaign or compliance activity of the type we are proposing. Based on the results, consideration might then be given as to whether to move to a national campaign in future years.

- 9.33 Based on our findings in Chapter 3 about the apparent prevalence of unpaid trials in the hair and beauty, retail and hospitality industries, we would recommend selecting at least one of those sectors for a targeted campaign or other compliance activity. The purpose would be to uncover the use of such trials and assess whether they involve contraventions of the Fair Work Act, as well as to educate businesses about the issues involved.
- 9.34 We would also recommend choosing one or two further industries in which it appears to be commonplace for unpaid internships to be undertaken outside the scope of an authorised education or training course. Based again on the findings from Chapter 3, we would have no hesitation in nominating the print and/or broadcast media as one of those industries. A second might be legal services, or perhaps advertising, marketing or event management.
- 9.35 Our second general suggestion for improving compliance is to institute more *test cases* on the legality of the work experience arrangements we have been discussing in this report. While some of the proceedings that have already been instituted by the FWO may serve that function, such as the case concerning the Fijian barge-workers outlined in 3.85, we believe that it is important that a greater range of matters come before the courts for decision. This should include cases dealing both with relatively short periods of unpaid trial work, and (at the other end of the spectrum) with lengthier internships that may have an element of training but mostly involve productive work.
- 9.36 It is important that such cases be brought in order to test out the limits of the law, so as to create greater certainty and enable the FWO to give more confident advice. In our opinion, FWO should be prepared to risk seeing its view of such arrangements disturbed or even rejected by the courts. It may be that if judges do prefer the narrower of the two approaches to identifying an employment contract sketched out in 9.12-9.13, the FWO will have to revise its advice to the public; though in that event, there may also be greater impetus for legislative action, as briefly discussed in the final section of this chapter. On the other hand, if the test cases confirm the FWO's view of the law, and appropriate penalties are imposed, this will not just strengthen the advice the FWO is able to provide, but hopefully act as an important deterrent for other organisations.

- 9.37 Thirdly, we recommend that efforts be continued to develop more effective *liaison* with other relevant agencies and institutions who are interested in, or in a position to influence the conduct of, unpaid work experience arrangements. In the case of international students and other visa-holders, it is especially important that the Department of Immigration and Citizenship (DIAC) be persuaded to do more both to alert visa-holders to the potential illegality of extracurricular unpaid work experience, and to ensure that such arrangements are not formally encouraged where there is a possibility of the Fair Work Act being breached.
- 9.38 We also believe it is important for the FWO to liaise with the Australian Competition and Consumer Commission (ACCC), especially in relation to advertisements for internships or other forms of unpaid work experience that may potentially breach the Australian Consumer Law (ACL) prohibitions on misleading or unconscionable conduct in trade or commerce. In the longer term, given that the FWO already has responsibility for enforcing various provisions in the Fair Work Act that deal with misrepresentations as to workplace rights, it may be preferable for it to have the power as well to investigate breaches of, at the very least, the ‘pre-employment’ provisions in sections 31 and 153 (see 5.66). But for now, it should at least be ensured that if one agency is investigating work-related advertising, the other is informed – especially as there may be situations which potentially breach the ACL, but not the Fair Work Act, or vice versa.

Engaging Stakeholders and the Community

- 9.39 From our examination of developments in other jurisdictions, and particularly the experience of the United Kingdom, it appears that effective engagement with a variety of stakeholders is one of the keys to ensuring the broad social commitment necessary to achieving decent work standards for all. The experience in the United Kingdom seems to indicate that it is not enough simply to engage the major national employer and worker or trade union stakeholders, who are perhaps already more likely than others to understand the importance of adherence to the existing legislative framework and the damage that can be done to individuals, businesses and communities by behaviours which constitute a ‘race to the bottom’.
- Furthermore, and again drawing lessons from the experience elsewhere, we would suggest that the best outcomes are more likely to be achieved not simply from an engagement with stakeholders that focuses on a minimal conception of ensuring compliance with legislative obligations. Rather a more effective approach would be for FWO to see itself as providing an enabling capacity, which assists others (be they

individuals, groups or institutions) to comply with the legislation within a context of developing best practice approaches to the issue of work experience.

- 9.40 Because there are a number of different stakeholders, in each case we would consider it to be most practicable to move beyond trying to connect only with individuals and to engage the various classes of stakeholders collectively. The four most important stakeholder groups would appear to be young people and migrant workers, educational institutions, particular industry groups, and government. We now discuss each of these in turn.

Young people and migrant workers

- 9.41 Young people and migrant workers are the group of workers who have a most immediate interest in the issues arising from unpaid work experience. While potentially quite a diffuse group, the transformation in communications opens the possibility for effective communication with them. As can be seen from its website and most recent *Annual Report*, the FWO has already begun to use social media as an effective way to connect to young people in relation to a range of issues, including that of unpaid work experience. We recommend that increased attention be paid to this means of communication in the future, not only in direct communications, but also through establishing connections to others identified through existing websites such as those for students seeking work experience or internships. As issues of unpaid work experience often first arise for young people while they are attending educational institutions, we consider that an effective way of reaching young people would also be through connecting to their representatives in those institutions (for example, student unions where they exist, or through the institutions themselves). Establishing connections with youth and migrant welfare services which are provided either by government or private agencies would be another effective way of targeting this group.

Educational institutions

- 9.42 Getting educational institutions on board in understanding that they play a vital role in ensuring that there is a decent work experience as well as a good education experience is clearly a matter of a key importance. In the United Kingdom it was significant that when the concern was raised recently about unpaid internships offered in businesses connected with Tony Blair (see 8.99–8.100), some educational intuitions indicated that they did not advertise any unpaid internships for their

students. These institutions clearly saw the importance of identifying themselves with best practices in the area. Prior to the commencement of this research project, and as mentioned in Chapter 3, the FWO had already begun to engage with various tertiary education providers about unpaid work experience. We would encourage an ongoing and deeper level of engagement. It is clear to us that, to date, many educational institutions continue to be focused, perhaps understandably, on wanting to enhance employability for their own students. They still do not necessarily seem to be aware of, or give sufficient attention to, issues relating to compliance with legislation governing the workplace, such as the Fair Work Act. Rather their focus is often a more limited one of general insurance both for the student and in relation to their own liability. We would suggest that the FWO consider developing advice targeted at educational institutions to make them more fully aware not only of the vocational work placement exception in the Fair Work Act, but also to encourage them to think about the positive ways in which their educational aims could be achieved alongside compliance with the Fair Work legislation. In achieving this, a key matter of importance is for FWO to identify and reach the right people within those educational institutions (not always an easy matter, even for those of us who work in such institutions!). We would suggest that one good avenue is actually to identify key contacts from the websites of institutions. Alternatively, a direct approach might be made to the Offices of the Deputy-Vice Chancellors responsible for academic areas (eg Academic/Learning and Teaching/Undergraduate/Postgraduate) and also perhaps to legal/compliance officers within such institutions. But we would recommend working closely with organisations such as the Australian Collaborative Education Network and the National Association of Graduate Careers Advisory Service, in order to provide a more direct link to staff ‘in the field’, not just their high-level managers or legal advisers

Particular industry groups

- 9.43 Particular industry groups are important stakeholders in relation to unpaid work experience. Clearly where organisations within an industry utilise practices that do not comply with Fair Work legislation, they develop a capacity to undercut their competitors unfairly. An industry group, therefore, should have an incentive to develop codes or best practice guidelines for work experience and internships that are particularly suited to the practices and needs of the particular industry. In the United Kingdom, as referred to in 8.89-8.94, various groups have developed such best practice guidelines and worked hard to ensure that their members adopt them. These guidelines frequently go beyond mere compliance with legislation, to include

what might be expected from an educational/management point of view. While the guidelines for various industry groups may be broadly similar, they can be adapted to the particular needs of the industry area.

Government

- 9.44 In the UK one of the first challenges was to ensure that the Government itself became a role model in the provision of decent work experience and that all areas of government (including Parliament), as well as government departments and governmental agencies, adopted best practice approaches to the offering of work experience and internships. Government policy endorsed principles of openness and transparency (eg, ensuring that opportunities for work experience and internships were openly advertised and that informal internships were eradicated), as well as compliance with National Minimum Wage legislation. We would endorse FWO doing all in its power to encourage a similar approach by government in Australia. As mentioned in 8.12, there are also some good examples in Canada of the approach that can be taken by the public sector in relation to advertising internships.
- 9.45 The UK also has the Graduate Talent Pool website, which was a government initiative. We take no view on whether such a government sponsored portal for advertising work experience is a good thing. However, we would encourage the FWO to engage with and educate those who promote and/or host advertisements for work experience and internships to ensure that all is done to encourage only the advertising of positions that are compliant with Fair Work legislation.

Law Reform

- 9.46 It has not been part of this project to focus on the question of changing the law. Nevertheless, we are bound to say that we believe it would be advisable for Parliament to lay down clearer rules on the legality of unpaid trials, internships and other forms of work experience. At the very least, the existing vocational placement exception that has been retained in the Fair Work Act could usefully be clarified; though as noted in 3.46-3.47, there have also been proposals both to expand and to narrow its reach. As it is, many organisations are unable to be sure whether it is lawful to adopt arrangements (whether connected to an education or training course or not) that they regard as unexceptionable. It is also possible that certain types of work experience that we would regard as highly questionable, especially in terms of maintaining the integrity of the labour standards established by the Fair Work Act,

may turn out to be lawful if managed in a certain way. We hope that in any debate prompted by this or other research, consideration is given to laying down much clearer ground rules as to the distinction between experience and exploitation at work.

Appendix A

The FWO Fact Sheet



Australian Government

Fair Work OMBUDSMAN



Internships, Vocational Placements & Unpaid Work

Employers are often approached by interested people (such as students) hoping to gain industry experience to aid them in their own career path. Sometimes unpaid work arrangements are entered into.

A common issue that can arise in these arrangements is whether or not an employment relationship has actually been created.

This fact sheet outlines some of the types of arrangements that can exist, the relationship between unpaid work and the relevant workplace laws and the problems that can sometimes occur. Each case will require a consideration of its own particular facts. Employers who fail to meet their obligations under the *Fair Work Act 2009* (FW Act) can face penalties of up to \$33,000 per breach.

Vocational placements

The FW Act recognises formal work experience arrangements that are a mandatory part of an education or training course. These arrangements are referred to as vocational placements, and are defined as being:

- Undertaken as a requirement of an Australian based educational or training course, and
- Authorised under a law or an administrative arrangement of the Commonwealth, a State or Territory, and
- Undertaken with an employer for which a person is not entitled to be paid any remuneration.

If all of these criteria are met, the person will not be covered by the FW Act and is therefore not entitled to the minimum wage and other entitlements provided in the National Employment Standards and modern awards.

Example 1

Katrina is in her third year of a nursing degree. A requirement for successful completion of her degree is to complete a minimum of 4 weeks work experience with a registered hospital in her state. Katrina approaches her local hospital as they have a pre-existing relationship with her university and have regular student placements. The arrangement is authorised under state law, and Katrina understands the placement is a learning exercise and she will not be paid. As the arrangement meets the definition of a vocational placement under the FW Act, Katrina would not be covered by the FW Act, and is therefore not entitled to receive remuneration.

It's important to note that exclusion from coverage under the FW Act does not limit any obligations that may arise under other legislation, including workers compensation laws, OH&S, discrimination and other relevant laws.

Work experience & internships

Unpaid work experience placements and internships that don't meet the definition of a vocational placement can be lawful in some instances. To be lawful, businesses need to ensure that the intern or work experience participant is not an employee.

One key issue in determining whether an employment contract has been formed is whether the parties intended to create a legally binding employment relationship.

When assessing whether the parties intended to form a legally binding employment relationship some key indicators would be:

- **Purpose of the arrangement.** Was it to provide work experience to the person or was it to get the person to do work to assist with the business outputs and productivity?
- **Length of time.** Generally, the longer the period of placement, the more likely the person is an employee
- **The person's obligations in the workplace.** Although the person may do some productive activities during a placement, they are less likely to be considered an employee if there is no expectation or requirement of productivity in the workplace
- **Who benefits from the arrangement?** The main benefit of a genuine work placement or internship should flow to the person doing the placement. If a business is gaining a significant benefit as a result of engaging the person, this may indicate an employment relationship has been formed. Unpaid work experience programs are less likely to involve employment if they are primarily observational
- **Was the placement entered into through a university or vocational training organisation program?** If so, then it is unlikely that an employment relationship exists.

Example 2

A local council has advertised an internship program for university students interested in government processes. The internships have been advertised as voluntary and students are allowed to select the hours they spend at the council office over a 2 week period. As the council is careful to ensure that the role is mainly observational, there is no expectation that the students will perform productive work during their internship and the student is gaining the main benefit from the arrangement, it is unlikely to create an employment relationship.

Example 3

Stuart recently completed a Bachelor of Journalism and is looking for work as a journalist. Stuart responds to an advertisement to write for his local paper on a full-time basis for 3 months as an 'unpaid intern' to try and gain experience and increase his chances of employment. Since Stuart had completed his degree and the placement was not a requirement of his course, it cannot be considered a vocational placement under the FW Act. The paper advises Stuart that he will be given specific tasks and deadlines to complete that will assist in the production of the paper and that this productive activity will take up the majority of his time. This suggests Stuart may have been engaged as an employee and entitled to remuneration.

If Stuart mainly observed how the newspaper operated for a few hours a week over 2 weeks and there was no expectation of productive work for the business, it is unlikely that he would be considered an employee.

Whether or not an employment relationship exists depends on the specific circumstances and any agreement reached between those concerned. Educational institutions and businesses should seek professional advice from their solicitor, chamber of commerce or industry association before entering into any such arrangement.

Volunteering

A great deal of volunteer work is performed in the not-for-profit sector, which includes charity and community service organisations. People can offer their services voluntarily to assist in the not-for-profit organisation's goals.

However, a business and person can't simply characterise what is actually an employment relationship as volunteer work. All the relevant factors outlined above need to be considered.

Unpaid trials

Trial work involves a person performing work (or 'trailing') at a place of business. If this is at the request of the employer or it is expected that the person will be performing productive activities, the person would normally be an employee in these circumstances and entitled to be paid as such.

If a work experience placement or internship is used to determine a prospective employee's suitability for a job, the person would be considered an employee for the trial period and should be paid as such. Similarly, probationary employees are paid for all hours worked.

While this does not prevent a person taking up employment after a genuine unpaid work experience or internship, each situation should be carefully considered to determine if the facts have given rise to an employment relationship.

Further information

Vocational placements and work experience are not the same as formal placements such as apprenticeships and traineeships. For information on these types of placements, visit the [Apprenticeships and traineeships](#) section of www.fairwork.gov.au.

The Fair Work Ombudsman has published fact sheets on many elements of the *Fair Work Act 2009* and employer obligations including modern awards, general workplace protections and unlawful discrimination. To access these fact sheets, as well as additional information and resources to help you understand your rights and obligations, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Find out more

About the Fair Work Ombudsman fact sheet

International students fact sheet

Minimum wages fact sheet

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Monday to Friday, between 8.00am–6.00pm

Fair Work Australia website: www.fwa.gov.au

FWA Help Line: **1300 799 675**

Monday to Friday, between 9.00am–5.00pm

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94

Fair Work Infoline: 13 13 94 www.fairwork.gov.au

Appendix B

Survey Instruments and Instructions

Survey of ACEN Members on Extracurricular Unpaid Work Arrangements

About this survey

This survey is concerned with arrangements that involve a student working without pay for an individual or an organisation, in order to gain experience, practise or improve their skills and/or improve their employability in a particular profession, occupation or industry. Such an arrangement may be called an "internship", a "placement", a "trial" or just "work experience" – the particular label does not matter.

The survey asks about unpaid work arrangements that are organised, facilitated or encouraged by educational institutions, but that are not undertaken for credit towards, or as a required element of, a degree or other educational qualification.

The survey is not concerned with work as a volunteer, ie work done with the primary motivation of helping a particular organisation (eg a club, church, charity, etc). Nor is it concerned with work done on behalf of a person's own business, or that of a family member.

By completing this anonymous survey, you are indicating your consent to be involved, on the terms set out in the Information for Survey Participants that appears on the next page.

Information for survey participants

Survey of ACEN Members on Extracurricular Unpaid Work Arrangements

The following study has been reviewed and approved by the University of Adelaide Human Research Ethics Committee:

Project Title: Unpaid Work Arrangements

Approval Number: HP-2012-018

ABOUT THE PROJECT

This project is being conducted by Professor Andrew Stewart and Professor Rosemary Owens on behalf of the Office of the Fair Work Ombudsman (FWO), the federal government agency responsible for ensuring compliance with the Fair Work laws. The project is focusing on three particular types of unpaid work arrangement: those involving internships, work experience and trial work, other than where carried out as a required element of an authorised education or training course.

The research has the following main objectives:

1. Develop a better understanding of the range, nature and prevalence of such arrangements in Australia.
2. Explain the various laws that may operate in relation to an unpaid work arrangement, including the legal principles for determining whether an employment contract may be said to exist in relation to an unpaid work arrangement.
3. Identify any particular issues or problems that arise in relation to internships, work experience or trial work for visa-holders under the Migration Act 1958.
4. Examine any relevant international labour standards, and identify any relevant principles or approaches adopted in other countries.
5. Formulate a set of principles by which to assess the legitimacy of internships, work experience or trial work arrangements, and which the FWO can use to provide guidance to individuals and organisations.

The research is not concerned with work as a volunteer, ie work done with the primary motivation of helping a particular organisation (eg a club, church, charity, etc). Nor is it concerned with work done on behalf of a person's own business, or that of a family member.

The principal outcome of the research will be a report to the FWO, to be completed by the end of October 2012.

WHAT THE SURVEY INVOLVES

The survey asks a series of questions about certain types of internship or unpaid work experience. Completing it should take no more than 15 minutes.

CONFIDENTIALITY AND USE OF INFORMATION SUPPLIED

All survey responses will be kept in secure storage and treated with the utmost confidentiality. As the survey is anonymous, your identity will not be disclosed to the researchers. Even if you reveal your identity, any information you supply or views you express will not be quoted in any report or publication that results from the project in any way that could identify you.

BENEFITS AND RISKS

The potential benefits from your participation are that your experiences and views will be taken into account in the writing of the report, that the outcome of the project is greater clarity around an important area of work and regulation, and that publication of the research may encourage closer scrutiny at the policy level of the issues relating to unpaid work. But none of these outcomes or benefits are guaranteed. There are no foreseeable risks to you, given the confidentiality arrangements outlined above.

You and your institution

***1. At which institution do you work (or principally work, if more than one)?**

***2. What is your principal role?**

Survey of ACEN Members on Extracurricular Unpaid Work Arrangements

***3. In what type of course or program are you most closely involved?**

Encouragement of extracurricular unpaid work

***4. To your knowledge, do any students in your courses or programs undertake unpaid work that is organised, facilitated or encouraged by your institution, but which are not undertaken for credit towards, or as a required element of, that program?**

- Yes
- No (if your answer is No, you will be taken straight to the final question)

Nature and prevalence of extracurricular unpaid work

5. Approximately what proportion of students in your courses or programs undertakes extracurricular unpaid work?

6. Please identify the type(s) of business or organisation for which such unpaid work is typically undertaken (eg engineering firm, radio station, public hospital, childcare centre, etc):

7. While undertaking such unpaid work, do students perform tasks that are of direct and immediate benefit to the business or organisation (eg, work that contributes to some product or service being supplied to a customer)?

- Never
- Sometimes
- Often
- Always
- Don't know

Survey of ACEN Members on Extracurricular Unpaid Work Arrangements

8. What perceived advantages or benefits do you see for students in undertaking unpaid work outside of a degree or other qualification?

- Better understanding of particular industry, business or occupation
- Chance to acquire, practise or improve particular skills
- Improve their employability
- Make useful contacts
- Promise of future employment if they perform well
- Help decide whether to change career or course of study
- None

Other (please specify)

9. How many unpaid work arrangements of this kind typically lead to an offer of paid employment for this student?

- All
- Some
- None
- Don't know

10. What types of control (if any) are exercised by your institution in relation to any unpaid work of this kind?

- Written guidelines
- Formal agreements with "host" organisations
- Visits by academic staff
- Design of projects to be undertaken by the student
- Don't know

Other (please specify)

Additional comments

Survey of ACEN Members on Extracurricular Unpaid Work Arrangements

11. Please add any additional comments or observations you may have about unpaid work undertaken outside of a degree or other qualification:

Contacts for information on project and independent complaints procedure

Thank you for your willingness to participate in this survey.

The University of Adelaide's Human Research Ethics Committee monitors all the research projects which it has approved. The committee considers it important that people participating in approved projects have an independent and confidential reporting mechanism which they can use if they have any worries or complaints about that research.

This research project will be conducted according to the NHMRC National Statement on Ethical Conduct in Human Research (see <http://www.nhmrc.gov.au/publications/synopses/e72syn.htm>)

If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the project co-ordinator:

Name: Professor Andrew Stewart

Phone: 08 8313 4445

Email: andrew.stewart@adelaide.edu.au

If you wish to discuss with an independent person matters related to:

- making a complaint, or
- raising concerns on the conduct of the project, or
- the University policy on research involving human participants, or
- your rights as a participant,

please contact the Human Research Ethics Committee's Secretariat on phone (08) 8313 6028

Survey of Students on Extracurricular Unpaid Work Arrangements

About this survey

This survey is concerned with arrangements that involve working without pay for an individual or an organisation, in order to gain experience and/or improve your employability in a particular profession, occupation or industry. Such an arrangement may be called an "internship", a "placement", a "trial" or just "work experience" – the particular label does not matter.

The survey asks about any unpaid work you have undertaken since leaving high school, and more especially "extracurricular" work that is NOT undertaken for credit towards, or as a required element of, a degree or other educational qualification.

If you are an international student, please answer the questions ONLY by reference to unpaid work undertaken within Australia.

If you are a domestic student, you may include unpaid work that was organised in this country but undertaken abroad.

The survey is NOT concerned with work as a volunteer, ie work done with the primary motivation of helping a particular organisation (eg a club, church, charity, etc). Nor is it concerned with work done on behalf of your own business, or that of a family member.

By completing this anonymous survey, you are indicating your consent to be involved, on the terms set out in the Information for Survey Participants that appears on the next page.

Information for survey participants

Survey of Students on Extracurricular Unpaid Work Arrangements

The following study has been reviewed and approved by the University of Adelaide Human Research Ethics Committee:

Project Title: Unpaid Work Arrangements

Approval Number: HP-2012-018

ABOUT THE PROJECT

This project is being conducted by Professor Andrew Stewart and Professor Rosemary Owens on behalf of the Office of the Fair Work Ombudsman (FWO), the federal government agency responsible for ensuring compliance with the Fair Work laws. The project is focusing on three particular types of unpaid work arrangement: those involving internships, work experience and trial work, other than where carried out as a required element of an authorised education or training course.

The research has the following main objectives:

1. Develop a better understanding of the range, nature and prevalence of such arrangements in Australia.
2. Explain the various laws that may operate in relation to an unpaid work arrangement, including the legal principles for determining whether an employment contract may be said to exist in relation to an unpaid work arrangement.
3. Identify any particular issues or problems that arise in relation to internships, work experience or trial work for visa-holders under the Migration Act 1958.
4. Examine any relevant international labour standards, and identify any relevant principles or approaches adopted in other countries.
5. Formulate a set of principles by which to assess the legitimacy of internships, work experience or trial work arrangements, and which the FWO can use to provide guidance to individuals and organisations.

The research is not concerned with work as a volunteer, ie work done with the primary motivation of helping a particular organisation (eg a club, church, charity, etc). Nor is it concerned with work done on behalf of a person's own business, or that of a family member.

The principal outcome of the research will be a report to the FWO, to be completed by the end of October 2012.

WHAT THE SURVEY INVOLVES

The survey asks a series of questions about certain types of internship or unpaid work experience. Completing it should take no more than 15 minutes.

CONFIDENTIALITY AND USE OF INFORMATION SUPPLIED

All survey responses will be kept in secure storage and treated with the utmost confidentiality. As the survey is anonymous, your identity will not be disclosed to the researchers. Even if you reveal your identity, any information you supply or views you express will not be quoted in any report or publication that results from the project in any way that could identify you.

BENEFITS AND RISKS

The potential benefits from your participation are that your experiences and views will be taken into account in the writing of the report, that the outcome of the project is greater clarity around an important area of work and regulation, and that publication of the research may encourage closer scrutiny at the policy level of the issues relating to unpaid work. But none of these outcomes or benefits are guaranteed. There are no foreseeable risks to you, given the confidentiality arrangements outlined above.

You and your institution

***1. At which institution are you enrolled as a student? (If more than one, please give the institution at which you have been contacted about this survey.)**

Survey of Students on Extracurricular Unpaid Work Arrangements

***2. In which degree(s) are you currently enrolled at that institution? (If you are undertaking a double degree program, and have completed one of them, you should still list both degrees.)**

***3. Are you a domestic student or an international student?**

- Domestic
- International

Experience of unpaid work

***4. Since leaving high school, have you ever performed unpaid work (other than as a volunteer or as part of your own or a family member's business)?**

- Yes
- No (if No, please go straight to Q12)

Type of unpaid work

5. How many of those periods of unpaid work were undertaken for credit towards, or as a required element of, a degree or other educational qualification?

- None
- Some
- All (if All, please go straight to Q12)

Nature and prevalence of extracurricular unpaid work

6. Approximately how many periods of unpaid work have you undertaken since high school that were not part of a degree or other qualification?

7. What was the duration, or range of durations, of these arrangements?

Survey of Students on Extracurricular Unpaid Work Arrangements

8. Please identify the type(s) of business or organisation for which you worked (eg law firm, radio station, public hospital, childcare centre, etc):

9. While undertaking such extracurricular unpaid work, have you ever performed tasks that are of direct and immediate benefit to the business or organisation in question (eg, work that contributes to some product or service being supplied to a customer)?

- Never
- Sometimes
- Often
- Always

10. What perceived advantages or benefits led you to undertake unpaid work outside of a degree or other qualification?

- Better understanding of particular industry, business or occupation
- Chance to acquire, practise or improve particular skills
- Improve your employability
- Make useful contacts
- Promise of future employment if you performed well
- Help decide whether to change career or course of study

Other (please specify)

11. Did any such periods of unpaid work lead to an offer of paid employment?

- All
- Some
- None

Additional comments

12. Please add any additional comments or observations you may have about unpaid work undertaken outside of a degree or other qualification:

Contacts for information on project and independent complaints procedure

Survey of Students on Extracurricular Unpaid Work Arrangements

Thank you for your willingness to participate in this survey.

The University of Adelaide's Human Research Ethics Committee monitors all the research projects which it has approved. The committee considers it important that people participating in approved projects have an independent and confidential reporting mechanism which they can use if they have any worries or complaints about that research.

This research project will be conducted according to the NHMRC National Statement on Ethical Conduct in Human Research (see <http://www.nhmrc.gov.au/publications/synopses/e72syn.htm>)

If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the project co-ordinator:

Name: Professor Andrew Stewart

Phone: 08 8313 4445

Email: andrew.stewart@adelaide.edu.au

If you wish to discuss with an independent person matters related to:

- making a complaint, or
- raising concerns on the conduct of the project, or
- the University policy on research involving human participants, or
- your rights as a participant,

please contact the Human Research Ethics Committee's Secretariat on phone (08) 8313 6028.

Appendix C

Results of ACEN Survey

Results of Survey of Australian Collaborative Education Network Members on Extracurricular Unpaid Work Experience and Internships

Online survey, 89 responses as at 18/10/12

Q1: At which institution do you work (or principally work, if more than one)?

Participants listed 29 different tertiary institutions.

Q2: What is your principal role?

Participants listed a variety of roles that can be grouped into the following categories:

Academic:	24
Manager:	21
Counsellor/advisor:	10
Co-ordinator:	15
Project officer:	8
Other admin:	4
Other:	7

Q3: In what type of course or program are you most closely involved?

Courses or programs listed included

- Careers Service
- Commerce
- Communications
- Education
- Engineering
- Environmental Science
- Exercise Science
- Medicine
- Nursing
- Occupational Therapy
- Psychology
- Public Health
- Tourism

Q4: To your knowledge, do any students in your courses or programs undertake unpaid work that is organised, facilitated or encouraged by your institution, but which are not undertaken for credit towards, or as a required element of, that program?

Yes	63.6%
No	36.4%

Q5: Approximately what proportion of students in your courses or programs undertakes extracurricular unpaid work?

Don't know	22%
20% or less	40%
20% to 49%	13%
50% to 79%	22%
80% to 100%	3%

Q6: Please identify the type(s) of business or organisation for which such unpaid work is typically undertaken (eg engineering firm, radio station, public hospital, childcare centre, etc):

Answers included the following:

- Graphic designer, PR companies, marketing companies, childcare, hospitality, engineering contractors, TV, Film Studios, Newspapers, Magazines, Advertising Agencies, Government Offices
- Business firms, accounting, property, tourism, public health, mental health, NGOs, hospitals,
- Banks, Consultancies, Financial Institutions
- Community and not for profit organisations, small business, medical assistance, Legal centres, Courts, banks
- SME, Public Sector, Large Multi National Corporations, NFP
- A very large variety, state government, private consultants, local government, university, community groups, charities
- Diverse, students from all disciplines are eligible to attain work experience insurance through the Careers Centre, where they have secured their own placement. We offer workshops and workbooks as resources and information to assist students with knowing how to go about finding work experience opportunities that are generally unadvertised.
- Sporting teams, clubs and associations.

Q7: While undertaking such unpaid work, do students perform tasks that are of direct and immediate benefit to the business or organisation (eg, work that contributes to some product or service being supplied to a customer)?

Never	2.1%
Sometimes	27.7%
Often	44.7%
Always	21.3%
Don't know	4.3%

Q8: What perceived advantages or benefits do you see for students in undertaking unpaid work outside of a degree or other qualification?

Better understanding of particular industry, business or occupation	91.7%
Chance to acquire, practise or improve particular skills	100%
Improve their employability	91.7%
Make useful contacts	87.5%
Promise of future employment if they perform well	50%
Help decide whether to change career or course of study	56.3%
None	0%

Q9: How many unpaid work arrangements of this kind typically lead to an offer of paid employment for this student?

All	0%
Some	55.3%
None	2.1%
Don't know	42.6%

Q10: What types of control (if any) are exercised by your institution in relation to any unpaid work of this kind?

Written guidelines	64.1%
Formal agreements with host organisations	71.8%
Visits by academic staff	23.1%
Design of projects to be undertaken by the student	20.5%
Don't know	10.3%

Q11: Please add any additional comments or observations you may have about unpaid work undertaken outside of a degree or other qualification.

Comments included the following:

1. Very confused about the Fair Work Act 2009 and the impacts of this on unpaid opportunities - more and more opportunities are coming through that are unpaid and are outside of a course.
2. I understand that it's not the main research question of this research, however the main issue we are aware of is unpaid placements (often student-sourced) that are occurring without course credit, or any valid avenue for this. This often takes place due to students needing experience but their course/s either not supporting this - or being too rigid about the types of WIL that that course recognises - and/or being offered WIL opportunities that don't meet their needs to sourcing more meaningful experiences. For course credit, plus unpaid, is not a problematic scenario, but no university will go on the record saying that unpaid, not-for-credit is encouraged.
3. I think some firms take advantage of certain groups. Work experience is harder to get in the enviro area, so some firms try to get these vac students for free.
4. Work experience should be permitted whether paid or unpaid since the Organisation providing the Placement is training the student

5. It's beneficial work experience opening doors to networks and perhaps employment opportunities whilst gaining an understand of the workforce.
6. I think it should continue to be regarded as "wrong" to have students doing unpaid work, encouraged by institutions of education, but not resulting in credit towards a degree outcome or component thereof. However I think we should consider potentially wrong the issue of requiring unpaid work even when it does result in a contribution to (e.g. credit towards) a degree outcome. It is time the business community and government realised that if the benefit of work-integrated learning placements etc are worthwhile then we should not ask the students to pay for them (which they do by foregoing wages/salary during placement AND foregoing opportunities to earn money because they are unavailable to work because they are on placement).
7. The organisations benefit from the work students do although often see the presence of a student as a burden to the designated mentor and organisation.
8. Clarity is needed on the implications of the Fair Work Act for tertiary students wishing to gain unpaid course relevant work experience. Tertiary institutions need clear guidelines on how to direct students. It has been discussed amongst University Careers Services and also with the legal section within the university, and I am still not clear on the best way for us as a careers service to proceed.
9. Engineering students are paid at the minimum rates shown at http://www.apesma.asn.au/adviceonline/remuneration/vacation_work.asp#pay Unpaid work undermines this.
10. We have a work placement agreement that students can complete with their host employers - in order for us to issue the insurance certificate students must prove that the work relates to the development of their graduate capabilities.
11. Most of our students have done a lot of community work (unpaid). That is the commonest experience that motivates them to do our program so they may go back and be of more help to their communities and beyond.
12. I believe there are benefits but to avoid exploitation it should be limited to perhaps one/two weeks per year of study as long as employer ensures student is covered for insurance and out of pocket expenses.
13. Some students may choose to undertake unpaid work in the interests of building extended experience. I do not know of any who have been exploited - i.e. undertaken unpaid work not by their free choice
14. Unpaid work taken outside of a degree or other qualification is valuable when applicable to the progress of study.
15. Unpaid work is more acceptable in some industries than others eg Law & Events but not in Trade, Logistics, Finance and Banking
16. Facilitation of these industry placements requires a knowledge of current Fair Work legislation. We receive inquiries from organisations wanting unpaid placements and are unaware of their responsibilities in engaging a student. Our role is often about educating industry, faculty and students of their rights and obligations.
17. In my experience and knowledge, currently unpaid work related to disciplines at [my university] predominantly relate to volunteer work organised by the academics or the university for the benefit of not-for profit organisations or the community.
18. More and more today employers are demanding graduates have already had practical experience creating a large gap between employer expectations and graduate

capabilities. Work Experience programs are one way in which we can provide a win / win for both the student and the employer. As long as the program is monitored, and that benefit is evenly weighed in regards to benefit.

19. I'm all for students getting work experience (credit or no credit), but not being paid can cause serious hardship for students and their families. more work should be done to create 'shell-type' units of study that turn the 'not for credit WIL' into "wil for credit" - where all work experience is captured, valued and reflected upon. where students add value to host organisations, some payment should be made
20. I would think that in certain situations unpaid work can be beneficial if it provides international students or domestic students who have not undertaken paid employment with the opportunity to better understand how the workplace operates
21. The FWA prevents students from gaining valuable experience at For Profit organisations. The FWA should enable universities to support unpaid work at For Profit organisations for a specific period such as up to 3 months.
22. [My] University does not advertise unpaid work experience outside of degree courses, due to the Fair Work Act, unless it's for a not-for-profit organisation. This limits some legitimate opportunities identified by students to gain relevant work experience, if the work placement is unpaid and not part of the course. It would be great to be able to support students who identify legitimate, but unpaid work experience opportunities in order for the student to gain valuable skills, experience, networks and insight into the relevant industry area.
23. Trying to work with [my university's] Careers Centre on a tool that will encourage students to record all work experience placements in a log form and also facilitate where appropriate insurance coverage. Some students will continue at an agency once there formal placement hours for credit have been completed and hence transition to undertaking work experience for no credit or 'volunteer' position.
24. On completion of their degree I know that there are some students who undertake this type of role to gain experience.
25. Very worthwhile for all concerned - engages community, enhances students employability, creates networks for [my university]
26. We are currently trying to establish opportunities for WIL or service learning as a university-wide unit. This would enable students to explore various work situations within the scope of the their courses. It is a long, hard battle and one we have yet to win. Next year I am hoping to 'hijack' an independent studies unit and open it up to students from the whole faculty so that they can all participate. The barriers are not limited to student credit; staff are reluctant to take on additional work that is not counted within their workload models. This is new in that the workloads have increased substantially, and this erodes goodwill.
27. Most courses do not have a formal WIL component where students can gain credit for time spent in a working environment. It is important that all students have the opportunity to access a WIL experience.
28. Frequent requests from organisations either directly to me, to lecturers or via student contacts which the University is unable to support with letters of assurance about insurance cover
29. It can often create issues where the boundaries of student contribution are not clearly negotiated leading to either students pulling out expectedly early or staying beyond their learning through obligation.
30. Necessary for students to gain experience/job ready skills/agree for the need to be for short periods of time.

31. We are seeking to expand opportunities for students in this area.
32. Due to limitations on the number of hours of work placement within the degree AND when these hours can be completed - formal semester time. This type of unpaid work allows students a greater range of experiences.
33. We see them as beneficial providing both the student and the organization approach it the right way.
34. We used to be able to organise it locally for our students, and it was of great benefit to them in gaining employment on graduation, but it was stopped by uni insurers.
35. I know that in this competitive world pressure is being put on our undergraduates to add to their CV by undertaking unpaid work. Having incorporated this "unpaid work" notion into a new Faculty wide iinternship program (where students receive credit points and the university covers the Insurance aspect) is working really well and is growing rapidly and covers these issues and satisfies the student "needs".
36. Valuable experiences to clarify students career goals - often of dual benefit to both student and employer host
37. I have no problem with WIL so long as it involves the institution in a monitoring and quality assurance role, I can find little reason to support unpaid work without academic supervision. There are two problems with this. 1. No one knows what is happening in the workplace. 2. Unpaid work is slavery and I thought we had abolished that some time ago.
38. It is a very valuable source of practical experience for students and relevant to their future employability and career development. In some areas the potential of the learning experience is not maximised as there is insufficient/poor organisation and facilitation.
39. It needs to be encouraged but perhaps with improved regulation in some cases.
40. We do not allow students to undertake employment that would put someone else out of a job. All placements must be relevant to tertiary study.
41. I am concerned about students undertaking unpaid positions for private companies.
42. We would consider unpaid work over which we had no oversight or control to be an unacceptable risk to us and the student.
43. Activity is learning, not work. Any work performed is insignificant and incidental to the learning experience in order to comply with the Fair Work Act
44. Excellent way of enabling our students to make informed choices about future employment or study options
45. I have no direct knowledge of this occurring as I am new to this particular institution . However I suspect it does occur and there will be organisations that will take on students for unpaid experience independently of the educational institution . There are of course benefits to the student in terms of making contacts, gaining experience, confirm career paths and so the line between exploitation and benefit is a fine one ... For example if a fashion design student was offered 2 weeks experience with an emerging cash strapped fashion design house and were prepared to make that investment in their future then Is that not to all parties benefit particularly the student . Clearly there are however many examples of exploitation.
46. We are thinking of designing a reflective course that would give credit for this work

47. Very confused about the Fair Work Act 2009 and the impacts of this on unpaid opportunities - more and more opportunities are coming through that are unpaid and are outside of a course.
48. As students typically assist with programs that have timeframes, there is sometimes an expectation that the students will "stay" until the end of the program even if they have completed their required hours, generally however, those students who "stay" are keen to continue the work. At times there needs to be a lot of consultation with new agencies regarding expectations and support of the students. As this course works with non-for profit organisation there is no real exploitation of students for money gain however at times students are required to perform extra duties outside of the "service learning scope" eg cleaning.

Appendix D

Results of UTS Journalism Students Survey

Results of Survey of UTS Journalism Students on Extracurricular Unpaid Work Arrangements

Online survey, 14 out of 50 responses as at 18/9/12

Q1: At which institution are you enrolled as a student? (If more than one, please give the institution at which you have been contacted about this survey.)

All answered UTS

Q2: In which degree(s) are you currently enrolled at that institution? (If you are undertaking a double degree program, and have completed one of them, you should still list both degrees.)

BA Communications (Journalism)	57%
Journalism & Law	29%
Journalism & International Studies	14%

Q3: Are you a domestic student or an international student?

Domestic	100%
International	0%

Q4: Since leaving high school, have you ever performed unpaid work (other than as a volunteer or as part of your own or a family member's business)?

Yes	100%
No	0%

Q5: (If Yes to Q4) How many of those periods of unpaid work were undertaken for credit towards, or as a required element of, a degree or other educational qualification?

None	7%
Some	93%
All	0%

Q6: (If None or Some to Q5) Approximately how many periods of unpaid work have you undertaken since high school that were not part of a degree or other qualification?

No answer	36%
One	0%
Two	2
Three	21%
Four	14%
Five or more	36%

Q7: What was the duration, or range of durations, of these arrangements?

4-8 months
4 months and 1 year
Between one week and two months.
A month, periodically, a year, one week, 3 months, ongoing
From 3-months to 1.5 years
8 months in total
From 1 week- 4 months
1 to 6 months
2 weeks
10 internships roughly 3 months long across 3 years. Also completed 5 different work experience placements.
First- one year (2 days a week) Second- one week Third- one night a week for 6 months
One full week (x2), and one day a week for 6 months.

Q8: Please identify the type(s) of business or organisation for which you worked (eg law firm, radio station, public hospital, childcare centre, etc)

Magazine, freelance, PR
Local newspaper, university
Newspaper, film festival, magazine, publishing house
Radio stations, online broadcaster, tv station, sporting administration, newspaper
Magazines, online, radio
Sports journalism company and radio station
Radio station, newspaper, TV station
Local paper, Metropolitan paper, magazine, website.
Journalism industry - magazine and newspaper
TV station, radio station, magazine publishers, local newspapers, not-for-profit, online media outlets
NGO, magazine, community legal centre.
TV station, news wire service and sports media company.

Q9: While undertaking such extracurricular unpaid work, have you ever performed tasks that are of direct and immediate benefit to the business or organisation in question (eg, work that contributes to some product or service being supplied to a customer)?

Never	0%
Sometimes	8%
Often	50%
Always	42%

Q10: What perceived advantages or benefits led you to undertake unpaid work outside of a degree or other qualification?

Better understanding of particular industry, business or occupation	100%
Chance to acquire, practise or improve particular skills	92%
Improve your employability	100%
Make useful contacts	100%
Promise of future employment if you performed well	42%
Help decide whether to change career or course of study	33%
Other	0%

Q11: Did any such periods of unpaid work lead to an offer of paid employment?

All	8%
Some	58%
None	33%

Q12: Please add any further comments or observations you may have about unpaid work undertaken outside of a degree or other qualification

1. If you are upfront about what you want to get out of these periods of unpaid work or internships then you most of the time get to do interesting jobs that are beneficial. Sometimes not but and you have to file. Win some, lose some. I have had only good experiences however.
2. I wouldn't be where I am today (in an industry I love, working for one of the most respected companies in the field) without having interned first. People with a sense of entitlement underestimate how necessary work experience is in this job market.
3. In the field of journalism, unpaid work is a vital and accepted part of gaining employment in the industry - the benefits are innumerable.
4. Better provisions need to be made available, ie they should have security passes so you can leave the building and should have an intern log in so you don't have to disturb them. If you are doing work that is above and of the standard that others get paid for, it's not right that it's an unpaid internship
5. I often struggled with the structure of the internship program within the particular institution, and to be honest I'm burnt out from interning as much as I have pressed myself to do.
6. Some employers specify whether there might be paid work at the end of the internship, which is great. Some employers just leave you wondering.
7. They can vary from being a waste of time for all concerned (where the organisation/business has nothing practical for the student to do other than watch other people work) to being entirely hands-on and slightly exploitative.

Appendix E

Results of Law Students Survey

Results of Survey of Law Students on Extracurricular Unpaid Work Arrangements

Classroom surveys at 3 law schools, 295 responses

Q1: At which institution are you enrolled as a student? (If more than one, please give the institution at which you have been contacted about this survey.)

106 answered Queensland University of Technology
72 answered University of Adelaide
116 answered University of Western Sydney
1 answered Women's Legal Service

Q2: In which degree(s) are you currently enrolled at that institution? (If you are undertaking a double degree program, and have completed one of them, you should still list both degrees.)

Law	43%
Law & Commerce/Business	28%
Law & Arts	13%
Law & Psychology/Behavioural Science	2%
Law & Science/Engineering	3%
Law & Justice	2%
Law & Media/Journalism	3%
Law & other	7%

Q3: Are you a domestic student or an international student?

Domestic	94%
International	6%

Q4: Since leaving high school, have you ever performed unpaid work (other than as a volunteer or as part of your own or a family member's business)?

Yes	50%
No	50%

Q5: (If Yes to Q4) How many of those periods of unpaid work were undertaken for credit towards, or as a required element of, a degree or other educational qualification?

None	79%
Some	11%
All	9%

Q6: (If None or Some to Q5) Approximately how many periods of unpaid work have you undertaken since high school that were not part of a degree or other qualification?

No answer	0
One	58%
Two	24%
Three	9%
Four or more	9%

Q7: What was the duration, or range of durations, of these arrangements?

One day a week for 8 hours - 6 months
 3 months - once a week
 1 week A few weeks 6 months onwards
 1x3hr trial shift 1x placement 1 day per week for 6 months
 1 month
 Around 30 hours
 5 years- one day a week during school terms
 8 weeks ongoing one day per week
 One day per week for 1 year, 7 days vacation work experience
 Seven months
 2-3 hours
 One for one month, one for 6 months +
 1-2 months
 One for 3 weeks, one for 5 weeks
 3 weeks 1.5 weeks
 20 days
 2.5 hrs (one shift)
 4 months - 1 day per week
 August 2012 - current - one day per week
 1.5 years
 9 months- 1 day per week
 3 months 1-2 days per week
 A few months
 2 months and year (Overseas) after school tutoring
 1 year
 4 weeks
 2 x 1.5 week periods
 One day a week for 6-7 months
 1 semester 9am -5pm each day
 3 hours each day
 3 hours per day Monday-Friday
 1 month - 6 months
 1 week per month for 6 months
 Every Friday for 2 years
 1 month during mid-semester break
 2 years

Q7: What was the duration, or range of durations, of these arrangements?

Continued...

1 day

18 months on and off

8.5hr sessions

6 weeks - 3 months

2 hr session 3 times a week

3 hrs per fortnight

5hrs per week for 6 months

One week

3 hrs / week

8 hr day

1 semester

2 days per week.

6 months, once a week for 6-7 hours each day

One day a week for 6-7 months

1 week - 6 months

6 months

1 - 2 hours 5 - 8 hours

6 weeks

2 weeks

1 month - 6 months

1 week per month for 6 months.

1 - 2 hours 5 - 8 hours 1 month during mid-semester break.

1 month of full time work - 1 day for 10 weeks, 9am - 5pm 1 day.

One day a week 8.30am - 5pm (often I still worked overtime) for 3 months then commenced a subject which gave me academic credit 4 months.

1 - 2 weeks

4 months

4 months & continuing.

3 weeks

1 month

Duration was 4 weeks

6 months -> 2 months of which were part of my business degree.

4 - 6 weeks

8 weeks - a semester

1 month average

6 months / internship

2 - 3 weeks

3 months

2 Weeks FT

5 weeks, 2 years, 1 night a month

**Q7: What was the duration, or range of durations, of these arrangements?
Continued...**

Assisting with renovations & painting of domestic violence victim home.

Six weeks

For the past three months & continuing.

Two weeks, One day, Three months.

5 hours

2 weeks

5 months

2 months

6 months

Current Internship 12 weeks

2 months

4 months each year

4 months.

Q8: Please identify the type(s) of business or organisation for which you worked (eg law firm, radio station, public hospital, childcare centre, etc)

Law firm	48
Barrister/chambers	10
Community legal centre/clinic	16
Court	4
Law (other)	5
Government	4
School/university	7
Health care	4
Non-government (other)	15
Media	8
Retail	4
Hospitality	4
Finance/insurance	4
Business (other)	7

Q9: While undertaking such extracurricular unpaid work, have you ever performed tasks that are of direct and immediate benefit to the business or organisation in question (eg, work that contributes to some product or service being supplied to a customer)

Never	6%
Sometimes	30%
Often	31%
Always	33%

Q10: What perceived advantages or benefits led you to undertake unpaid work outside of a degree or other qualification?

Better understanding of particular industry, business or occupation	69%
Chance to acquire, practise or improve particular skills	71%
Improve your employability	72%
Make useful contacts	50%
Promise of future employment if you performed well	35%
Help decide whether to change career or course of study	21%
Other:	
Decide what area I would like to work in	
All were unpaid internships in NYC - useful for all the above.	
Getting involved in the community.	
To look good on resume.	
Enjoyed helping football club	
I am a nice person	
Gain experience since necessary for the future	
Kindness	
It is really hard to get a job in law after graduation and I've heard that getting practical experience helps. I've heard that without practical experience, you won't get a job.	
Cold ambition	

Q11: Did any such periods of unpaid work lead to an offer of paid employment?

All	17%
Some	17%
None	66%

Q12: Please add any further comments or observations you may have about unpaid work undertaken outside of a degree or other qualification.

1. Almost necessary without the right contacts in the legal industry
2. Some good opportunities available to students but some can be exploitive EG- requiring student to work 2-3 days p/w over a 3 month period as competition against other students.
3. I was willing to do unpaid work to gain experience in the law industry. However no one would take me up on my offer. I found it easier to get paid work and also I have noticed I get more legal experience than my friends doing unpaid work experience.
4. I don't think it's right for an extended period. Perhaps if a company is financially able to pay you and you offer to work for the experience but no positions should be as unpaid offered.
5. Very insightful on a day to day lifestyle of working in the particular occupation.
6. Unpaid work may be a good opportunity to gain exposure to an area of interest of a particular field.
7. Chance to develop good relationships.

8. It's useful in gaining skills but it often doesn't lead to paid work.
9. Shadowing the person is fun.
10. It looked great on my resume, not only as experience in the field but also as showing my dedication, commitment and enthusiasm to learning.
11. Provision of reference letter is helpful for future employment prospects
12. I believe it is beneficial as it is often difficult to obtain employment without experience and employers are not going to add somebody to their payroll if productive employment won't be received. However, personally I am highly motivated by money and therefore would avoid undertaking unpaid work unless I was desperate.
13. Very difficult to find unpaid work at certain organisations. And internships that don't require you to have experience are still very picky about their applicants.
14. Unpaid work in the legal field is very common. Students volunteer as a way of getting extra experience in order to find work as graduates. Perhaps this is caused by the lack of job opportunities for graduates.
15. It's something I'd like to do, particularly overseas.
16. I don't understand how people can afford to do it. Studying at Uni is a big enough expense. I also don't understand ethically how businesses can ask for that.
17. Not encouraged as much as it should be.
18. I don't agree with unpaid work as students in today's society have a lot of expenses that they need to worry about and unpaid work makes it a lot harder for students to get by.
19. It is a good opportunity provided the work done is relevant and beneficial for the student - it should not be a situation that is only advantageous to the employer
20. Gain experience
21. I will be looking to undertake unpaid work in relation to my law degree in order to gain work experience etc.
22. I think its a good idea. Builds character
23. If I was presented with the opportunity of completing some unpaid work, I would do so, but not if it interferes with paid work or studies.
24. Some were unorganised.
25. Was not very useful
26. No opportunities of unpaid work in my legal sector
27. Unpaid work = Slavery! Exploitation of students
28. Often the work undertaken is grudge work and not related to the skill your trying to get experience in.
29. Should be the last choice
30. With competition being so fierce amongst uni students & Grads, unpaid work is a good way to get ahead.
31. I believe a lot of unpaid workers are taken advantage of in regards to the hours worked and the work required to be completed quite often under the fake promise of future employment - especially in Law.
32. For students eager to contribute to an organisation or looking to boost their experience for a resume, unpaid work experience is a valuable option!!

33. I believe it demonstrates the student's commitment and drive to securing employment in that organisation. To work unpaid shows a level of interest & determination to obtain paid employment in that area.
34. I enjoyed my time there and gained a lot of useful skills
35. If I were to undertake unpaid work it would be to benefit my degree.
36. I think it was a great way to gain experience.
37. Would like to do it provided it was relevant to my degree, but I have not proactively sought it out.
38. I think its good to have experience without the pressure of being paid for it. Working for free will allows more responsibility to be placed o the volunteer.
39. I would not do it!
40. It is a long period to be unpaid and as I'm doing work of use to the business it is unfortunate I don't earn even \$10/hr - which I would be happy with.
41. May give the participant a good experience & may provide an opportunity to draw on this experience during paid employment interviews.
42. Would complete such work in terms of further career advancement or as a learning and development tool.
43. Not many law firms keen to offer law students work experience.
44. I think it can be very beneficial if it furthers the participants knowledge and skills in an area with which they take particular interest or wish to pursue professionally.
45. Good opportunity to interact with people you wouldn't normally interact with
46. Useful for the community. Also helps develop communication skills.
47. Does not appear common. There is always some form of remuneration.
48. In the law world it is perhaps the only way to get the 'experience' you reuire to get a job (even at the bottom rung!)
49. People seemed to show a better appreciation for what they were doing.
50. I don't get paid to work, yet the firm still charges me out at \$150/hour. The firm is gaining a considerable financial advantage from me being there. For me, giving up my own time is a being deal as I work 20+ hours at another job & study full time. I will be disappointed if this placement doesn't increase my employability.
51. The work for the online publication sold itself as a portfolio - building opportunity, but I never had a chance to do work to build a portfolio. The organisation was certainly targeting keen uni students who wouldn't know better
52. If it is for a good cause, it's worth it.
53. I plan to do some unpaid work experience before or after I complete my degree hopefully in a law firm that deals with law I am interested in. Sometimes work experience can be a foot in the door for some professions.
54. Currently looking into doing more.
55. Gain a lot of experience that you could not learn in a university.
56. It was a good experience.
57. I would do it if I was passionate about the work.
58. Some companies take advantage of students seeking experience within their field. A friend was offered unpaid work experience for 12 months - which she turned down.
59. Its valuable learning experience!

60. Some of it can be completely irrelevant, companies taking advantage of free work.
61. Lots of employer also employ students as 'internship' to work as an unpaid worker
62. Hard to get
63. Good for the soul
64. It probably helps because of the experience you get from it
65. They help to build confidence and self-reliance
66. Always hard work for long hours training without getting paid
67. I did some research work for a Barrister
68. In Law, it is not optional, if you want employment once graduated
69. I think it is an important thing to do as a professional
70. The hours of unpaid work should be limited per week eg under 10hrs
71. I think that all experience gained is valuable and would also be a rewarding experience
72. Preferable that you be paid to work, but if unpaid work is what is required to get a job in the future, I would do it.
73. Job trials should be paid
74. I think that doing unpaid work for no credit towards a degree is acceptable as a way of seeking experience in a competitive field such as law where there are insufficient paid clerkships for all law students
75. There should be more opportunities available as it is important to gain first hand experience
76. US boring but enlightening
77. Sometimes they say they might hire you, then they don't. I once had a law firm string me along for 2 months before they decided they didn't need me.
78. Did it to work out specialisation for degree
79. It's hard to find and potentially quite useful to developing your career prospects. It would be great if it were more readily available
80. It's good to have on the resume
81. Why on earth would people work for nothing
82. Unpaid work is just like a slavery trap
83. Unpaid work overseas gave me an opportunity nethertheless (of course, probably not relevant to this survey)
84. Takes advantage of job insecurities
85. For Law, unpaid work is necessary if you wish to be eventually hired by a firm. Hence, most law clerks that are at University are unpaid
86. It sucks
87. it is important to find a job
88. Good experience, maybe unfair at times
89. Workload/bullying
90. It is unfair that some organisations make it known that an employment opportunity may come out of the placement when they really have no role to offer – misleading conduct.
91. Unpaid work provides experience and in many cases leads to paid employment. But it was not a financially viable option as I needed to support

myself through my degree.

92. Rip off and total wasted of time
93. There are lots of Law students undertaking unpaid work
94. You have to do it to be competitive in the job market
95. It's a good way to gain experience
96. I don't think it's right for an extended period. Perhaps if a company is financially able to pay you and you offer to work for the experience but no positions should be as unpaid offered.
97. Waste of money
98. Unpaid work may be a good opportunity to gain exposure to an area of interest of a particular field.
99. Supposedly it is increasingly common. Worryingly, I have read articles that indicate that unpaid work can be abused by employers (i.e with promises made that never eventuate).
100. It's useful in gaining skills but it often doesn't lead to paid work.
101. These days unpaid legal experience doesn't help with getting a job post graduate.
102. It looked great on my resume, not only as experience in the field but also as showing my dedication, commitment and enthusiasm to learning.
103. It should be offered to get Practical experience.
104. I believe it is beneficial as it is often difficult to obtain employment without experience and employers are not going to add somebody to their payroll if productive employment won't be received. However, personally I am highly motivated by money and therefore would avoid undertaking unpaid work unless I was desperate.
105. It's beneficial as skills are developed that can be used for future paid employment.
106. Unpaid work in the legal field is very common. Students volunteer as a way of getting extra experience in order to find work as graduates. Perhaps this is caused by the lack of job opportunities for graduates.
107. It is an invaluable experience for seeking employment in the future, however while studying and working full time it is difficult to find time to undertake work experience.
108. I don't understand how people can afford to do it. Studying at Uni is a big enough expense. I also don't understand ethically how businesses can ask for that.
109. I personally could not do it. I do not agree uni students should do unpaid it is unfair when we have bills, text books etc to buy.
110. I don't agree with unpaid work as students in today's society have a lot of expenses that they need to worry about and unpaid work makes it a lot harder for students to get by.
111. It only helps if you spend significant amount of hours and weeks to assist your degree.
112. Good for resume and most people do it for this reason (unless very passionate about a particular cause).

- 113.** I will be looking to undertake unpaid work in relation to my law degree in order to gain work experience etc.
- 114.** I understand that it is a good experience and also helps employers but it seems unethical that the current expectation is that you need to do a certain amount of unpaid work to be considered qualified or experienced. Employers exploit this and it is almost impossible for a uni student living out of home to be expected to work for free as a pre-requisite to achieving a paid job in the future.
- 115.** If I was presented with the opportunity of completing some unpaid work, I would do so, but not if it interferes with paid work or studies.
- 116.** Great experience
- 117.** Was not very useful
- 118.** Restricted access to volunteer work
- 119.** Unpaid work = Slavery! Exploitation of students

Appendix F

YWLS Survey

Young Workers Legal Service



Unpaid Work Survey Results

October 2012

Anne Purdy
Coordinator
Young Workers' Legal Service

1. About our survey

The Young Workers' Legal Service launched a survey about unpaid work on 31 August 2012. The survey was conducted online using Survey Monkey. The survey was publicised through the handing out of flyers at Adelaide University and on the Facebook page of the Young Workers' Legal Service and SA Unions. We also asked the following organisations to publicise the survey on our behalf: YACSA, the YWCA, the AUU, and various South Australian unions.

We received 40 responses to our survey.

The survey asked a range of quantitative and qualitative questions. A copy of our survey is attached.

2. Unpaid worker demographics

The unpaid work reported through our survey was mostly carried out by workers between the ages of 15 and 24.

We heard more stories of unpaid work being done by women than men.

The unpaid work referred to by our survey respondents was done by people with a range of different qualifications, ranging from part completion of secondary school to completion of a Graduate Diploma or Graduate Certificate.

3. Types of unpaid work referred to

The majority of our survey's respondents spoke about unpaid trial work. That is, the practice of giving a worker an unpaid work trial to assess their suitability for paid employment. A lesser number of respondents referred to unpaid internships.

Survey respondents talked about unpaid trials which lasted from three hours to two weeks. Five said they worked an unpaid trial which lasted between two and five hours. Eight did a trial that lasted either one day, one shift, or eight hours. Five worked for three or four shifts, several shifts, or one to two days. Three worked on a trial for 1 week or five days. One worker undertook a trial which lasted 2 weeks.

Almost half of the unpaid work referred to by our survey's respondents was undertaken within the hospitality, accommodation, cafes and restaurants industry.

4. Working for free to get paid

All of the unpaid work referred to by our survey's respondents was undertaken in the hopes of gaining paid employment.

However, over half of the unpaid work reported in our survey failed to lead to paid work.

When unpaid work did lead to paid employment, the paid employment was mostly casual and part-time.

5. Attitudes to unpaid work

Over half of the respondents to our survey strongly agreed that 'no one should ever have to work for free to get a job'. Only eight respondents disagreed or expressed a neutral opinion about this statement.

Almost two thirds disagreed or strongly disagreed with the suggestion that 'it's fair enough that people should expect to do some unpaid work at the beginning of their careers.'

Respondents said:

Unpaid work is slavery, it is used by pig headed employers exploiting young people trying to break into the work force.

I think it's wrong and a form of exploitation.

It is wrong and should not be allowed.

Absolutely illegal and immoral.

Totally not called for, a shift is a shift and work is work. I don't think people should be expected to "prove themselves" in one shift, especially one they're not getting paid for.

Unpaid work is unfair in many cases. It is inequitable & unjustly takes advantage of vulnerable people in society. Unpaid work, in many cases, should be made illegal.

Bully tactic, that targets young inexperienced kids

It is exploitation, everyone is and should be paid for working, even if it is training.

Completely unjustified!

Unfair and generally an exploitation of desperate people.

People who use and abuse workers' ignorance of the law should be fined heavily!

It is best if young workers are protected through paid employment and are given their full entitlements.

That it is unfair and an easy way for employers to save money.

To many unscrupulous operators have the opportunity to get some free work for a few days by "searching" for staff.

Some respondents talked about the practical problems posed by working for free. For example:

It's hard to try to meet bills with unpaid 'study placement' when it is long periods, and as such not work so Centrelink does not support you either.

I do think that it is unreasonable for employers to assume that prospective employees have finances to spare to travel...and supply suitable clothing to 'try' out for a job.

It's really bad because while you get the experience it's time that could be spent studying or looking for paid work and ultimately sets people behind in their career.

Transport is required and suitable clothing. Not all people trying out have finances behind them to start.

6. Being forced to do unpaid work

In spite of the negative attitudes toward unpaid work expressed by our survey respondents, all respondents had done unpaid work in the past or knew someone who had.

Half of our survey's respondents agreed or strongly agreed with the proposition, 'I will probably need to do unpaid work in the future to help me find a job.'

Many respondents said that they felt forced to do unpaid work. For example:

Many people either think it's legal or know it's illegal but are effectively forced into taking up unpaid positions (a) in the hope of getting a job or (b) because they've been forced into taking up the position by employment network providers. If you don't take up the position, even if you know it's illegal, you can be accused of being uncooperative.

Sometimes students have to do it and it's the only way to gain experience in their profession.

It's deeply unfair. You can't say no.

They implied that this would be the only way I would get the job.

When asked about payment, was threatened that payment could mean that she would not get the job.

Some respondents commented on the normalisation of unpaid work. For example:

Unpaid work is more prevalent than most people realise. It is often used as a tool for employers to get workers in for 'trial shifts' or as a way for students to build their resume in areas such as the legal industry. I think it is an unfortunate part of our employment sector and it is also generally accepted as being the norm or being ok.

It's common.

7. Where the line between paid and unpaid work should lie

Respondents expressed a range of opinions about what work should and should not be unpaid. Many drew a distinction between acceptable forms of unpaid work, like work experience which counts toward formal education, and volunteering for not for profit organizations, and other, less acceptable, types of unpaid work. For example:

[Unpaid work] should not be allowed unless part of formal work experience as part of attaining educational outcomes.

When it comes to short term work experience placements, I think unpaid work is reasonable. During my university studies I completed a few unpaid work placements (all short term) and found this was a great way for me to develop my skills and knowledge and increase my confidence. However I did have some friends complete longer unpaid work experience (some up to 6 weeks full time) and this was hard on them, as they had to take 6 weeks off work, and struggled financially.

I think it is acceptable for legitimate 'work experience', however it becomes inappropriate if the employer gains a material benefit from the worker.

Unpaid work is great in some cases (volunteer work for a not-for-profit organisation, structured work experience or training through an educational facility [or sometimes even independently of an educational facility to get some experience, but I would suggest perhaps this is only fair if it is very short-term, only involves observing, rather than working & it isn't done in order to gain employment], etc), but unpaid work in order to gain paid work is really unfair.

Volunteering is fine but unpaid work such as 'training' or 'trial periods' is exploitative

Unless if it is "volunteer work experience", it should not be allowed.

Any work not part of a formal education process should be illegal.

Volunteering should be the only unpaid work

If you ask to not be paid for work experience or as a volunteer you should not be paid, this should be legal. But as a "trial" or through misinformation of the job it should be illegal and pay should be mandatory.

Only volunteer work and specified work experience and industry training as a part of an accredited course should be free.

Unpaid trial shifts should be illegal and work experience with no pay legal but limited to a set number of hours and conditions.

Unpaid work or work experience organised through an educational or training institution that's for a set period of time should be legal. Any other work that is unpaid should be illegal. If it does not go to a formal qualification then it should be paid.

Formal work experience at high school should be legally unpaid, but that's all. It's ridiculous that student teachers aren't paid but have to go to school five days a week, 9-5, for weeks or months at a time. I want to be a teacher but I cannot afford that.

Official volunteering positions should be legal, as volunteers are valuable to society's maintenance & function. However, positions for paid work, even if requesting unpaid trial shifts first, should be illegal.

Work experience ok but trial shifts longer than one hour should be paid

Short-term placements for high school only. When it is a longer term requirement for a degree (e.g. teaching or legal placements lasting 4-6 weeks full time equivalent) it places a burden on students to take time away from their paid work and that should be recompensed.

Work experience should be legal so that a worker can develop new skills, but there should be a time limit. It should be illegal for an employer to put people in unpaid trials, or indicate that paid employment will result at a later stage if unpaid work is put in.

Illegal: Unpaid trial shifts, long and continuously extended work experience placements organised by employment network providers. Commission work without a guaranteed minimum wage that is solely dependent upon making a sale to be paid anything. Really the only type of work that should be unpaid is volunteer work that you do of your own accord for something you care deeply about where getting paid doesn't matter to you. You shouldn't have to do any unpaid work in the hope that it might lead to paid work later.

Unpaid work that is done in order to directly gain paid work should be illegal, as it exploits the vulnerable. It's basically slavery and leaves the worker unprotected. They do work for the employer while they could be doing paid work elsewhere and do not have any rights (ie WorkCover). Meanwhile, the employer only gains and holds all the power. On the other hand, unpaid work in the form of work experience (as mentioned above) that is based on learning and observing, rather than actually working should be legal.

If it's an internship or a work placement as part of education then that is fine. Anything else (excluding volunteer work of course), some form of payment should be issued for the time and labour. That of course raises the question of what constitutes correct/fair pay.

Volunteer work is the only type of unpaid work that should be legal - when people specifically aim to give up their time to serve others. Trial shifts, and even internships should be paid.

Work experience which is required for university degrees should be unpaid and legal as institutions need to be encouraged to provide the work experience. However, work experience which is done to further career prospects, and is not a formal part of a degree or directly related to courses being studied should be paid work.

Formal work experience or placements through an educational institution should be legal. Other work experiences than the above should be illegal

Legal - Voluntary Work, Internships. Illegal - Working for no pay or no educational achievement.

I have no objection to work experience through schools. Trials should be compensated by some means.

Some believed it was important to ask who benefits from the work. For example:

Any and all work that contributes to the increase in an employer or businesses ability to perform, cannot be unpaid.

If it is a 'trial shift' depends a bit, from the employers point of view, whether they have to have someone supervise the unpaid worker, and so cannot do their own job as efficiently, and also if the employer is getting a benefit from the unpaid worker, or if they are more of a burden until they 'know the ropes'. Monetary payment is only one sort of reward. If the unpaid person is getting experience/contacts/ etc and the employer gets little in return, then maybe it's ok to be unpaid. If the employer is essentially getting a free pair of hands to do the work, that's not ok.

When you perform work for someone, your labour contributes to the value of the business. You should be compensated for your efforts either by financial

payments or attributing your work towards an education/vocation requirement.

It depends who is benefiting, if the unpaid worker is gaining more skills and experience than what they are contributing then some forms of unpaid work for educational purposes is okay, provided this is monitored and all parties have clear expectations from the start.

If a worker is contributing in any way to the operations of an employers business, then it should be paid, no matter what it's called. Perhaps there is room to have a discussion around what suitable payment looks like, but 'unpaid' isn't an option.

Work is still creating something for the buisness its being done for. Workers, regardless of trial shift or non trial shift should be paid for their efforts.

Illegal, if the employer is getting a benefit (ie competent employee, especially if they are taking the role of someone who is normally paid). illegal if for more than a few hours to see if the potential employee has the potential to do the job.

8. Case studies

A young woman worked for free in a clothing store for one week. She was told that the trial was necessary in order for her to be considered for a paid role.

A teenager worked a 35 hour week at a restaurant to gain work.

A young man worked a week long unpaid trial in the hopes of getting an apprenticeship. The work he did during his trial was charged to a customer of the employer.

A young man worked for two weeks without pay in the hopes of gaining work in the building and construction industry. He was formally interviewed for the role after his two week trial but, after the interview, he never heard from the employer again despite numerous attempts to contact them.

A teenager worked for three hours unpaid in a shop in the hopes of gaining work.

A young woman applied to work at shop. After completing an interview, she was asked to work an unpaid trial for a day. She was pregnant at the time and was not given a break during the trial shift. Afterwards, the employer failed to contact her again.

A teenager worked for five hours in a kitchen without pay in the hopes of being employed as a kitchenhand.

A young woman was referred to work in a shop by a job network agency. When she reported for work, she was told it was actually a volunteer position.

A teenager worked an eight hour shift in a restaurant in the hopes of getting work. During the shift, she was told she could not take a toilet break as the restaurant was too busy. At the end of the shift, she was told she would not be paid for her work.

A teenager worked several shifts at a hotel throughout a two week period in the hopes of gaining permanent employment. When she asked if she would be paid for her work, she was told she would not get the job if she asked about pay again.

A young woman applied for a job at a popular bar and they asked her to come in for a trial shift. The day they asked her to come in was one of the busiest days of the year, as there was a festival on. While working, she discovered that there were up to 10 other workers there also on 'trial shifts'. She ended up working 12 hours without a break.

A 15 year old girl worked for two hours unpaid at a café as a trial for paid employment. She was provided with lunch afterwards.

A young woman worked for five hours as a trial in a fast food store. Afterwards, she never heard from the employer again.

A teenager was told that she would not be paid for her first week of work in a fast food store as she was not qualified for the role yet. She worked 40 hours during that week.

A young man was referred to a job by a job network agency. He worked for a week, but was told afterward that he had been unsuccessful in getting the job and that he would not be paid for his time. The worker contacted his job network agency for help, but the employer just ignored their calls until the agency gave up.

Young Workers' Legal Service Unpaid Work Campaign

Exit this survey

The Young Workers' Legal Service wants to know about your experiences of unpaid work, and how you feel about the issue.

Your answers will be used by the service to develop its position on unpaid work and to contribute to research being done in this area.

Your answers will be treated confidentially and anonymously. We will not link your name to your responses, or reveal any other information that might otherwise identify you. We will also not name any businesses or people who you refer to in your answers, unless you give us your express permission to do so.

If you have any questions about this survey or our unpaid work campaign, please do not hesitate to contact us on (08) 8279 2222.

Many thanks for taking the time to fill out our survey.

1. Please tell us your thoughts about unpaid work.

2. Some forms of unpaid work are legal, like formal work experience done through an educational institution. Others are illegal, like unpaid trial shifts.

What kinds of unpaid work do you think should be legal or illegal?

3. Do you agree or disagree with the statements below?

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
No one should ever have to work for free to get a job.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
I will probably need to do unpaid work	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
in the future to help me find a job.					
It's fair enough that people should expect to do some unpaid work at the beginning of their careers.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

4. Have you or someone you know worked without pay? If so tell us about it. If not, please go to question 14.

5. What industry was the unpaid work in?

- Hospitality, Accommodation, Cafes and Restaurants
- Retail Trade
- Wholesale Trade
- Agriculture, Forestry and Fishing
- Mining
- Manufacturing
- Electricity, Gas and Water Supply
- Construction
- Transport and Storage
- Communication Services
- Finance and Insurance
- Property and Business Services
- Government Administration and Defence
- Education
- Health and Community Services
- Cultural and Recreational Services
- Personal and Other Services
- Legal Services
- Other

6. How long did you or the person you know work without pay?

7. Did you or the person you know do the unpaid work in the hope of gaining paid employment?

8. Did you or the person you know gain a job as a result of working without pay?

9. If you or the person who did the unpaid work gained a job as a result, please tell us more about that job:

- | | Yes | No |
|---|-----------------------|-----------------------|
| The job was casual | <input type="radio"/> | <input type="radio"/> |
| On average, the job was 38 hours or more a week | <input type="radio"/> | <input type="radio"/> |

How long did the job last?

If you worked the unpaid trial or internship, please tell us a little bit about yourself below.

If you have told us about another person's unpaid trial or internship, please tell us more about that person.

If you are unable to or would prefer not to answer any of the below questions, please just leave them blank.

10. Age of the person who worked without pay at the time the unpaid work was done:

- | | |
|-------------------------------|-------------------------------|
| <input type="radio"/> 10 - 14 | <input type="radio"/> 45 - 49 |
| <input type="radio"/> 15 - 19 | <input type="radio"/> 50 - 54 |
| <input type="radio"/> 20 - 24 | <input type="radio"/> 55 - 59 |

- 25 - 29
- 30 - 34
- 35 - 39
- 40 - 44
- 60 - 64
- 65 - 69
- 70 +

11. Gender of the person who worked without pay:

- Male
- Female

or:

12. Language background of the person who worked without pay:

- Non-English speaking background
- English speaking background

13. Highest level of education of person who worked without pay, at the time of the unpaid work:

- Part way through secondary school
- Completed secondary school
- Part way through Certificate I, II, III or IV
- Completed Certificate I, II, III or IV
- Part way through Diploma, Advanced Diploma, or Associate Degree
- Completed Diploma, Advanced Diploma, or Associate Degree
- Part way through Bachelor Degree
- Completed Bachelor Degree
- Part way through Graduate Diploma or Graduate Certificate
- Completed Graduate Diploma or Graduate Certificate
- Part way through Postgraduate Degree
- Completed Postgraduate Degree

Other (please specify)

14. Is there anything else you'd like to tell us?

15. If you'd be happy for us to contact you to discuss your responses to this questionnaire further, please fill in your contact details below.

Please note that, if you fill out this section of our survey, your personal details will be treated confidentially.

As well, your responses to our survey, and any businesses or people named in them, will be treated anonymously unless we contact you and you give us your express permission to share this information.

Name:	<input type="text"/>
Company:	<input type="text"/>
Address 1:	<input type="text"/>
Address 2:	<input type="text"/>
City/Town:	<input type="text"/>
State/Province:	<input type="text"/>
ZIP/Postal Code:	<input type="text"/>
Country:	<input type="text"/>
Email Address:	<input type="text"/>
Phone Number:	<input type="text"/>

Powered by **SurveyMonkey**
Check out our [sample surveys](#) and create your own now!

Appendix G

AIA Submission



Internship
Research
Project

November 15

2012

Australian Internships Industry Association
(AIIA) response to a report investigating
internships in Australia

Private &
Confidential



Dear Researchers,

Thank you for the opportunity to provide information about our industry. We hope this information will contribute toward the development of balanced and supportive legislation for internships, such that genuine arrangements can proceed to the benefit of providers, hosts and interns alike.

PREAMBLE

In this response the following terms will be used and primarily refer to:

- **AIIA:** The Australian Internship Industry Association
- **Providers:** organisations who liaise between the intern applicant and the hosting organisation/business, in this instance specifically members of AIIA.
- **Interns:** those persons (students and recent graduates) who apply to receive supervised experience in a career field, either to develop their skill sets in their chosen career and/or to “test out” different professions to see where they may wish to direct their future efforts.
- **Hosts:** Organisations, businesses, companies, etc who agree to host an intern, or interns, in their operation.

The *Australian Internship Industry Association (AIIA)* brings together organisations active in the domestic and international internship industry in Australia. Membership is open to organisations and educational institutions that deliver Internship programs (send and receive participants), or offer services to interns, or new program providers developing their Internship program(s). Members meet regularly to discuss current issues affecting the industry and to ensure maintenance of best practice standards across membership. The association has a rigorous application process to ensure only providers of the highest quality internships access membership and are in agreement with association values. (Source URL: <http://www.aiaa.org.au/aboutus.htm>)

We support Fair Work Australia’s initiative to legislate for clarity for internship placements such that there is protection from exploitation for internship applicants and also the ability to identify and remove “sham internships”. We appreciate the opportunity to move the conversation away from the “headline grabbing” reporting on the issue of internships that has occurred in the media in the past year¹. We support a more balanced discussion of the value of internships to the Australian social, cultural and economic environments as well as to the individual interns as well as to the providers and hosts involved. Providers with AIIA, whilst operating as businesses in arranging internships, see their activity as high quality and innovative practice designed to provide mutually beneficial arrangements for all parties involved.

[¹ Khoo, V. 2011 “Eager workers can be free and easy”, *Sydney Morning Herald*, 13 August, Business, p.23. Souter, F. 2012, “All work and no pay”, *Sydney Morning Herald*, 13 October, Good Weekend, p.26]

We have reached out to our members to provide summary information about their activities in relation to the facilitation of internships throughout Australia. Please note that the following information is a compilation of information provided by members and does not



reflect any particular AIIA member or members. In addition, some members may not have responded, or responded in the same detail, thus we are unable to present a complete picture of current member activities. Most respondents focused on their international market, that is, applicants from overseas seeking an internship placement within Australia. Lastly, it should be noted that not all providers of internships within Australia are members of AIIA. However, we believe the following information to be reliable within these limitations.

FINDINGS FROM AIIA

Numbers

Members reported the following number of internships as happening in the past 12 month period (2012).

- 2,040

This figure reflects a focus on international (overseas) applications for internships in Australia, although a small percentage of domestic, on-shore, applications (from local international students/graduates) are also factored into this figure.

Visas used

Members used a variety of visa options to meet the specific needs of their applicants. The main visas used were:

- Working Holiday Visa (Subclass 417)
- Work and Holiday Visa (Subclass 462)
- Skilled – Graduate (Temporary) Visa (Subclass 485)
- Special Program Visa (subclass 416)

Duration of internship placements

There was a vast diversity in duration of internships, with placement durations ranging from 6 weeks to 26 weeks. Some students come out for a total of 44 weeks as part of the Professional Year or Skilled Migration Internship Programs but the actual internship component comprises only 12 of those weeks.

The average placement duration appears to be for approximately 12 weeks (3 months).

Characteristics of interns

- Interns are generally aged between 18 and 30 years, with the majority aged between 19 years to 24 years.
- Interns are primarily current tertiary students or recent graduates (within the past 18 months).
- There are a very few who are yet to start university and wanting an internship to help to decide what direction to shape their future.
- Some interns are from English-as-a-second-language but the internships are English-language internships. For these placements, minimum standards of English proficiency are expected and determined prior to commencement of the placement.

Unpaid internships



Primarily the internships provided are for “unpaid” placements. These placements require hosts to commit to providing the following for the interns, in lieu of payment:

- career-relevant experience, frequently project driven
- nominated supervision for the intern, with regular meetings and/or feedback
- flexibility with hours/days expectations
 - some interns are only on-site four-days per week, to allow time to travel
 - some interns are on-site for less hours per day
 - some interns may have flexible contact hours, negotiated in advance
 - sick leave and/or leave for other reasons are more leniently accommodated
- reporting as required, to enable monitoring of the placement and/or for purposes of receiving academic credit and/or professional association recognition for placement.
- supportive and encouraging environment, with the intern’s needs in mind
- opportunities to learn in response to intern’s career direction and requirements
- opportunities to practice language skills and soft (generic skills), as well as develop discipline specific knowledge related to their studies and/or career direction
- exposure to common “workplace” activities such as teamwork, meetings, administration, policies, hierarchical structures and interactions, to name a few
- placements are for a limited duration, with start and end dates set prior to commencement. They are not meant to lead to a permanent position with the host.

In addition to the above arrangements in lieu of payment, hosts are expected to adhere to standard workplace health and safety requirements for the intern, including providing a safe environment, both physically and emotionally.

The ability to pay an intern whilst they gain experience, knowledge and skills, that the interns then TAKE with them (as they pursue their career) is not always feasible. In addition, permanent employees are often required to double-check an intern’s output or performance. This takes the paid staff members out of their substantive role they would be fulfilling if not supervising an intern. Lastly, and not insignificantly, each time a host commits to supporting a new intern, and provide them with “real world” experience, they have to commit to providing “training” to bring them up to a level of productivity pertinent to career expectations and/or if dealing with clients run the risk of alienating established clients if the intern’s performance is not up to standard. These are all risks and costs to the host that need to be weighed when they agree to accept an intern.

Types of internships

- For academic credit
- For practical English-language experience
- For professional association requirements (eg engineering, teaching)
- For career-relevant experience in another country
- Training
- Volunteer

Common fields for internships

- engineering
- events
- research



- hospitality/tourism
- education
- social services
- marketing, PR
- finance / accounting
- animal care
- IT / computing
- human resources
- health care

Services supported by AIIA providers

Internship providers offer a broad range of services to assist **both the intern and host**. This is because providers have an excellent understanding of how internships evolve and how best to optimize the experience for both host and intern. Each provider offers a different level of support for their internship placement but some examples of the type of services provided include, but are not limited to:

- Assistance with visa application
- Matching intern experience request with suitable host and placing intern with host
 - Assistance with application materials (CV, cover letter, interview)
 - Skype or phone interview prior to placement between intern and host site
 - Meeting university and/or professional body expectations for placement
 - Identifying nominated host supervisor
- Pre-departure support and advise
 - Assistance with booking of flights and land transfers
 - Pre-departure information about destination
 - Encouragement to prepare for placement in advance
 - For example: researching and writing a “pre-departure” paper
- Assistance with arranging accommodation in Australia
- Orientation services. These vary and can include some or all of the following:
 - Orientation handbook, including information on Australian culture, common business environments and practices, safety advise, hints for getting the most out of an internship, emergency contact information, etc.
 - Orientation presentations (face-to-face, via Skype)
- In-country support

Again, this varies between providers but can include, although not limited to, the following:

 - Orientation experience, in-country, with other interns. From half-day to multiple-days with information sessions and cultural experiences.
 - Training Journals for monitoring learning
 - Provision of “induction” checklists for hosts
 - General monitoring of the placement
 - regular evaluations and/or feedback sought
 - Emergency contact as required (for interns and for hosts)
 - Comprehensive insurance coverage for the intern
 - Support with negotiating issues between intern and host, as required
 - Relocating to a new internship site if issues are not able to be rectified
 - Support with social networking and activities outside of internship placement
 - Courses in “career readiness” skills, prior to commencement of internship
 - Newsletters (for interns and for hosts)
 - Phones



- “Welcome Packs”
- Support with housing/accommodation as required and relocation if required

CONCLUSION

We hope the above information is useful. Whilst obviously, paid internships would be preferable, given the costs associated with living in another country and/or simply living a period of time without an income, it is not always viable for hosts to provide. Both hosts and providers recognise that for young people to gain experience, environments need to be provided that are non-threatening and relevant. For many interns, “non-threatening” means “not employed” as employment carries with it connotations of dismissal for poor performance. Rather, an internship that allows them to learn, without having ramifications on their employment status is a more desirable option for a first (safe) step in a career.

As you can see, the commitment on the part of both providers and hosts is extensive and focused on the needs of the interns. In addition, by mediating between hosts and interns, providers offer a level of control, in terms of quality, safety and standards of practice, that individual interns negotiating their own placement direct with a host may not receive. Although both providers and hosts are businesses, and as such need to operate as profitable enterprises (charity organisations who host being the exception) the provision of internships is driven by much more than profit. Internships are an important contribution to an individual’s learning (as recognised by the increasing emphasis Universities are placing on experiential learning as part of a qualification). International internships are an important contribution to global awareness at both an individual and corporate level. Legislation that supports responsible internships that respects the rights of the intern and the ability of hosts to sustain offering internships is the way forward in Australia and the AIIA looks forward to direction on this matter.

Kind regards,

Shelia Houston

On behalf of Australian Internship Industry Association

Appendix H

Selected Internship Advertisements



Listed 6 Nov 2012
Advertiser: Estee Lauder P/L

**ESTÉE
LAUDER**
COMPANIES

Interns - Expressions of Interest wanted Sydney Head Office

Are you in your FINAL year of study?

- Gain experience with a leading luxury manufacturer of skin care, fragrance and hair care products
- Kick start your resume by adding '*Intern – Estee Lauder Companies*'

What's in it for you?

Motivating and supportive team environment
Gain skills in fast paced office setting
Experience within a globally recognised company
Experience with one of the of the world's leading manufacturers and marketers of quality skin care, fragrance and hair care products.
A culture which believes in 'High Touch Service'

Estee Lauder Companies is one of the world's leading manufacturers and marketers of quality skin care, fragrance and hair care products. Our vision is to be 'the global leader in prestige beauty: a well diversified, brand building powerhouse of unrivalled creativity and innovation'. Our global mission is 'bringing the best to everyone we touch'.

Within Australia the Estee Lauder Companies brand portfolio includes Estee Lauder, Clinique, M.A.C Cosmetics, Bobbi Brown, Tom Ford Beauty, Aveda, Jo Malone, La Mer and Aramis and Designer Fragrances, which include Tommy Hilfiger, Donna Karen, Michael Kors and Zenga.

Our talented and motivated people make Estée Lauder Companies a great place to work. They help us deliver our High Touch customer service to all of our internal and external customers, suppliers and retailer partners. We're committed to attracting, retaining, rewarding and helping them be the best they can be now and in the future.

We are currently interested in hearing from candidates looking for internships within our marketing department and visual merchandising team at our office based in Erskineville.

As a marketing intern at Estee Lauder Companies you will have the opportunity liaise with key stakeholders, be involved in meaty project work and put their theory into practice, whilst providing general support to the department and/or brand. Day-to-day tasks may include:

- **PR send outs**
- **Updating press releases and media lists**
- **Updating and collating information for retail stores**
- **Market research and reporting**
- **Assisting with organising launches and events**

An Internship is an unpaid opportunity for you to gain valuable work experience whilst you study, so we can tailor the days you work around your study timetable.

The successful candidate will:

- **Be currently in their final year of study**
- **Have terrific attention to detail**
- **Be highly organised**
- **Have exceptional communication and interpersonal skills**
- **Have a genuine interest in the prestige beauty industry**
- **Have excellent time management skills and the ability to manage multiple projects at the one time**
- **Ideally be proficient in Adobe Illustrator or Photoshop**

To apply visit www.elccareers.com.au. Be sure to attach your resume and a cover letter, including 100 words on why you would be an ideal Intern for Estee Lauder Companies. We look forward to hearing from you TODAY!

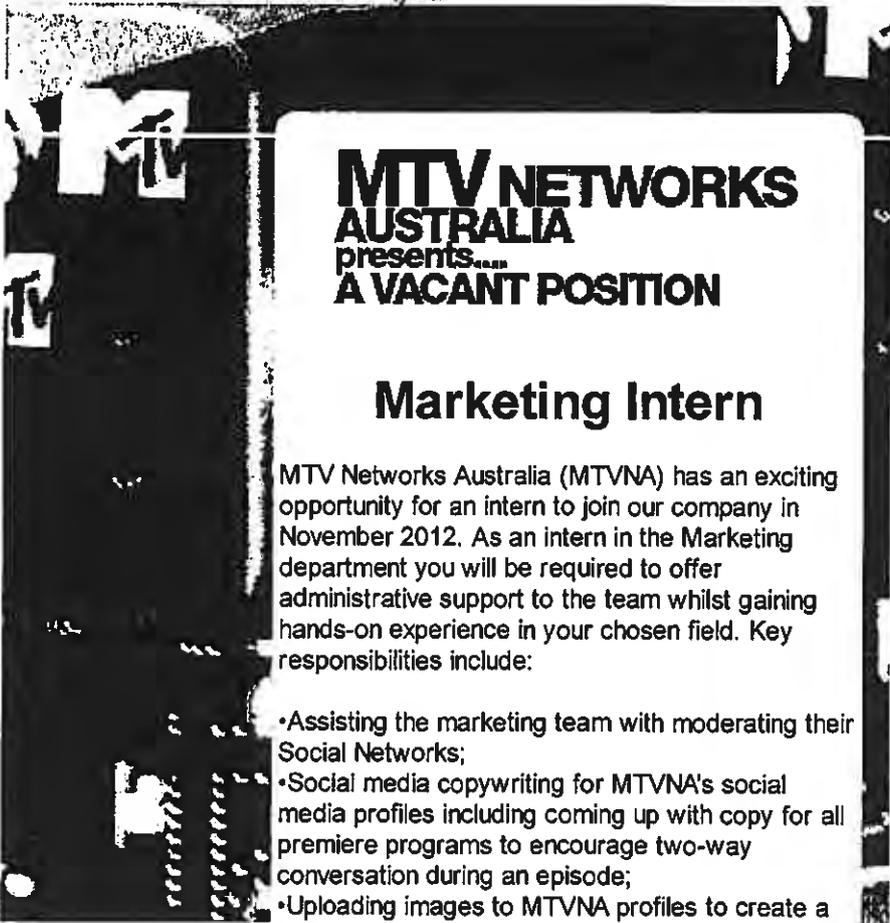
**ESTÉE
LAUDER
COMPANIES**

www.elccareers.com.au • www.elccareers.com.sg • www.elccareers.co.nz • AU: [twitter@elccareers](https://twitter.com/elccareers) • NZ: [twitter@jobstoolaukz](https://twitter.com/jobstoolaukz)



Listed 16 Oct 2012

Advertiser: MTV Networks Australia Pty Ltd

The background of the advertisement is a black and white photograph of a television set. The MTV logo is visible on the screen and on the side of the TV. Overlaid on the right side of the TV is a white rectangular box containing the text for the job advertisement.

MTV NETWORKS AUSTRALIA presents... A VACANT POSITION

Marketing Intern

MTV Networks Australia (MTVNA) has an exciting opportunity for an intern to join our company in November 2012. As an intern in the Marketing department you will be required to offer administrative support to the team whilst gaining hands-on experience in your chosen field. Key responsibilities include:

- Assisting the marketing team with moderating their Social Networks;
- Social media copywriting for MTVNA's social media profiles including coming up with copy for all premiere programs to encourage two-way conversation during an episode;
- Uploading images to MTVNA profiles to create a more engaging profile;
- Setting up competitions on the MTVNA website including drafting terms & conditions and briefing the digital team;
- Drawing winners, contacting winners and organising prize fulfilment;
- Conducting desk research for the marketing team for various projects as required;
- Sending merchandise to partners, viewers and clients as required;
- Managing the merchandise and signage storeroom;
- Covering reception lunch cover 1-2 times per week (1 hour at a time) including answering the switch, greeting office visitors, organising couriers and freight.

This voluntary internship is currently open to tertiary students in their penultimate or final year studying in the Marketing, Communications or Publicity field. If you are available 2 days per week from November to February then apply now by sending your CV and cover letter (please include availability) to Rochelle Orphin at careers@mtvna.com.au



Listed 24 Oct 2012

Advertiser: cudo.com.au

HR Internship

HR Internship Opportunity – Pyrmont – just down the road from Ultimo TAFE and UTS

What you get

Dynamic team environment and support
Culture that lives by our core values
Access to our lap pool, spa, gym, sauna & free fruit
Work for the most dynamic media organisation in Australia

Cudo is a joint venture between Nine Entertainment Company and Microsoft who partners with businesses to offer its massive member-base extraordinary offers on the things we know they love.

As an intern at Cudo, you will be continuously learning and assisting with the day to day tasks, whilst supporting our People and Culture Manager in various duties. In addition, you will be provided with one-on-one mentorship.

An Internship is unpaid work experience, so we can work around set dates and times whilst you are completing your degree.

This in turn will provide you with invaluable experience that will assist you in your future career endeavours.

You will also be responsible for:

- Writing and posting job advertisements
- Pre screening applications and CV's
- Arranging interviews
- Conducting reference checks
- Working on exciting new HR specific projects from conception to completion
- Assisting with our culture club
- Assisting with induction

To be considered for this role, you must have the following:

- Previous experience in administration
- Computer literacy, in particular Microsoft Office
- Strong verbal and written communication skills
- A self motivating attitude and an ability to work autonomously
- Be in the final years of an HR related degree

If you would like an opportunity to learn with a company that is in the forefront of company culture, please send your covering letter and resume through to jobs@cudo.com.au



Listed 25 Oct 2012
Advertiser: Get Pulped Media Pty Ltd



Digital Associate Producer/ Video Producer/ Developer - Student Internship

Company Profile – The Get Pulped Brand

Get Pulped Media are an Australian based start-up media company in the process of designing, developing and launching a global social networking site, targeting 16 to 28 year olds.

Positions Available

Three intern roles are available:

- Associate Producer
- Video Production Producer
- Front end developer (html, javascript, css)

To be launched in Q1, 2013, Get Pulped is a global networking channel for vibrant, outgoing, people who want to be exposed, be rated, meet other people, participate in fun challenges. Get Pulped is the internet's first community and social networking channel that focuses on everything that's fun, sexy, romantic, party-oriented and fashionable for the younger generation. It combines the interactivity and voyeurism of the internet with the emerging explosion of online video and mobile phone usage.

The Opportunity

- Enable students to gain real-world work experience and further enhance employment opportunities
- Increase students' skills and interest in careers in the digital industry
- Introduce students to professionals in the digital industry
- Potential for permanent work in the future

Get Pulped Media is looking for up to three digital media students to work with them on the development and launch of the Get Pulped brand and the management of the user base.

During this process, students will get "hands on" experience with the following:

- Development of an Digital Brand
- Brand and product development
- Viral marketing across social media sites including Facebook, Twitter, You Tube
- Working with one of Australia's largest digital agencies
- Exposure to the complete development lifecycle including, persona, wireframes, development, system integration, and testing

- Exposure to the latest social networking Web 2.0 tools and methodologies
- Exposure to email, analytics, SEO, reporting tools
- The opportunity to work on a digital start-up venture and see it through to launch

Note: This is initially a part-time role @ up to 16 hours per week and would suit a student or recent graduate studying digital media.

This is work experience only opportunity, there is no payment for service. There may be however, opportunity for permanent paid work at a later stage.

Skills required by Students (skills vary depending on which position you apply for)

We are looking for 3 students looking for a career in the digital media space as either a Producer, Product Manager, Front-end developer, Video Producer, with a passion for communication and delivering great work; on-time, on-budget and on-brief.

- An ideas person, creative thinker
- A keen interest in online, social and web marketing
- Content skills
- Understanding of online communities
- Understanding of social media sites, such as posting on Facebook, blogs, twitter
- Coming up with ideas to promote brands and companies using social media for an under 30 demographic
- Video production and editing skills
- Front end development skills (html, javascript, css)
- With account manager and project team, participate in client meetings
- Great interpersonal and communication skills
- Ability to work independently and as part of the project team to deadlines
- The ability to work independently and autonomously, without constant supervision
- Sydney based
- Ability to attend meetings in Sydney CBD
- Ability to work remotely from home
- Hours are flexible

Opportunity for students looking for a career in the digital media space as either a Producer, Product Manager, Video Producer, Front-End Developer, with a passion for Social Media.

Send your resumes stating which position you are applying for too:

Michael Taylor
Managing Director
Get Pulped Media
miketaylor023@gmail.com
+61422600922

Michael Taylor, Managing Director
Get Pulped Media
miketaylor023@gmail.com
Mobile 0422600922



-



Listed 6 Jul 2012



Internship Functions and Events - Riverlife Brisbane

You too can be part of Riverlife's award winning dynamic and fun loving team. This is a fabulous entry level internship for an energetic person interested in delivering functions, weddings and events and an opportunity to succeed in the this industry while having fun in a healthy and caring environment.

At Riverlife we are passionate about outdoor riverside functions, culture and recreation and in the heart of Brisbane, boasting Brisbane's best views of the City, the Brisbane River and the Botanical Gardens. We are the hub of a vibrant recreation precinct, situated at Kangaroo Point, Brisbane and is based in the heritage listed Naval Stores (Built 1887) and located on the Brisbane River cycle way.

The Internship role in Functions and Events is an unpaid position with travel allowance to get to and from work. 3 or 4 days a week (we can work around study and other commitments). You will be eligible to apply for the role of Functions and Events Assistant Coordinator in Spring (a Salary Position and includes weekend and evening work when required. Gross Salary \$30,000 + Superannuation).

You will learn directly from the Functions and Events Manager and develop your skills directly from them and other team members.

Duties and responsibilities include communicating with customers for event enquiries, site inspections, coordinating and setting up weddings, events and functions, cleaning and organising the facility and equipment, actively participating in event set-up and pack-down and other general task involved in running a small business. You will be part of a small management team and required to contribute to every aspect of the operation.

The successful Intern applicant must be self motivated, professional, a leader, have excellent time management and organisational skills, high attention to detail.

Preference will be given to graduates or advanced students in the the hospitality industry.

We are looking for a person with good communication and organisational skills and previous experience in the food and beverage or the hospitality industry, function centres, hotels or catering companies and a demonstrated ability to work under pressure would be an advantage.

Only apply for this internship if you have a presentable appearance, a friendly manner and you are someone who works hard and takes great pride in your work.

Immediate Internship available.

Note - Applicants without a cover letter and CV will not be considered (written applications only) and applicants will only be contacted if successful for a job interview, we thank you for your interest.

Please visit www.riverlife.com.au and www.brisbanefunction.com.au to learn more about Riverlife functions

██████ -



Listed 26 Jun 2012

Graphic Design Internship at Social Media Agency in the CBD

We are Influence Media, an innovative social media agency based in the Sydney CBD that specializes solely in Social Media Marketing. Influence Media has an exciting 3-months internship for a Graphic Designer to join our young and dynamic team at our office near Town Hall. You will produce awesome web graphics, social media pages and marketing collateral for both our company and clients.

Are you a creative and design-focused person with a passion for social media?

If the answer is 'yes', then don't miss this opportunity to join our fun agency! The successful candidate should have:

- Adobe Photoshop, Illustrator and InDesign skills
- Web Graphic Design skills and aware of the latest web design trends (Web 2.0)
- Be familiar with social media sites (Facebook, Twitter) and custom Facebook page design experience
- Basic HTML skills
- Exceptional organisational and communication skills

Your main responsibilities will be:

1. Create and design social media pages, brochures, flyers, basic web pages, event and promotional pamphlets as required
2. Prepare concepts, design briefs or any visual representation to meet the requirements of the organization
3. Manage your time and workload effectively to meet set deadlines??

What we can offer you:

1. A vibrant and funky office in the heart of Sydney Metro
2. An experienced mentor to guide you
3. Great potential for learning and growth
4. The chance to join one of the most interesting social media organisations in Australia!

The position is a volunteer position and is an opportunity to gain skills that will make you highly employable and thus is unpaid. We will however give you a reference letter and build up your portfolio for future employment. If you believe you are the right candidate for Influence Media, shoot us an email with your resume, cover letter and creative portfolio (5MB max) to: admin@influencemedia.com.au

Max
Managing Director
Influence Media

HOME. NEWS. FEATURES. TV. GALLERY. SPORT. TRAVEL. PHOTO AWARDS. MIDORI
 Job Search. Post FREE Job Ad. Signup to Daily Job Alerts.

Search

LOVE YOUR WORK

Enter keyword (s)

Any Classification Any Sub-Classification

All \$0 to \$250k+

All Aus Everywhere in Australia

FIND YOUR DREAM JOB.



	SIGN UP FOR JOB ALERTS		UPLOAD A JOB IT'S FREE		LOGIN & EDIT JOBS
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FanDependent Internship - National Tour
 FanDependent

November 22, 2012
 Internship/Work Experience
 Based in Sydney
 Applications close November 30, 2012.

Description

FANDEPENDENT INTERNSHIP POSITION 2

Annabelle's experience interning at FanDependent:

"FanDependent has been a fantastic company to intern with. Over the past 3 months, I have been doing hands-on crowdfunding, marketing and distribution research and strategising on several feature films. I have learnt how to set up, run and complete a successful crowdfunding campaign; develop and retain a fanbase through engagement on social media, direct emailing, person to person and through organisations databases; fulfilment distribution; video on demand distribution, and much more.

I developed my skills in analytics though preparing analytics reports during crowdfunding campaigns, analysing statistics, and reporting back to the team with suggested changes to help improve the campaign.

I have been overwhelmed with a wealth of knowledge from interning at FanDependent, I feel confident with the skills I have gained, that I am already consulting on two projects. I am so grateful to have had this opportunity, it literally does come once in a blue moon. You can't learn these skills anywhere else."

- Annabelle Fouchard

Digital Media Strategist who interned with FanDependent from September – November 2012.

Internship position at FanDependent for Deep Blue Sea National Tour

We are looking for an enthusiastic intern to help us run an audience-demanded distribution campaign for the documentary film *Between the Devil and the Deep Blue Sea*.

You will:

- Work with the FanDependent team and the Deep Blue Sea team to organise and manage the Deep Blue Sea National Tour to 30 cities around Australia.
- Work with the FanDependent team to manage the additional Ambassador screenings, to be hosted both privately, and by groups/schools/organisations interested in refugee advocacy
- Liaise with these groups, issue them with Screening Kits and help them to organise their screenings

POPULAR JOBS.

- Eventfinder Intern
- Journalist
- VFX Artist/Compositors NEEDED to join
- Fabrica Sales Co-ordinator/Assistant
- Photography Assistant
- Design Stylist, Couturier Internship
- Spectrum Films Internship
- Creative Graphic Designer
- Showroom Manager
- Area Manager - Gold Coast
- Communications Intern
- WANTED: WORLDS GREATEST
- Account Executive
- Discounted desk space for contra
- Senior PR Contractor

[View All Jobs](#)

- Learn how to distribute a film via VOD (iTunes, Amazon, streaming from website etc.)
- Learn how to market and distribute a film using innovative techniques
- Help implement a national PR campaign
- Help the Deep Blue Sea Team in their attempt to change the way Asylum Seekers are currently treated in Australia

Expectations:

- Enthusiastic with a passion for filmmaking and asylum seekers
- Creative
- Great attitude and team player mentality

Requirements:

- Must be either at university or a recent graduate
- Pursuing a career in film or refugee advocacy/human rights
- Able to work a min. 24 hours per week. We're flexible and happy to talk about how we can best accommodate your other commitments/studies.
- Preferably a three month internship, starting ASAP. Internship position is until at least the 18th March (last day of the National Tour).

The position is unpaid.

Contact Name - Kat O'Toole

Email - katoole@spectrumfilms.com.au

Contact Number - 02 9383 4455

[Apply](#)

MORE FEATURES.

[View All](#)

- » *Flume Talks Us Through Each Track On His Self-Titled Debut*
- » *Product Review: We Road Test Activated Almonds For Their Activating Properties*
- » *That One Time I Permanently Deleted Facebook*
- » *The Top 10 Musical Moments in Film*
- » *Voting Is Now Open For The 2012 Photography Awards*
- » *The 10 Greatest Music Documentaries Of All Time*
- » *Listening Party: Ari Vs Science And Doals Pick The Tunes*
- » *13 Scary Movies To Set The Mood For Halloween*
- » *The Most Legendary Modern Muscs*

MOST VIEWED.

- » *Eventfinder Intern*
- » *Journalist*
- » *VFX Artists/Compositors NEEDED to join our award winning VFX Team.*
- » *Fabrics Sales Co-ordinator/Assistant Sales Manager - NSW*
- » *Design Stylist, Couturier Internship*
- » *Spectrum Films Internship*
- » *Creative Graphic Designer*
- » *Showroom Manager*
- » *Area Manager - Gold Coast*
- » *Communications Intern*

FEEDBACK

Tell us what you love, Tell us what you hate
 » feedback@pedestriangroup.com.au
 Get your Videos, Photos, Art, Writing and other creative talents out to the world and our Pedestrians
 » submissions@pedestriangroup.com.au
 » [Contact the Editor](#)

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Model Management Intern
 eMG Models

October 30, 2012
 Part-time
 Based in Sydney
 Applications close December 20, 2012.

Description

Do you love fashion? Do you enjoy being around beautiful people? Are you trying to dete e model? These are all reasons that you might want to Intern for EMG Models. If you are serious about the modeling industry you will be in the running to land to internship with EMG Models. Competition is fierce our Internship program.

EMG MODELS. Is the most prestigious and most successful management company for models in Australia , setting the highest standard for worldwide beauty and fashion. We value and reward ambition, resourcefulness and innovation. We are looking to edd to our top talent with star students and current alumni eager to gain experience as well as knowledge available within the Internship Program here at EMG. We are looking for someone who is available for 2-3 days per week. This internship is for 5 months.

Position Description/Breakdown:
 The Intern for the Sydney office will provide administrative support to the entire office. This candidate will need to possess excellent communication and interpersonal skills while being extremely detail oriented. The ideal candidate will have a passion for the fashion industry with the ability to thrive in an extremely fast-paced environment.

- Someone that is passionate about fashion and entertainment
- Has an awareness of current trends and fashion magazines
- Possess an open mind and hunger for learning
- Able to work late hours, if needed.
- Must have excellent people skills
- Organization and prioritizing skills
- Ability to multi-task without losing focus
- Motivated and able to take initiative
- Creative and innovative
- Must have excellent communication skills on the phone and in person
- Must be good at asking questions
- Must have excellent follow up
- Must be capable of thinking on their feet and have a sense of urgency
- Great Problem Solver
- Must be good with a camera and be photo savvy

Qualifications:
 Must be computer Savvy and have well rounded computer skills (ie: Photoshop, excel/databases, Microsoft Office, etc.) and have MAC proficiency. Please be prepared to submit Professional references as per requested. This is an unpaid internship.

Please email your CV to info@emgmodels.com

Contact Name - Triann
 Email - info@emgmodels.com
 Contact Number - 83022900

[Apply](#)

POPULAR JOBS.

- Eventfinder Intern
- Journalist
- VFX Artists/Compositors NEEDED to join
- Fabrics Sales Co-ordinator/Assistant
- Photography Assistant
- Design Stylist, Couturier Internship
- Spectrum Films Internship
- Creative Graphic Designer
- Showroom Manager
- Area Manager - Gold Coast
- Communications Intern
- WANTED: WORLDS GREATEST
- Account Executive
- Discounted desk space for contra
- Senior PR Contractor

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INTERN WANTED FOR LEADING FASHION DISTRIBUTION AGENCY
 NMI Pty Ltd

November 29, 2012
 Internship/Work Experience
 Based In Sydney
 Applications close December 07, 2012.

Description

(CHIPPENDALE NSW)

NICK MASCITELLI IMPORTS is a leading fashion distribution and manufacturing powerhouse responsible for introducing many high-end fashion brands to the AUST and NZL market. We are looking for a bright, fashionable and creative intern - Please note this is an unpaid position but a chance to gain invaluable experience, contacts and a reference upon internship completion.

Candidates desired skills:

- Well organised and passionate about the fashion industry
- Proficient Apple and PC user (Photoshop and Excel are essential)
- Strong attention to detail, fast learner and 'can do' attitude
- Excellent communication
- Photography skills
- Be a current student studying Fashion or relevant course at university, TAFE or college.

Candidates will be required to:

- Assist Graphics department (shooting products)
- Assist in the showrooms with sample management and send outs
- Assist PR / marketing department
- Assist footwear designers and sales teams

DATES REQUIRED: immediate start with flexible days

PLEASE NOTE THIS IS AN UNPAID POSITION HOWEVER TRANSPORT AND LUNCH WILL BE REIMBURSED.

Email - reception@nmi.com.au
 Website - www.nmi.com.au

Apply

POPULAR JOBS.

- Eventfinder Intern
- Journalist
- VFX Artists/Compositors NEEDED to Join
- Fabrica Sales Co-ordinator/Assistant
- Photography Assistant
- Design Stylist, Couturier Internship
- Spectrum Films Internship
- Creative Graphic Designer
- Showroom Manager
- Area Manager - Gold Coast
- Communications Intern
- WANTED: WORLDS GREATEST
- Account Executive
- Discounted desk space for contra
- Senior PR Contractor

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November 28, 2012
Internship/Work Experience
Based In Sydney
Applications close December 28, 2012.

Description

GET IN AT THE GROUND FLOOR OF A FAST GROWING DIGITAL START-UP!

SKUVantage is a new and exciting company that services some of Australia's largest retailers, like Coles and Myer.

They are looking for someone who is passionate about marketing who is proactive and hungry to learn and grow as part of their team. You will be working close to the founder of the business who was used to run digital for Woolworths, so you will learn a great deal, but be expected to take ownership of the projects you are given and run with them.

Projects you will be responsible for include: creating web pages for SKUVantage's products, creating videos and print materials for marketing purposes. Generating PR with online publications like PowerRetail and running events for clients.

Based in Brookvale (15 mins from Manly, 30 mins from Wynyard), you will enjoy working in a casual, start-up environment with a driven team who will reward you for your hard work and contribution to the business.

You may be trying to break into the digital industry, be a mum who is looking to return to the workforce or someone who is willing to risk a little salary at first to get into the right company.

For the right person, a full-time job offer in the future is very likely.

Contact Name - Daniel Roberts
Email - jobs@skuvantage.com
Website - www.skuvantage.com
Contact Number - 0438478153

Apply

POPULAR JOBS.



- Eventfinder Intern
- Journalist
- VFX Artist/Compositors NEEDED to Join
- Fabrics Sales Co-ordinator/Assistant
- Photography Assistant
- Design Stylist, Couturier Internship
- Spectrum Films Internship
- Creative Graphic Designer
- Showroom Manager
- Area Manager - Gold Coast
- Communications Intern
- WANTED: WORLDS GREATEST
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Polite in Public Internship
Polite In Public

November 26, 2012
 Part-time
 Based in Sydney
 Applications close February 26, 2013.

Description

Polite in Public is currently seeking someone to take up the opportunity of an unpaid internship over the next 3 months this summer - brief below.

Polite in Public is what marketing always wanted to be - a polite way to chat to consumers without freaking them out or telling them what to do. We offer custom-made experiential photography solutions that disseminate and track brand interaction via social-media channels.

Working with the likes of CLEO magazine, Kiehl's and Smirnoff Vodka at events including Future Music Festival, Maxim Magazine's Launch Party and the 'American Pie: Rounion' red carpet premiere, we're not your average event photography agency...

We're seeking a savvy, switched-on intern to help us out in the office 2-5 days a week over a 3 month period with the possibility of future work. In this position you also responsible for carving your own role - if deemed competent your responsibilities will continue to increase.

To qualify, we're looking for someone with:

- Strong communication skills both verbal and written
- An interest in the marketing/events/PR fields
- A outgoing, yet professional personality
- Ability to multi-task
- Ability to finish things, follow through, follow up and ensure that your cross your t's and dot you i's

Tasks will include:

- General Event management including logistics and staffing
- Sourcing props for events + making props for events
- General admin duties
- Assisting the operator at events
- Helping with event preparation

If you feel you match the above description and are interested can you please email a cover letter and CV to tosangeeta@politeinpublic.com.au

Contact Name - Sangeeta
 Email - sangeeta@politeinpublic.com.au

[Apply](#)

POPULAR JOBS.

- Eventfinder Intern
- Journalist
- VFX Artists/Composers NEEDED to join
- Fabrics Sales Co-ordinator/Assistant
- Photography Assistant
- Design Stylist, Couturier Internship
- Spectrum Films Internship
- Creative Graphic Designer
- Showroom Manager
- Area Manager - Gold Coast
- Communications Intern
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Content Writer
girlpower

November 26, 2012

Part-time

Based in Sydney

Applications close December 05, 2012.

Description

We are looking for a digital writer who is confident and capable of producing fun, interesting, well-researched pieces for our blog. You must be interested in women, business, fashion, beauty and food. The ideal person will be able to research current topics rewrite press releases, attend some events and put together compelling content. Ideally it would be good if you had your own camera to take images. This is a sophisticated audience and we would want someone who understands how to communicate with this audience. All copy and content will be edited and guidelines provided but you must be able to think on your feet.

You will also be required to attend girlpower radio interviews on a Wednesday at 5pm in Paddington and create good interview content based on who is interviewed and the questions.

You will be able to work from home and will be required to attend a meeting once a week on a day that is suitable some days may be a Saturday morning.

You will also be able to attend the girlpower events and participate in the 2013 calendar of events, which are set to be great fun.

This is a fun and easy internship where you will be exposed to the current business environment that directly related to women and topics that affect them. There is a possibility that this could lead to a paid role if the candidate is good and shows initiative.

If you are interested in applying please write a short (no more than 400 words) piece using the title What's Hot! And email this to natascha@giripowersydney.com.au by 5 December 2012 with a cover letter and a short CV.

Contact Name - Natascha

Email - natascha@giripowersydney.com.au

Website - www.giripowergoddess.com.au

Apply

POPULAR JOBS.



- Eventfinder Intern
- Journalist
- VFX Artist/Compositors NEEDED to join
- Fabrics Sales Co-ordinator/Assistant
- Photography Assistant
- Design Stylist, Couturier Internship
- Spectrum Films Internship
- Creative Graphic Designer
- Showroom Manager
- Area Manager - Gold Coast
- Communications Intern
- WANTED: WORLDS GREATEST
- Account Executive
- Discounted desk space for contra
- Senior PR Contractor

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Online design is at the cutting edge of communications and is undoubtedly the most exciting industry to work in.

Best fit candidates will be bright university students willing to contribute creatively and perform quality unpaid work to build up their experience base. References will be supplied for all successfully completed internships.

For this role you need to be creative, resourceful, self-managing and have excellent design skills. It is best suited to Design and Media students who already have strong Photoshop skills.

Where possible, please include a portfolio with your application. Applications without a cover letter will not be considered.

REQUIREMENTS

At Web Profits, we seek only the best Interns. You must be able to deliver on the below selection criteria:

You are an undergraduate student

You have worked part-time, with at least one job being longer than 6 months

You have the ability to work both autonomously and effectively

You're computer literate and understand and use the internet regularly

You have strong design and communication skills

You are willing to learn, work hard, help the team and have fun along the way

You must be available to work the equivalent of 2 days per week for a minimum total of 60 work days. Note you can work more days per week or over the holidays to shorten the internship duration.

Please note that only successful applicants will be contacted.



40 Day Human Resources Internship- Mentoring & Real Client Work & Great Young Team

Lead Creation is a young, dynamic team working at the leading edge of social media and internet marketing. We help our clients generate qualified sales leads for their businesses.

Our team is currently looking for a young, enthusiastic **human resources intern**, who is passionate about **HR** and is looking to work on real organisation and client projects.

The role is best suited to a human resources or business student who wants to gain experience in HR, in recruitment, HR admin and client work. This position will involve recruitment, induction, policy and procedure, administration and management, client liaison and general office duties. You must be an organized and hard working individual, with good written and verbal communication skills. Competency with the Microsoft Office Suite and the internet is preferred. Good telephone etiquette is an advantage for this position.

We want the best and the brightest interns working with us. The requirements for this internship include:

- Currently studying at university (undergraduate level).
- You have worked part-time while at school/university. At least one of your jobs must have been for longer than 12 months. Your employers in these jobs will be contacted at a later stage to verify your experience there and your commitment to them and their business.
- You have the ability to work both autonomously and effectively within a small team.
- You must be available to work a minimum of 2 days (one day being Tuesday) per week for a total of 40 days.
- Please state in your cover letter the days you are available, (they may include half days).
- You have very strong written and oral communication skills and attention to detail.
- You have a very strong work ethic and are eager to learn.
- You're computer literate and competent with technology.
- Familiar or have an understanding of webinars and feel comfortable using them.
- Most importantly, you are willing to learn, work hard, help the team and be reliable.

You must be available to work the equivalent of 2 days per week for a total of 40 days – though you can work more days per week if you like to complete the internship earlier.

***Please note that this internship is an unpaid internship, and will help you gain valuable skills in the HR field.**

APPLICATIONS

Please send your resume and a short covering letter (addressing all the above criteria) in a single word document to Human Resources on:

Journalism internship

- Flexible timetable (2-5 days per week)
- Learn from experienced journalists
- Fantastic experience

We're a publishing company, looking for smart, savvy, enthusiastic aspiring journalists to participate in our volunteer internship program.

Benefits of the role:

- flexible timetable (2-5 days per week)
- learn from experienced journalists
- convenient St Leonards location
- receive valuable work experience
- work across a variety of consumer and B2B titles
- get your work published

The role involves:

- assisting journalists to gather research material
- basic news writing
- sub-editing
- collating research into reports
- learning about print and online publishing

The successful candidate will be:

- smart and professional

- interested in business and finance journalism
- enthusiastic, with a can-do attitude
- available between 2-5 days per week for at least 6-10 weeks

Testimonial

"The Key Media internship program helped me realise where I want to go with my journalism career. I was mentored by a Walkley nominated journalist, had stories published for the first time, and received invaluable and practical feedback on my writing."

(Stephanie, editorial intern, 2011)

About Key Media

Key Media delivers world class content through various multimedia channels including print, online and in person.

The organisation's products operate across key business verticals including Financial, Property and Human Resources, and bring product providers and business communities together through print media, in person and online. Key Media has an unquestioned reputation for delivering high quality, timely information in whatever format best suits our customers.

In less than a decade, Key Media has grown from the launch publisher of a single B2B magazine to a global business media company with an ever-growing portfolio of market leading products.

Creative Technologist - Internship

The Role:

Explore innovative and people-centric uses of technology in the broader context of communication, humanity, culture, business and brands.

Essentially this role requires you to sketch in technology and offer insight and ideas to the broader DTDigital team, which lead to innovative, tangible and commercially effective solutions for our clients.

Desired Experience:

- Electronics rapid prototyping - Arduino, Freetronics and beyond!
 - Software rapid prototyping - Processing, Open Frameworks, MaxMSP, PD and beyond!
 - Physical rapid prototyping - laser cutting, 3D printing, CNC routing and basic model making.
 - Installations in public and gallery spaces.
 - Develop an understanding of the business needs and objectives of clients.
 - Work with creative teams, designers and developers to deliver tangible marketing solutions that have a positive impact on our clients businesses.
 - Support and educate DTDigital team members on innovative business models, cultural trends and relevant use of technology in marketing and advertising.
 - Play a role in the development of the new DTDigital Rapid Prototyping Lab.
 - Present interesting and innovative applications of technology and user experience to the DTDigital team on a regular basis (providing a source of inspiration and information)
 - Research trends in technology, human behaviour, advertising and marketing.
- Please note: this is an unpaid internship, initially for 1 - 2 days per week

You've got a bright future. Now you need a jumping-off point. Verizon internships are the place to start. Where you can put your education into action. Gain the competitive edge. Showcase your talents. Shine.

Verizon internships offer you the chance to channel your drive and enthusiasm. Putting you front and center. Working on high-impact projects while you learn the inner workings of one of the world's most connected companies.

About Verizon :

Verizon Business is a leading provider of advanced communications solutions to enterprises and governments. With offices in 75 countries, across six continents, we provide mission-critical communications services for organisations worldwide, including 94% of Fortune 500 companies.

In Australia – we are a leading communications, IT and security solutions partner to business and government, with one of the world's most connected IP networks. We're innovators.

We're consultants. And we've been providing networked solutions to Australian businesses and government since 1994. We have invested heavily in our IT infrastructure here and run commercial, government and security operations data centers throughout the country.

About the Internship:

Our Internships are open to full time students who are currently enrolled and studying at an Australian University in a technology related degree. The length of engagement can be up to 12 months– we can even be flexible on days and hours depending on your availability. **If you have studied any Security or Networking certifications – it would certainly assist your application.**

If you possess the required skills and are looking to join a global leader in the communications industry, we welcome you to apply online.

2012 Internship Opportunities with the Walkley Foundation

The Walkley Foundation is the professional development arm of the Media Entertainment and Arts Alliance (MEAA). The foundation administers the Walkley Awards, Australia's most prestigious accolades for journalism, and also organises training and development programs for journalists and other media professionals.

Who we are looking for?

Internships are open to third and fourth year students with an events management, public relations or journalism tertiary focus. If you are in your final year, are passionate about Australian journalism, have a can-do attitude and a variety of skills you're keen to hone, we want to hear from you!

What will you work on?

Depending on the time of year in which an internship falls, interns assist on a variety of projects with the marketing, communications and event operations for our key program areas including:

- **Recognising Excellence: The Walkley Awards Program** (includes Young Australian Journalist of the Year, Super Student Award and the annual Walkley Awards for Excellence in Journalism)
- **Community Building and Networking: Conferences Program** (includes our annual Public Affairs Conference, Freelance Conference and Media Conference)
- **Photography Program** (includes the annual Nikon-Walkley Photo Exhibition national tour, Art & About and our annual Slide Nights in Sydney and Melbourne)
- **Training & Development Program** (a series of national training courses focussing on the online social media skills our members need now and for the future)
- **Promoting Press Freedom** (centred around our annual Australia Press Freedom Media Dinner)
- **Encouraging Long-Form Journalism: The Walkley Book Program** (includes the Walkley Book Award and collaboration with writers' festivals throughout Australia and the Asia Pacific region)

These programs are developed for MEAA members who comprise journalists, photographers, public affairs professionals, freelancers and other media representatives.

The Walkley Foundation also produces a bi-monthly publication *The Walkley Magazine* and, depending on the timing of an internship, interns may have the opportunity to attend production meetings and write newsbites for print and our website.

How long is an internship?

A standard internship is three weeks, full-time in our Sydney office, however there are opportunities for longer term placements. Internships are unpaid, however successful applicants from interstate may apply for a living allowance of \$200/week for a maximum of three weeks.

So, what are you waiting for...

Email us with:

- Your current CV
- Your dates of availability for the internship
- A 100-word statement about why you would like to work at the Walkley

Internship - Digital and Social Media

Looking for digital media and social media experience? The Walkley Foundation is offering a new Digital Media Internships covering a wide range of areas: social media management; event promotion and coverage; content management; website production; video recording and editing.

Who we are looking for?

Internships are open to third and fourth year students (of journalism, communications, PR, marketing or related fields) with a focus on digital media. If you're proactive, passionate about Australian journalism and keen to gain some genuine work experience, we'd like to hear from you. An interest and involvement in social media is also required.

What will you work on?

The Digital Media Intern will assist with social media management, content promotion and event marketing through a variety of tasks.

Key to your success will be flexibility: the ability to complete a wide range of tasks which will vary from day to day, from uploading articles and resizing pictures to scheduling tweets and writing website copy – no two days will be the same.

Assisting with live coverage of Walkleys events will have you tweeting, operating a video camera, recording sound and taking photographs for our website and magazine.

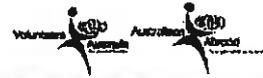
Broad technical competence is a must – comfortable performing a wide range of tasks on a PC, with digital and picture cameras. Good copywriting skills will be considered favourably, and a friendly and professional "can do" attitude will serve you well.

How long is an Internship?

A standard internship is three weeks, full-time in our Sydney office, however there are opportunities for longer term placements. Internships are unpaid, however successful applicants from interstate may apply for a living allowance of \$200/week for a maximum of three weeks.

Email us with "Digital Media Intern" in the subject line, and include:

- Your current CV
- Your dates of availability for the internship
- A 100-word statement about why you want to be one of our Digital Media Interns



Intern Corner

Home / Intern Corner / Vacancies & News

Latest Internship Vacancies

Please register if you are interested in applying for one of the below internship placements by quoting the Internship Reference Number in the Register Online form

Note: We cannot guarantee that you will be accepted for one of the below placements as our selection process is competitive and merit based. Candidates who do not meet the requirements for the requested internship position might be able to apply for an internship through our normal processes – in this case we will negotiate an internship on request which will take approximately 3-4 months.

Current vacancies (not all our vacancies are listed below, please contact us for more information).



Human Resources Internship in Sydney (20/04/2012)

MG12031

REGISTER TODAY

Sydney
Unpaid

3 to 6 months – Start date : ASAP

Enjoy a warm welcome, and stunning views of Darling Harbour and the city skyline, proudly located in one of the world's great waterfront destinations. There is always something happening in Darling Harbour, only a short stroll away. Concerts, street performers, family fun days or dina al fresco at one of the many restaurants, bars and cafes.

Tasks

- Will be required to work within a busy Human Resources department, tasks will involve a variety of Human resource administration

Requirements

- BA or studying Human Resources or Business Management with an interest in human resourcing.

Marketing Internship in Brisbane (20/04/2012)

MW12008

REGISTER TODAY

Brisbane

unpaid - accommodation offered

3 to 6 months – Start date : ASAP

This establishment is gaining a reputation for "raising the standard of budget accommodation to a new level of quality". It's not just the friendly service, but also the things that you don't see.. And close to transport and the city.

Tasks

- The successful applicant will be expected to hae a creative input on most facets of the business.
- Must be able to stay on task from conception to execution of event.

Requirements

- BA or studying Marketing, public Relations, events management or other related field.

Marketing Internship in Sydney (11/04/2012)

MG12041

Sydney
Unpaid

3 to 6 months – Start date : ASAP

For over 40 years, this company has been building a solid reputation in accurate and timely resources, by assisting Australian professionals to establish and maintain their practices and business.

Tasks

REGISTER TODAY

- Provide support with direct marketing campaign.
- Database management.
- Updating online store.
- Creating marketing web pages.
- Assist with marketing conferences/events.
- General Administration.

Requirements

- BA or studying marketing or similar.

IT Internship in Sydney (11/04/2012)
MG12040

REGISTER TODAY

Sydney
Unpaid
3 to 6 months – Start date : ASAP

This company is a Sydney based full service production house covering all aspects of high quality media production, custom and online publishing, design and print. Their team has produced print advertising and editorial photography for fashion, film and entertainment clients in Australia and overseas.

Tasks

- Knowledge of graphics and proficient in Photoshop software and layout software like Illustrator/In Design.
- Photo Retouching, graphic layouts for flyer/magazine/brochure/coffee table book
- Some knowledge of web developing skills – dreamweaver/wordpress/html/php/joomla – files uploads and web formats.
- Downsizing of photos/files. Mac preferred

Requirements

- BA or studying web development, graphic design or other related field

Advertising, Art & Media Internship on the Gold Coast (04/04/2012)
MW12007

REGISTER TODAY

Gold Coast
Unpaid
3 to 5 months – Start date : May 2012

This TV Production company want to share with you some of the great Travel experiences that can be enjoyed in Austrelle.

Tasks:

- 60% will be on 'film in site' location – all accommodation, meals etc will be provided with the rest of the crew.
- 40% in the office developing communications, marketing, emag and other associated tasks.

Requirements:

- BA or studying Film and Television or Media Production or other related field.

Marketing Internship in Sydney (29/03/2012)
MW12005

REGISTER TODAY

Sydney
Unpaid
3 – 6 months, Start Date: ASAP

This not-for-profit organisation's vision is to save the lives of all children suffering from cancer.

Tasks:

General Administration and data entry, survey reporting and analysis, investigation of webpage, managing photo/AV library, assist with social media strategy, stakeholder mapping and researching, researching prospective donors and corporates.

Requirements:

BA or studying marketing, business management or other related field.

IT Internship in Sydney (29/03/2012)
MG12026

Sydney
Unpaid
3 – 6 months, Start Date: ASAP

REGISTER TODAY

This company promotes a work culture that is fun and exciting that embraces the creative work styles. There isn't a formal management structure instead everyone has roles and responsibilities and we setup virtual teams based on the projects and tasks they have.

Requirements:

A passion for technology and mobile application development, familiar with Apple devices. Interested in social media and design, creative and innovative, self starter and learner. excellent team worker

BA or studying Information Technology or similar.

Tourism / Events Internship – Sunshine Coast (29/03/2012)

MG12025

REGISTER TODAY

Sunshine Coast

Unpaid

3 – 6 months, Start Date: ASAP

This business is an award winning tourist attraction and function venue on the beautiful Sunshine Coast.

The internship is unpaid but accommodation and living expenses will be paid for by the company.

Tasks:

Customer service and retail sales. Organising, planning and coordinating events, assisting with set up and 'clean up' from events.

Requirements:

Strong interest in tourism and/or events management/planning

Accounting / Finance Internship in Sydney

MG12003

REGISTER TODAY

Sydney

Unpaid

3 – 6 months, Start Date: 1 June 2012

This company has some very distinct corporate values. This is what guides their behaviour towards employees, customers and business. The values are honesty, entrepreneurship, responsibility and quality.

Tasks:

Will be required to complete administration and accountancy tasks. Must be committed and respectful of deadlines.

Requirements:

Must be studying Accountancy or similar, have Microsoft office experience, good English both written and verbal.

Accounting / Finance Internship in Sydney

MG12024

REGISTER TODAY

Sydney

Unpaid

3 – 6 months, Start Date: ASAP

This company has a long and proven history of delivering comprehensive and flexible financial solutions to many of the world's largest and most sophisticated institutional investors.

Tasks:

Assist in the delivery of accurate and timely investment analytics information, solving data or process issues, actively participating and adding value to the training and committees of the organisation, assist in data loads, data analysis and data reconciliation, assist in stakeholders queries, offer assistance to others to achieve results

Requirements:

BA or studying accounting/finance or similar

Events Management & Marketing Internship in Sydney (29/03/2012)

MG12012

REGISTER TODAY

Sydney

Unpaid

3 – 6 months, Start Date: ASAP

This company is involved in hundreds of promotions, ranging from flyer drops to national product launches. Its promotional staff range in looks and ages, with many of their staff being from Australia's top model agencies.

This organisation has contributed to and enhanced many corporate, charity and social events by providing exceptional promotional staff as well as creative campaign concepts

Tasks:

Event Organisation, Personal Assistant Tasks, Event Management duties as required, Account Keeping, Computer Management, Assist with secretarial tasks.

Requirements:
BA or Studying Event Management/ Marketing/Promotions or similar Must have very strong administration skills

Marketing Internship in Brisbane (29/03/2012)
MG12021
REGISTER TODAY

Brisbane
Unpaid
3 – 6 months, Start Date: ASAP

This organisation is a college located in the centre of Brisbane. They cater for International students who are seeking a personal level of service with a friendly, relaxed atmosphere and professional, caring staff.

Tasks:
Develop a strong and long-term social media strategy for the college. Analyse and understand the requirements and goals of the college's social media strategy. Develop online activities to engage with the target market, taking into account the cultural diversity. Explore and suggest further social media channels to complement activities on Facebook and website. Propose a clear guideline/schedule for future online activities.

Requirements:
BA or studying marketing/Communications or other field which relates.

IT Internship in Brisbane (27/03/2012)
MW12006
REGISTER TODAY

Brisbane
Unpaid
3 – 6 months, Start Date: ASAP

This company is a leading expert in social media development, management and strategy. They love getting social with social media. It's fun, it's full of potential, and it's undoubtedly the best thing you can do right now to get your business motorring.

Tasks:
Must know HTML, CSS, JavaScript, Facebook application, Web Architecture WordPress. Project will be turning a JNG or PNG design into a functioning web page

Requirements:
BA or studying information technology/web design or related field. Must have excellent English and a 'can-do' attitude.

Admin Internship in Legal Industry
MG12033
REGISTER TODAY

Melbourne
Unpaid
3 – 6 months, Start Date: ASAP

This company assists its clients to negotiate, structure and complete financial transactions by applying a commercial 'can do' attitude to produce results which exceed our client's expectations.

Tasks:
Assisting with all administration tasks within a busy legal environment.

Requirements:
Good administration skills, an interest in the legal field and excellent English.

Legal / Law Internship in Melbourne (27/03/2012)
MG12032
REGISTER TODAY

Melbourne
Unpaid
3 – 6 months; Start Date: ASAP

This company assists its clients to negotiate, structure and complete financial transactions by applying a commercial 'can do' attitude to produce results which exceed our client's expectations.

Tasks:
Preparing first draft of legal documents, Assisting lawyers, attending meetings, lodging documents, Research and article writing and a variety of other tasks.

Requirements:
BA or studying Law. Must have excellent English

<p>Logistics Internship in Melbourne (27/03/2012)</p> <p>MG12015</p> <p>REGISTER TODAY</p>	<p>Melbourne</p> <p>Unpaid</p> <p>3 to 6 months – Start date : ASAP</p> <p>This company is an international leading supplier of machinery, software and technical services. The company provides a wide range of services including sheet metal machinery, CNC machine tools, vertical storage systems, spare parts and fabrication machinery.</p> <p>Tasks</p> <ul style="list-style-type: none">● Freight Imports for all spare parts orders,● Machine Logistics processing work,● Working with Project,● Manager for local machine transport,● Basic Admin assistance,● Possibly some project work on logistics companies. <p>Requirements</p> <ul style="list-style-type: none">● BA or studying Logistics, Import/Export or similar
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<p>Human Resources Internship in Sydney (27/03/2012)</p> <p>BH12001</p> <p>REGISTER TODAY</p>	<p>Sydney</p> <p>Unpaid</p> <p>3 to 6 months – Start 01/06/2012</p> <p>Experience an energising retreat in the centre of the city, surrounded by Sydney's most enticing fashion retailers and restaurants. We're also located only minutes from the Sydney Opera House, Darling Harbour, NSW Art Gallery, and Sydney Harbour.</p> <p>Tasks</p> <ul style="list-style-type: none">● Answering phones and taking messages,● Assisting in the induction process for new associates,● Assisting in solving associations and managers inquiries● A variety of general HR administration including, reference checks, updating training materials, payroll paperwork, auditing. <p>Requirements</p> <ul style="list-style-type: none">● BA or studying Human Resources or similar
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Posted 22 Apr 2012
It's Internship/Work Experience
Based in Australia

Description

PLEASE NOTE THIS IS AN UNPAID INTERNSHIP

We are an on-line marketing company who requires a range of writing assignments to be completed.

This is a 6 month internship where you can work from your own computer at home.

We will communicate through email, skype and where necessary phone.

You can work your own hours, so long as required deadlines are met.

Writing Assignments:

- Content for Web Pages
- Articles for on-line distribution
- Blog Articles

We have a range of clients in a range of industries including:

- Health
- Weight Loss
- On-line Marketing
- Gift Ideas
- Phone Sales
- Dating

We require a casual, chatty, humorous, friendly style of writing.

Please provide a cover sheet and a sample of work that demonstrates the required style to trish@seowebmagic.com.au

Applications close 6th May 2012

Applications close 6 May 2012.
Contact Name - Trish Riedel
Email - 61408528161
Fax - u.b.s@bigpond.com
Website - www.seowebmagic.com.au



**Marketing Internship
Phoenix3 Entertainment**

Posted 17 Mar 2012
It's Internship/Work Experience
Based in Sydney, Australia
This is an unpaid position.

Description

Phoenix3 is an innovative company in the film and festival industry. This exciting role is responsible for maintaining and enhancing the IT and digital media infrastructure and its innovative off-shoots as well as 'e-marketing' of Phoenix3. The role involves management of the company websites, integration with digital platform. There will be significant responsibility for developing and managing a fan base through social media channels such as our Facebook, Twitter and YouTube sites as well as other promotional tools.

This is a challenging internship that offers broad experience, working with talented people on innovation in converging film, digital media and mobile technology. We offer significant exposure and experience in a future-looking business that is making waves.

The internship is part-time (1-2 days a week), unpaid – 6 month minimum, starting immediately. There is a 3 months initial probation period.

Role specifics:

1. Management of Phoenix3 web platforms
2. Graphic designs where required.
3. Managing Admin and Data entry
4. Working on marketing and social media strategies - such as developing and implementing new ideas on building and engaging a Facebook and Twitter fanbase Managing interactions with festival partners and stakeholders where appropriate Engage with other other online forums/communities
5. Strong writing and proof reading skills

Skills and Capabilities:

- Experience in developing and managing interactive Content Management System based website
- Expertise in integrating films/ videos on a website
- Substantial knowledge of Facebook and Twitter tools and applications
- Proficiency with Photoshop, or other media creation tools
- Self-driven, enthusiastic and independent. Flexible to take on new challenging tasks

Other requirements:

- Able to work independently from home
- Able to work flexible hours and after hours where required (nights and weekends)
- Able to use multiple channels of communication including Skype
- Must have own transport and laptop/ PC

Highly desirable:

- Experience or exposure in the film industry / film festivals
- Experience or exposure to the mobile phone industry
- Experience or exposure to digital media projects
- Web design or Graphic design experience and knowledge of Adobe Suite software

Applications close 31 Mar 2012.
Contact Name - Renata
Fax - renata@phoenix3.com.au



Listed 19 Apr 2012



Future Scientist – Intern

- Internship
- Great Companies
- Flexible Hours

Various assignments are available for University Undergraduates in Perth based laboratories on internships. We are looking for people who are studying towards qualifications within the following areas Food, Mineral and Chemical.

The right placement can give you invaluable practical experience, the chance to work with leading scientists and networking opportunities that are essential to working in the sciences today. But the benefits go far beyond the internship itself. In some cases, companies often retain their interns on a part-time basis during the academic year and you will find that your industry experience will make you more marketable following graduation.

You'll have more professional choices, be immediately productive and be far more likely to achieve a higher starting salary. What's more, because companies often offer permanent positions to students who have participated in their Internship programs, there's also the possibility of a job with your preferred company after graduation.

Please apply on-line or contact Merren Roberts on 08 9229 1888 for further information. Please include a brief cover letter outlining your availability

Due to the large amount of candidates applying, only short listed candidates will be contacted. All other CVs will be placed on our database for possible future opportunities

Email: Please click the 'Apply Now' button below.



RECRUITMENT | OUTSOURCING | CONSULTING

kellyscientific.com.au

KELLY
Talent at work

Enter keywords: Any Classification All Australia More search options

\$0 to \$200k+ Any Sub-Classification Everywhere in Australia SEEK

Trainee Systems Engineer Private Advertiser



Trainee Systems Engineer

28 Feb 2012

Location Melbourne

Work type Part Time

Classification Information & Communication Technology Help Desk & IT Support

Like this job?

save this job

print

add notes

Share this job

via email

on Facebook

on Twitter

(does your boss follow you?)

Want more jobs like this?

email me similar jobs

more jobs by this advertiser

Something fishy?

report this job to SEEK

APPLY

Related SEEK Learning Courses

MCSE on Windows Server 2003

Bachelor of Technology (Computing Studies)

Bachelor of Technology (Information Systems)

Choose from our nationally recognised courses

Choose an occupation

Trainee Systems Engineer

Part Time Immediate start

An exciting opportunity to join an IT Managed Services provider who specialises in developing tailored IT solutions for small to medium businesses is currently available.

Your Duties

- Work with senior engineers in implementation of Windows Servers, SBS, Exchange, Networks and Virtual environments.
- Manage tickets, job priorities and process incoming calls, ensuring SLA's are met
- Provide level 1 helpdesk support.
- Workbench repairs of Desktops, Servers and Laptops
- Travel to client sites to provide level 1 onsite support

Skills and Experience

- Ability to troubleshoot and install routers, modems and switches
- Ability to troubleshoot computer hardware issues
- Troubleshooting and installing Windows Operating Systems
- Skills in troubleshooting Microsoft Office suite including configuration of Outlook
- Knowledge of Active Directory, MS Exchange Server, Firewalls, VMware, Anti-virus and backup software, Terminal servers and VPN environments is an advantage
- Microsoft certifications and Tertiary studies in the field of IT will be considered highly
- CISCO certifications and experience will be an advantage
- Exceptional communication skills is a MUST

This is an unpaid role that runs for 3 Months. A generous travel allowance is provided.

In your cover letter outline why you are interested in doing an unpaid trainee-ship for 3-6 Months.

Must have own car.

Graduates and students Welcome.

You must have the right to live and work in this location to apply for this job.

APPLY

Be careful! Don't provide your bank or credit card details when applying for jobs

Enter keywords: Any Classification All Australia More search options

\$0 to \$200k+ Any Sub-Classification Everywhere in Australia SEEK

Appendix I

Internships at International Organisations

INTERNSHIPS AT INTERNATIONAL ORGANISATIONS

SUMMARY

Organisation	Duration of internship	Paid?	Other
ILO	3-6 months (6 month maximum). Full-time.	Stipend for basic subsistence if internship not otherwise funded	
ICC	3-6 months (6 months maximum). Full-time.	No. Some financial assistance available for those most in need.	Selected interns / visiting professionals are eligible for 2½ days leave per month, subject to their supervisor's approval.
UNHCR (in Canberra)	Minimum 3 months (possibility of extension; full-time.	Unpaid. No provision for travel, living and accommodation costs.	
UN (including UNDP, UNICEF, UNFPA, UNHCR, UNEP, UNOPS)	2-6 months	Unpaid.	Some agencies seem to require enrolment in Masters/PhD programme for eligibility
World Health Organisation	6 weeks-3 months (max extension to 24 weeks)	Unpaid. All costs of travel and accommodation responsibility of intern/sponsoring institution	Require enrolment in graduate degree; WHO Interns are <u>not</u> eligible for appointment to any position within WHO for a period of three months following the end of their internship. Any employment with WHO at that point in time shall be subject to established recruitment and selection

			procedures.
Human Rights Watch	No general set period – dependent on vacancy. Examples included ‘minimum six months’; not all were full-time though.	Usually unpaid	Some lunch/travel costs may be reimbursed; academic credit available.
Amnesty International (AU)	Not full time (currently advertised internships require either 20 hours per week or 3 days); currently advertised for four-month periods.	All currently advertised internships are unpaid.	
Amnesty International (world-wide)	Minimum 3-6 months	Unpaid	Will cover up to £6.50 per day for travel and £4.50 for lunch expenses. Fact sheet emphasises that internship does not guarantee entry into paid work.
UNESCO	1-4 months	Unpaid	Emphasised that is not a preliminary step to employment with UNESCO
UNICEF	Minimum 6 weeks, maximum 16 weeks; mostly full-time.	Unpaid.	
International Red Cross	Occasionally hires interns for specific posts as advertised. One currently advertised for 12 months.	Paid.	