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PLT Placements and the Fair Work Act

*Professor Andrew Stewart
Adelaide Law School*

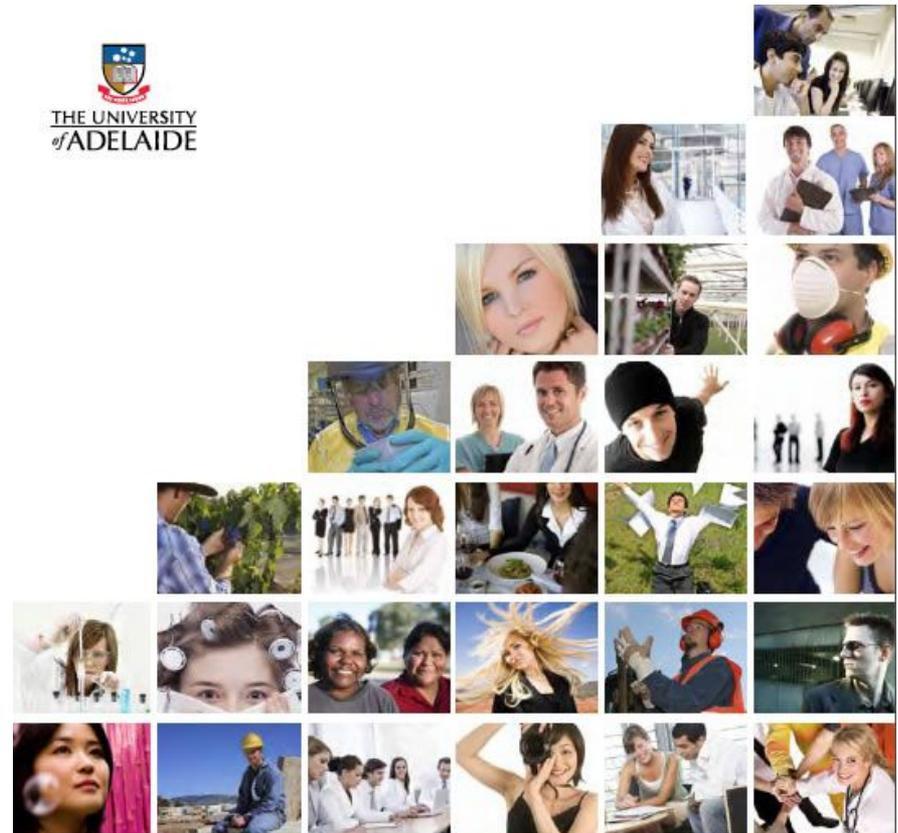
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Overview

- Report for Fair Work Ombudsman (FWO) on unpaid work experience
 - ❖ background
 - ❖ key findings
 - ❖ implications for PLT placements
 - ❖ recommendations and outcomes from the report

Experience or Exploitation?

- Report commissioned by FWO
- Released in Feb 2013
- Available from www.fwo.gov.au/unpaidwork



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

Experience or Exploitation?

Andrew Stewart and Rosemary Owens
Adelaide Law School

Report for the Fair Work Ombudsman
January 2013

Forms of work experience

- Combining work and training
 - ❖ apprenticeships
 - ❖ vocational education and training
 - ❖ work experience for school students
 - ❖ ‘work integrated learning’ in universities
 - ❖ support programs for unemployed or injured workers

Forms of work experience

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

Prevalence of unpaid experience

- No definitive statistics
- But evidence of
 - ❖ significant use of unpaid trials/training, especially in certain industries
 - ❖ use of unpaid interns to perform extracurricular work that could or would otherwise be done by paid employees
 - well established in some sectors
 - on the rise in many others

Prevalence of unpaid experience

- Findings supported by
 - ❖ individual testimony and comments
 - ❖ FWO investigations
 - ❖ observations/material from stakeholders
 - ❖ advertisements
 - ❖ surveys
 - ACEN members
 - university students
 - YWLS survey

Survey of law students

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

Survey of law students

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

Do employment laws apply?

- *Fair Work Act 2009* (Cth) applies to all non-government employment (with limited exceptions in WA)
- Requires minimum wage and other entitlements if there is an ‘employment’ relationship
 - ❖ not defined, except to exclude unpaid ‘vocational placements’ under authorised education/training courses
 - ❖ therefore left to common law

Employment at common law

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

Employment at common law

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

Unpaid work experience as employment

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

Unpaid work experience as employment

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

Unpaid work experience as employment

- Little attention in cases to the requirement of consideration
- But clear that consideration for an employment contract need not be wages
 - ❖ eg board and lodging
 - *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92
 - ❖ or just provision of experience?
 - *Quashie v Stringfellows Restaurants Ltd* [2012] UAEAT 0289_11_7604 at [51] (but cf view on appeal: [2012] EWCA Civ 1735 at [57])

Unpaid work experience as employment

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

Unpaid work experience as employment - other jurisdictions

- Interesting examples from the legal profession
 - ❖ *Strachan v Moodie* [2012] NZCA 508
 - ❖ *Edmonds v Lawson* [2000] 2 WLR 1091
- Other examples concerning internships
 - ❖ *Hudson v TPG Web Publishing Ltd* [2011] ET/2200565/11
 - ❖ *Glatt v Fox Searchlight Pictures Inc* (No 11 Civ 6784, US District Ct, SDNY, 11/6/13)
 - ❖ *Sarmiento v Gavin Wilding & Rampage Entertainment* [2008] CanLII BCPC 232

‘Vocational placement’ exception

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

‘Vocational placement’ exception

- ‘A placement’
 - ❖ a process for placing?
 - what if student acts on their own initiative?
- ‘For which a person is not entitled to be paid any remuneration’
 - ❖ remuneration does not usually include reimbursement of costs
 - ❖ nor a gratuity – because no entitlement

‘Vocational placement’ exception

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

‘Vocational placement’ exception

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

‘Vocational placement’ exception

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

Upton v Geraldton Resource Centre

[2013] FWC 7827

- U, graduate lawyer, commenced 75-80 day unpaid PLT placement with GRC, under PLT in Regional Rural and Remote Australia Project
- After 22 days, U offered paid employment
- Dismissed just short of 6 months in paid job
- Unfair dismissal application under FW Act rejected for failure to satisfy 6-month minimum employment period

Upton v Geraldton Resource Centre [2013] FWC 7827

- Cloghan C satisfied initial period was a ‘vocational placement’, authorised by *Legal Profession Act 2008* (WA)
- Also rejected argument based on *Cossich* that this was a ‘smoke screen’ for employment
 - ❖ citing Lawler VP in *UNSW (Prof Staff) EA* [2010] FWAA 9588 at [78] that at ‘general law’, student work experience ‘does not involve employment’
 - ❖ but Lawler’s decision that certain ‘cadets’ working for Uni during breaks were not employed was overturned on appeal: [2011] FWAFB 5163 at [40]

GLS v PLP [2013] VCAT 221

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

GLS v PLP [2013] VCAT 221

➤ Garde J held

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

Other laws

- Application of other laws covered in detail in report
- But note
 - ❖ work health and safety laws will always apply
 - ❖ new workplace bullying provisions adopt the definition of ‘worker’ in WHS laws
 - see FW Act s 789FC(2)
 - ❖ broad definition of ‘work’ in migration legislation
 - ❖ Australian Consumer Law may apply to misleading advice and ads for unpaid work

Report's recommendations to FWO

1. Articulate a clear view as to legitimacy of unpaid work experience, in order to inform education and operational decisions
2. Provide more detailed guidance, eg as to vocational placement exception
3. Institute one or more targeted campaigns
4. Consider instigating test cases

Report's recommendations to FWO

5. More effective liaison with other government agencies, such as DIAC or ACCC
6. Engagement with stakeholders, eg to develop best practice approaches