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# *The Experience or Exploitation?* Report: Implications for Tertiary Education

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# 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*)
  - ❖ plus prevalence of unpaid trials
  - ❖ compare volunteering, unpaid work performed with the primary purpose of benefiting someone else or furthering a particular belief

# Global context

- Social and economic impacts of globalisation
  - ❖ eg GFC and impacts on youth employment
- Pressures on industry
  - ❖ productivity and flexibility
- Transformation of work
  - ❖ growth in non-standard, precarious work
- Risks of growth of the informal economy

# Global context

- Educational services as part of a global competitive industry
  - ❖ regulatory changes
    - increased number of players – public and private
  - ❖ changes in technology
  - ❖ changes in funding
  - ❖ increased global movement of students
- Pressures for more work integrated learning
  - ❖ young people spending longer in formal education
  - ❖ industry demands for ‘job ready’ graduates

# Prevalence of unpaid work experience

- No definitive statistics – so more research needed!
- 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 work experience

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

# ACEN survey

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

# ACEN survey

- Benefits
  - ❖ acquisition and practice of skills, improved understanding of industry, contacts/networking
- Disparate attitudes
  - ❖ from strong support for benefits gained to concern at exploitation and real value
- High level of institutional involvement
  - ❖ 70% indicated institution had formal agreements with industry/organisations
  - ❖ 64% - written guidelines

# Legal position

- Fair Work Act 2009 requires minimum wage and other entitlements if there is an ‘employment’ relationship
  - ❖ not defined, but ‘vocational placements’ excepted
  - ❖ therefore left to common law, which requires parties to have created an employment *contract*

# Legal position

- Requirements for a contract include
  - ❖ intention to create legal relations
  - ❖ consideration
  - ❖ mutuality of obligation
- To be determined objectively, by reference to the *reality* of the arrangement, not necessarily what's formally agreed

# Legal position

- Limited and very mixed case law on status of unpaid trials and work experience
- But on a broad view of the Fair Work Act, scope for identifying a contract where
  - ❖ there is a commitment to work in return for experience/opportunity
  - ❖ work is of value to the ‘employer’

# ‘Vocational placement’ exception

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

# ‘Vocational placement’ exception

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

# ‘Vocational placement’ exception

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

# ‘Vocational placement’ exception

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

# ‘Vocational placement’ exception

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

# Legal position

- Application of other laws covered in detail in report
- But briefly note
  - ❖ work health and safety laws will always apply
  - ❖ potential application of Australian Consumer Law to misleading advice or ads for unpaid work

# Migration legislation– international students

- Migration legislation defines ‘work’ as ‘any activity that normally attracts remuneration’
  - ❖ may include work that is unpaid where performed for benevolent, educational, or community purposes
  - ❖ at the very least, ‘work normally attracts remuneration’ if the person is an ‘employee’ because of Fair Work Act
- Conditions 8104 and 8105
  - ❖ 40 hours per fortnight

# Migration legislation– international students

## ➤ Condition 8105

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

# Risks for international students

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

# International picture

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

# International picture

- ILO website article, August 2012
  - ❖ ‘internships have become increasingly common in developed economies, as has controversy over the practice’
  - ❖ warning of the dangers if internships become simply a ‘disguised form of employment’ and without any of the benefits they promise, such as real on the job training

# Legal developments in other countries

## ➤ US, UK, Canada

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

# United Kingdom

## ➤ Public debate and action

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

# Our recommendations to FWO

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

# Our 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

# Implications for tertiary institutions

- In the short term – review existing programs for legal compliance
- In the longer term – finding the right balance