

UNPAID WORK EXPERIENCE: MEETING A REGULATORY CHALLENGE

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Abstract

This paper discusses the legal status in Australia, New Zealand and other countries of what appears to be a growing phenomenon: the use of unpaid 'internships', 'job trials' and other 'work experience' arrangements to replace what might previously have been paid entry-level jobs. Drawing upon research conducted for a study commissioned by the Australian Fair Work Ombudsman, the paper explores some of the difficulties that can arise in applying conventionally-framed labour laws to such arrangements.

Introduction

In August 2011, an article appeared in a leading Australian newspaper under the title 'Eager workers can be free and easy' (Khoo 2011). 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 journalist 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, she would reward their 'value and passion for the business' by offering them paid employment.

The article prompted a swift response from the Office of the Fair Work Ombudsman (FWO), the agency that is responsible for administering Australia's main labour statute, the Fair Work Act 2009. Its Director of Education wrote an article for the same paper, warning employers that 'generally, when a person performs work for a business, they are legally entitled to be paid for it' (Fogarty 2011). In October 2011, following extensive consultation with stakeholders, the FWO released a Fact Sheet on 'Internships, Unpaid Work Experience and Vocational Placements'. A dedicated section on 'Student placements & unpaid work' was subsequently launched on the agency's website.¹

The issue of whether and how to regulate unpaid internships and other forms of 'work experience' is by no means a new one. But it is only recently that it has begun to attract serious attention from policy-makers and

researchers. A significant spur has been the publication of Ross Perlin's book *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Perlin 2012). This charts the 'explosion' in such arrangements, especially in the United States, and highlights some of their downsides – notably in creating barriers to entry for workers from lower socio-economic backgrounds. Such workers often cannot afford to spend months or even years performing what may be a string of unpaid jobs in order to break into their chosen field.

In order to look into the matter further, the FWO has commissioned us to 'investigate the range, nature and prevalence of unpaid work arrangements in Australia and ... examine international best practice for dealing with these arrangements' (FWO 2012). At the time of writing this paper, our report is still being finalised, and we are unable to release any of its specific findings. But we do draw on some of the research conducted for it to paint a picture of what is happening in other countries, including New Zealand. We also highlight some of the difficulties faced by conventionally-drafted labour laws in responding to the challenge of unpaid work experience.²

The Different Forms of Unpaid Work Experience

There is nothing new in the idea of combining work and training. 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 generally treated as employees and must be paid for their work, a broader array of training programs today may provide for unpaid work experience. Many programs in the Australian vocational education and training 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. Secondary school students too typically spend a week attending a workplace of their choice to gain some idea of what work involves in a particular industry or occupation.

In universities as well, there have been significant moves to embrace the concept of what is often now referred to as 'work integrated learning' (Patrick et al 2008, Orrell 2011). Some degrees, especially those with a vocational focus, make it compulsory to complete an internship or placement in a particular industry or occupation. But students may also now be able to do this on an optional basis. In many Australian law schools for instance, 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.

A further area where 'institutionalised' unpaid work experience seems to be cropping up is as an incident of government programs supporting unemployed or injured workers. In Australia, for example, job seekers can seek the assistance of their allocated employment services provider to undertake a 'voluntary placement' of up to four weeks with a host organisation.³ Similar arrangements operate under some workers compensation schemes, allowing injured workers to be placed for short periods of time with a host employer, with the formal agreement of the host, the insurer and the worker's rehabilitation provider.⁴

Increasingly, however, organisations are offering 'internships' that are not taken for credit in any recognised course, or to satisfy a formal education or training requirement. Once generally confined to medical graduates gaining supervised (and generally *paid*) practical experience before gaining their licence to practise, the term seems to have come 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. As Perlin (2012: 25–6) notes, 'what defines an internship depends largely on who's doing the defining'. He says of the word 'intern' that it 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' (2012: xi).

A further form of 'work experience' that also appears to be on the rise, particularly in the current economic climate, is that of the unpaid job trial. Rather than engaging a worker as a probationary employee and paying them for their work while their suitability or aptitude is being assessed, an organisation may allow, ask or even require job applicants to work unpaid for a day, a week or even longer. A number of such examples have recently been highlighted in Australia (see eg Wilson 2012, Souter 2012). As the FWO notes on its website, job seekers may undertake unpaid work trials for a range of reasons. They may assume they will be paid for any work carried out. They may have been led to believe that they will be offered a job after the trial is completed. They may think that employers are entitled to ask applicants to undertake such a trial. Or they may simply be desperate

for a job. The FWO's view is that such arrangements are 'generally' unlawful, on the basis that the Fair Work Act would require that the worker be paid for their work.⁵

On the other hand, at least for the purpose of our study, we have put to one side the broader field of *volunteering*, which for present purposes may be understood as involving 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.

The International Picture

In June 2012 the International Labour Conference considered the issue of young people at work, in the context of the aftermath of the global financial crisis and the continuing call for austerity in many European countries. It adopted a 'Resolution concerning The Youth Employment Crisis: A Call for Action',⁶ which painted a grim picture of the position for young job-seekers. The Resolution noted that transitions into employment can be especially precarious, especially for those lacking work experience, and continued:

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.

The Resolution suggested to governments that they consider improving the links between education, training and the world of work through a variety of means, including work experience and work-based learning. As for the social partners (trade unions and business), they were invited to raise awareness about the labour rights of young workers, including interns.

The International Labour Organisation (ILO) has since published an article on its website noting that "internships have become increasingly common in developed economies, as has controversy over the practice". While recognising the awkward 'catch 22' for young people who cannot get enter the labour market without work experience and who cannot get work experience without some access to a job, 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 (ILO 2012).

The ILO article refers to developments in both France and the United States. In the former, 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.⁷ The 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 tripartite 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.

The new law also limits the duration of internships to six 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 intern is subsequently employed by an organisation their period of probation must be reduced by the period of the internship. There are also obligations to report the number of interns.

In the United States, by contrast, the issue has not been one of changing the law, but of *enforcing* it. The Fair Labour Standards Act 1938 (FLSA) requires businesses to accord their employees the minimum wage and overtime compensation for hours worked in excess of 40 in a work week. An employee is defined in section 203 as 'any individual employed by an employer', and the word 'employ' includes 'to suffer or permit to work'.

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 test to determine whether an intern in the for-profit private sector is an employee (Bacon 2011). There are six criteria, derived from a 1947 US Supreme Court decision which drew a distinction between employment and training,⁸ each of which must be satisfied for an intern *not* to be regarded as an employee:

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.

On the face of it, the test casts the net very broadly and should ensure that most interns working in that sector are entitled to at least the minimum wage. Indeed Perlin (2012: 61) has commented that in industries such as fashion, publishing, entertainment and journalism, 'unpaid internships dominate, with illegal situations possibly constituting a majority of all available opportunities'. The supposed 'crackdown' by the DOL has not eventuated (Braun 2012), not least because of that

agency's limited resources. Instead, it is being left to private litigants to raise the issue.

At the time of writing, at least three major lawsuits are under way in the US, featuring interns suing for unpaid wages and other entitlements. One group is suing the Hearst Corporation, the publisher of *Harper's Bazaar*, while the other two involve interns who worked on the film *The Black Swan* (produced by Fox Searchlight Pictures) and the TV program *Charlie Rose*. The first two of these cases have turned into class actions, with Hearst now apparently facing over 3,000 separate claims. Some commentators see these cases as heralding the beginning of the end for unpaid internships in the US.⁹

The United Kingdom is another country in which a great deal of attention has been given in recent years to the legal position of interns. In response to a request by the government to review the labour market position of young people, including interns and apprentices, the Low Pay Commission (2011: 92) stressed the value of internships. But it also indicated that there were 'serious issues around intern pay that need to be addressed'. Unpaid interns were especially common, it found, in the cultural, media and political sectors. It recommended (2011: 101) 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.

In the wake of this report, HMRC began a campaign of targeted enforcement, focusing in the first instance on internships in the fashion and film sectors. In November 2011, *The Guardian* reported that while HMRC had only prosecuted seven companies, its lawyers had warned that many unpaid interns would be entitled to compensation (Malik and Ball 2011).

In 2012 the Low Pay Commission returned to the issue. It noted that there continued to be many unpaid internships, from evidence provided by the Graduate and Interns Alliance (GAIA), comprising the groups Interns Anonymous, Intern Aware and Internocracy, and trade unions such as Unite's Parliamentary Branch, BECTU and Equity. The Commission observed (2012: 98):

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.

Because there was some evidence that improving guidance to the law and strengthening enforcement were leading to an improved situation, the Commission recommended (2012: 110) that time be provided to enable them to take full effect. But it also noted 'continued evidence of the apparent breaking of the NMW [national

minimum wage] rules, including possible abuse of the voluntary workers' exemption'.

In Britain, minimum labour standards generally apply to employees. This is true of the National Minimum Wage Act 1998, although section 54(3) does extend the operation of the statute to include workers who supply their services under some other types of contract. Section 44, on the other hand, exempts voluntary workers who supply their services on an unpaid basis to 'a charity, a voluntary organisation, an associated fund-raising body or a statutory body'.¹⁰

The term 'employee' has traditionally not been defined in legislation. Instead it has been applied by reference to certain tests developed under the common law (that is, judge-made law). These focus on the extent to which the alleged employer has a power to control what the relevant worker does, or has 'integrated' the worker into its organisation, among other factors. But in addition, it has to be shown that the worker concerned has entered into a legally enforceable *contract* for the provision of their services (Creighton and Stewart 2010 ch 7).

There are a number of potential difficulties for an unpaid worker in establishing that they have such a contract, as explained below in discussing the Australian position. Nevertheless, in two recent British cases interns have been found to be entitled to wages and holiday pay. In the 2008 case of *Vetta v London Dreams Motion Pictures ET/2703377/08* (unreported), the applicant had worked as an art director's assistant for several weeks following her application and subsequent interview for a position described as being 'expenses only'. The Employment Tribunal concluded that since she was not a volunteer, nor involved in a training program, there was 'no doubt' that she was covered by the relevant legislation.

The same conclusion was reached in *Hudson v TPG Web Publishing Ltd ET/2200565/11* (unreported), where the applicant worked full-time on the Village website for six weeks. She 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 no written contract of employment, although she had had some discussions about pay. This, along with the nature of the work undertaken, was taken to indicate the existence of an employment relationship.¹¹

What is perhaps more significant than these legal outcomes is the way in which efforts to identify and address the problems faced by unpaid interns have become so widespread in the UK. For example, in the artistic/cultural sector the Creative Choices website, while encouraging internships as a means to developing a career, alerts readers to a guide prepared by the Arts Council England and Creative & Cultural Skills, which notes that 'the majority of interns ... would most likely be classified as a "worker" for the purposes of the National Minimum Wage Act 1998'.¹²

A further indication of the way in which the debate has progressed in the UK is the publicity recently given to the decision to pay interns in ex-PM Tony Blair's profit making businesses. This news followed revelations of the practice in those businesses of using unpaid internships and the announcement of an investigation by HMRC (Malik 2012).

The Legal Position in Australia

There has been nothing like the same level of debate in Australia as in the US and the UK about the issue of unpaid internships or other forms of work experience, although the mere announcement of our research project for the FWO has generated attention to the matter (see eg Souter 2012).

As far as the law is concerned, the key question is whether an arrangement for unpaid work experience involves an employment relationship. If it does, then statutes such as the Fair Work Act 2009 will ensure that, at the very least, a minimum level of remuneration is payable for the work. There may also be entitlements to leave; awards may impose controls on working hours; and so on. If not, then the arrangement may still be subject to work safety or discrimination laws, but it will otherwise be free of 'labour' regulation.

The one point of relative certainty is that various provisions in the Fair Work Act, including sections 13 and 15(1)(b), preclude a person who is 'on a vocational placement' from being treated as an employee. Section 12 defines such a placement as one 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.

This would, for example, cover placements or internships that are undertaken to satisfy the requirements of a university degree or training college diploma.

Aside from this exclusion, the terms 'employer' and 'employee' are not defined in the Fair Work Act. The courts have to date assumed, as with other labour statutes, that the common law meaning is to be applied.¹³ That in turn means, as the High Court of Australia has made clear, that there must be a legally binding *contract* for the performance of the work.¹⁴

There are at least three potential obstacles to identifying such a contract in relation to an arrangement for unpaid work. First, if it is clear that the parties did not intend their arrangement to be legally binding, there can be no contract.¹⁵ Secondly, there must be some form of 'consideration', in the sense that each party is agreeing to do something in return for the other. The consideration for an employment contract is usually the exchange of wages for work, but in principle there is no reason why a person cannot work in return for the opportunity to gain experience.¹⁶ Thirdly, however, there must be some element of 'mutuality of obligation', in the sense that the worker is *promising* to work, and the employer is undertaking in return to train them or provide them with experience. This requirement was found to be lacking by the High Court in a case that involved a job trial for a disadvantaged worker, who was being given an opportunity to paint a benefactor's house in return for an agreed wage.¹⁷

That unpaid work experience *can* involve employment relationships that attract the operation of labour laws is apparent from cases finding that what may have started out as ‘voluntary’ arrangements effectively evolved over time to become employment contracts.¹⁸ But there have been no cases as yet properly exploring the status of internships, unpaid trials or other forms of work experience under the Fair Work Act. Until there are, uncertainty will remain as to the legality of such arrangements, at least when unconnected to an education or training course.

Unpaid Work Experience in New Zealand

If the debate about unpaid work experience is in its infancy in Australia, it appears not to have started in New Zealand. But it seems likely that labour market pressures are having the same effect as elsewhere in the developed world, even if not (yet) to the same extent. Judging by a recent newspaper report (Collins 2012), 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.

A 2010 article in the *New Zealand Herald* discusses the experiences of three young unpaid interns (Walker 2010). 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.

According to a recent article in *HRM Online NZ* (Bell and Zillman 2012), ‘tougher economic times and higher unemployment have resulted in the increased use of unpaid internships’. Alluding to the recent cases in the US – discussed earlier – that have seen disgruntled interns taking court action over their treatment, they note that:

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.

New Zealand’s Employment Relations Act 2000 applies to ‘employees’, as defined in section 6. That definition also governs the application of other labour statutes, such as the Minimum Wage Act 1983 and the Holidays Act 2003. 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 provisions in British or Australian labour statutes, this effectively imports the common law definition of employment.¹⁹ 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’. On the other hand, section 6(1)(c) excludes a ‘volunteer’ who ‘does not expect to be rewarded for work to be performed as a volunteer’ and indeed receives no reward.

As to whether this definition of employment is wide enough to cover interns or others undertaking work experience, the Ministry of Business, Innovation and Employment appears to harbour few doubts. In a section on its website dealing with ‘different kinds of employment’, it answers the question ‘What is work experience?’ as follows:

‘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.

The limited case law to date on this point appears to support this view. 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 as personal trainer. But despite having been given a ‘Casual Employment Agreement’ that contained detailed provisions as to his duties, professional obligations and hours of work, he was found not to be an employee, essentially because he had agreed to work without pay. According to the Authority, the absence of any agreed ‘reward’ meant that he was a ‘volunteer’.

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, a crusading if somewhat eccentric lawyer. The plaintiff, who was looking to gain experience in transitioning from a nursing career to legal practice, agreed to undertake legal research, assist the defendant with the preparation of his files, and act generally as a clerk. The understanding was that she would be reimbursed for out of pocket expenses and receive an occasional gratuity. Over the course of 2005 she began to work more regularly for the practice. Nevertheless, Chief Judge Colgan found (at [38]–[39]) that she was not at this stage an employee:

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.*

By early 2006, however, the plaintiff was working as a full-time solicitor and effectively managing the practice. She had also begun to be paid under an agreement that she receive a share of the firm's profits. Thenceforward there was 'really no doubt' that she was an employee (at [59]).²⁰ 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.²¹

From our perspective what stands out 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 apparent 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; or whether – on an expansive view of the concept of 'reward' – the plaintiff worker might have been deriving something valuable from the arrangement.

Conclusion

There can be little doubt that the growing prevalence of unpaid internships, trial periods and other forms of work experience unconnected to an education or training program poses major challenges for the integrity of labour laws. From one perspective, the matter might appear simple. If it is unlawful to agree to work for less than the minimum wage, how can it be legitimate to work for nothing? Even if there really is a benefit to the individual concerned, both they and the organisation prepared to engage them are effectively undercutting minimum standards, to the detriment of those prepared to observe those standards. The growth of such arrangements can only have the effect of driving out paid entry-level jobs, to the inevitable detriment of those who lack the means to work for long periods without pay.

And yet at the same time, it may not be sensible or feasible to prescribe that all work – or even all 'productive' work – be paid for. Even putting aside volunteering (in the broader sense discussed earlier), or work in family businesses, there are surely some limited forms of unpaid work experience that ought to be permissible.

More immediately, the challenge in countries such as Australia and New Zealand – and possibly yet the UK, if

cases reach the higher courts there – is to determine the legality of such arrangements by reference to common law principles that recognise the freedom of parties to agree *not* to create legally binding contracts. In the context of distinguishing between contracts of employment and independent contracts 'for services', the courts in these countries have been willing to look beyond the labels used by the parties and examine the underlying 'reality' of their agreement, as a matter of substance, not form.²² The question is whether they are prepared to take the same view of 'voluntary' arrangements to work without pay.

Postscript

Since writing this paper, the report for the FWO referred to in the introduction has now been completed: see <http://www.fairwork.gov.au/unpaidwork>.

Notes

- 1 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 18 November 2012).
- 2 Note that for the purpose of this paper we will focus on labour laws that impose minimum wages and other conditions, as opposed to those that deal with issues of workplace safety, discrimination and so on.
- 3 See <http://www.deewr.gov.au/Employment/JSA/Resources/Documents/WEUnpaidWork.pdf> (accessed 18 November 2012).
- 4 See eg <http://www.workcover.nsw.gov.au/injuries/claims/injurymanagement/ReturntoWork/Vocationalrehabilitationprograms/Pages/Worktrials.aspx> (accessed 18 November 2012).
- 5 <http://www.fairwork.gov.au/pay/student-placement-and-unpaid-work/pages/unpaid-trials.aspx> (accessed 18 November 2012).
- 6 See <http://www.ilo.org/public/english/standards/reln/ilc/ilc93/pdf/resolutions.pdf> (accessed 18 November 2012).
- 7 An account of the Cherpion Law is available at <http://www.eurofound.europa.eu/eiro/2011/11/article/s/FR1111011I.htm> (accessed 18 November 2012).
- 8 See *Walling v Portland Terminal Co* 330 US 148 (1947).
- 9 See eg <http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/> (accessed 18 November 2012).
- 10 Regulation 12.5 of the National Minimum Wage Regulations 1999 also exempts workers who are participants in a government scheme designed to provide them with training, work experience or temporary work, or to assist them in seeking or obtaining work.
- 11 For discussion of these cases, see Rooksby and Leonard 2012, Dougan and Wiseman 2012.

- 12 See <http://www.creative-choices.co.uk/> and http://www.artscouncil.org.uk/media/uploads/internships_in_the_arts_final.pdf (accessed 18 November 2012).
- 13 See eg *Cai v Rozario* [2011] FWAFB 8307 at [25]; *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677 at [95].
- 14 See *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.
- 15 See eg *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201.
- 16 See eg *Quashie v Stringfellows Restaurants Ltd* [2012] UKEAT 0289_11_7604 at [51].
- 17 *Dietrich v Dare* (1980) 54 ALJR 388; and see also *Pacesetter Homes Pty Ltd v Australian Builders' Labourers' Federated Union of Workers (WA Branch)* (1994) 57 IR 449.
- 18 See eg *Cossich v G Rossetto & Co Pty Ltd* [2001] SAIRC 37
- 19 See *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 at [31].
- 20 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.
- 21 *Moodie v Employment Court* [2012] NZCA 508.
- 22 For a review of recent Australian and UK case law to that effect, see Roles and Stewart 2012. In New Zealand, see *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721; but cf Employment Relations (Film Production Work) Amendment Act 2010, effectively reversing that decision, albeit only for the film industry.

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