INTERN OR EMPLOYEE?
A POTENTIALLY EXPENSIVE QUESTION

By John Wilson and Kieran Pender

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Internships are becoming increasingly prevalent in the legal sector and elsewhere. While internships can be beneficial for intern and host organisation alike, these atypical workplace arrangements pose several thorny employment law questions. When, as is commonplace, interns are unpaid or only receive a modest 'stipend', these dilemmas become particularly pressing.

The foremost question concerns the legal status of the intern. 'Internship' is not a legal term of art – it has no meaning at common law or under the industrial relations regulatory landscape created by the *Fair Work Act 2009* (Cth). An intern is therefore either an employee, or has no legal relationship whatsoever with the host organisation. There is no middle ground. This article will not consider the status of 'volunteers' in this context, although that topic is perhaps deserving of a separate contribution.

Where an intern is objectively considered to be an employee, they are entitled to the minimum wage and basic entitlements as set out in the *Fair Work Act*, National Employment Standards contained therein and any applicable award or enterprise agreement. Accordingly, organisations who use interns without providing them with the requisite wages and conditions risk exposure to considerable liability – through litigation initiated by either interns themselves or the Fair Work Ombudsman – for non-compliance with the *Fair Work Act*. This risk has been exacerbated by recent developments.

The Fair Work Ombudsman's crackdown

Concerned by the apparent increase in unpaid work arrangements across the country and perhaps inspired by high-profile internship-related lawsuits in the United States, in 2012 the Fair Work Ombudsman commissioned a report into the phenomenon. In *Experience or Exploitation: The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*, academics Andrew Stewart and Rosemary Owens found that – despite a dearth of official data – internships are undeniably on the rise. They observed that 'unpaid work exists on a scale substantial enough to warrant attention as a serious legal, practical and policy challenge in Australia'.

Snapshot

- Recent proceedings brought by the Fair Work Ombudsman have highlighted the financial risk of utilising unpaid interns in a capacity which gives rise to an employment relationship.
- While the law remains unsettled, interns will likely be deemed as employees when they are undertaking productive work indistinguishable from that of paid employees rather than solely engaging in training and skill development.
- Even where there is no employment relationship between an intern and the host organisation, liability may arise under occupational safety or discrimination legislation.

The Ombudsman was quick to respond, and has successfully prosecuted three companies in recent years for utilising unpaid or underpaid interns. In the first case to be determined, *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140, Judge Riethmuller penalised a Melbourne-based sports media company $24,000 for an 'exploitative' arrangement where two individuals undertook work in return for modest 'expenses' payments. Similarly, in *Fair Work Ombudsman v Aldred* [2016] FCCA 220, the respondent was ordered to pay $17,500.

While these sums may seem modest, Judge Riethmuller sounded an ominous warning at the end of his *Crocmedia* judgment. There can be little doubt, he noted, 'that the penalties are likely to increase significantly over time as public exposure of the issues in the press will result in respondents not being in the position of being able to claim that a genuine error of categorisation was made' (at [46]). This prediction came to fruition in mid-2016, when the Federal Circuit Court imposed a penalty of almost $300,000 on a media company that had failed to pay an intern for 180 hours of work and committed various other breaches of the *Fair Work Act* (see *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024).

Employment relationship

To date, in each of the cases brought by the Fair Work Ombudsman, the respondent admitted liability and the proceedings were focused solely on the question of penalty. The simplicity of this recent case law obscures a far more complex underlying state of affairs, where determining whether an intern is properly classified as an employee raises challenging legal questions. Ascertaining the existence (or otherwise) of an employment relationship requires a return to common law principles of contract. Most likely to be at issue in this context are the presence of an intention to create legal relations and consideration.

While in most short-term internship arrangements there may be no intention to create a legal relationship, that is not to suggest that the necessary intention could never be found via the objective test demanded by the High Court in such circumstances. Rowland J aptly summarised in *Pacesetter Homes Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449, 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'.

A subsidiary question is whether there exists a 'mutuality of obligation' – is the intern obliged to attend the workplace on a regular basis, and is the host organisation obliged to provide work or training?

The other hurdle to identifying an employment relationship is consideration. In an *unpaid* internship, how can there be consideration sufficient for a contract to exist? The legal position remains unsettled. In England, a superior court has suggested that the training and education received by a reader from members of chambers could constitute consideration (*Edmonds v Lawson* [2000] 2 WLR 1091). While Australian case law on the existence of consideration in the absence of wages is inconclusive, Stewart and Owens in their report for the Ombudsman support the view that training, experience and the opportunity to make contacts could all satisfy the consideration requirement.

While this jurisprudential ambiguity limits our ability to provide clear guidance, it is likely that the ultimate determination will turn on the extent to which the intern is involved in productive work towards the business of the organisation, rather than simply training and skill development. In the case of the former, particularly where the internship extends beyond a few weeks, the intern works regular hours and completes activities similar to those undertaken by a junior employee, an employment relationship will be found. Where the internship is educational in nature and the intern's work-producing role is limited to this end, no relationship exists.

Vocational placement exception

The *Fair Work Act* does however provide one safe harbour for organisations looking to operate an internship program.

An employer's usual obligations to a 'national system employee' will not apply if the intern's role or placement satisfies the definition of a 'vocational placement' (s 13).

A 'vocational placement', is 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' (s 12).

The vocational placement exception covers internship arrangements undertaken for credit as part of a course of study. Law firms, for example, are therefore not at risk of Fair Work Ombudsman investigation for taking on unpaid law graduates completing the practical legal training (PLT) required for admission to practice after graduation. Accordingly, employers seeking to utilise interns should wherever possible align their programs with a local school, university or technical college to minimise exposure.

Other liability

Even where an intern is not considered to be an employee, whether because no employment relationship exists at common law or because the vocational placement exception applies, other workplace legislation can still impact on the arrangement. Two examples deserve particular consideration: occupational safety laws and discrimination prohibitions.

The *Work Health and Safety Act 2011* (NSW) defines a 'worker' as a person who 'carries out work in any capacity for a person conducting a business or undertaking' (s 7). This includes not only 'an employee' or 'a contractor' but extends to 'a student gaining work experience', 'an apprentice or trainee' and 'a volunteer'. Accordingly, interns should be treated as employees for work health and safety purposes, and a failure to provide a safe workplace could give rise to liability.

Section 22B of the *Anti-Discrimination Act 1977* (NSW) prohibits sexual harassment against a 'workplace participant', defined to include 'a volunteer or unpaid trainee' in addition to employees, contractors and partners in a partnership. It also extends vicarious liability for contraventions of the statute by volunteers and unpaid trainees to the person or body on whose behalf the volunteer or trainee provides services (s 53). Organisations must thus take reasonable steps to prevent interns from both harassing others and being harassed themselves, or face liability for heightened *Richardson v Oracle* damages (see *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82).

Where to next?

The current unsettled state of the law regulating internships is unsatisfactory. On one hand, such arrangements can be of great value to intern and employer alike – even leading to full-time employment in many cases. Particularly in a saturated labour market with an oversupply of qualified graduates, it would be ill-advised and practically challenging to entirely prohibit the practice. The present lack of clarity does not help employers implement legally-compliant and commercially-sound internship programs (beyond the obvious solution: employ them at full pay for a fixed term in accordance with the relevant award or enterprise agreement).

Yet the risk of exploitation in unpaid internship arrangements is also considerable, and the increasing utilisation of interns for work that would otherwise be done by employees is troubling. Even where determined students actively seek out unpaid work, a situation which some observers may find difficult to describe as exploitation by the employer, there is a deeper issue at stake. Not only does the normalisation of long periods of unpaid work at a graduate level impede social mobility, but it undermines a core principle of the Australian industrial system. As Stewart and Owens write, 'the point of … taking action is not necessarily to protect [the intern] 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.'

Given there is no indication that the prevalence of unpaid internships has peaked, the Fair Work Ombudsman's ongoing interest in this area will undoubtedly lead to more litigation in the coming years. Unless federal parliament introduces legislative reform, employment lawyers are advised to be attentive to nuances in the emerging case law. One might hope that contested compliance proceedings will soon give rise to greater judicial guidance on this vexing topic. Until then, organisations and their counsel should remain alert to this potentially expensive question: intern or employee? **LSJ**