



Employers' obligations to interns

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Work experience and internship arrangements are becoming a growing feature of the Australian labour market. These arrangements can be a valuable way for prospective employees to make the transition from study to work, or explore a new career path.

However, the boundaries between paid employment and legitimate unpaid internships are not always clear. While many graduates, or other people new to the Australian workforce, might be more than willing to work without receiving remuneration in order to gain experience, employers should be aware of their obligations in relation to these types of arrangements.

In research commissioned by the Fair Work Ombudsman, Professor Andrew Stewart and Rosemary Owens of Adelaide Law School concluded that there was a need for increased awareness of the issues surrounding unpaid work arrangements.

Employers who are found to be exploiting vulnerable workers through internships or volunteer arrangements that are found at law to be employment relationships, expose themselves to potential court action. Recently, the Federal Circuit Court in Melbourne ordered penalties against Crocmedia Pty Ltd, a business producing content for radio, TV and online, in the amount of \$24,000. In its decision, the Court sent a clear message to employers that exploitative arrangements will not be tolerated.

DEFINING INTERNSHIPS AND WORK EXPERIENCE

Although they are words we use every day, the public's understanding of the terms work experience and internship can vary. The word internship can be used to describe almost everything from paid

entry-level or low-skilled jobs to voluntary work in the non-profit sector.¹

For most Australian employers and employees, their rights and obligations in the workplace are governed by the *Fair Work Act 2009* (the Act). The Act relies on common law concepts of employment and doesn't directly engage with the concepts of work experience or internships. However, the Act does make clear that a person won't be an employee – and won't be entitled to payment – if they are undertaking a formal vocational placement.

Pursuant to the Act, a vocational placement can be unpaid if it meets all the following criteria:

- **There is a placement:** This can either be arranged by the educational institution, or directly between a student and an individual organisation, in line with the requirements of their course.
- **There is no entitlement to pay for the work the student undertakes:** There must be a clear, mutual understanding that the student is not entitled to payment.
- **The placement is being done as a requirement of an education or training course:** The placement must be a required component of the course as a whole, or of an individual subject or module of the course, regardless of whether that subject is compulsory or an elective.
- **The placement must be one that is approved:** The institution delivering the course which provides for the placement must be authorised under a Commonwealth, State or Territory law or an administrative arrangement. Examples of authorised bodies include universities and TAFEs.

An example of this type of an arrangement is an unpaid placement with a law firm, that occurs as a part of a law student's Practical Legal Training as a prerequisite to admission.

For internship and work experience arrangements that fall outside of the definition of a vocational placement, this doesn't automatically mean that the intern is an employee and entitled to payment. Employers will need to look carefully at the nature of the arrangement to determine whether an employment relationship exists.

IS THERE AN EMPLOYMENT RELATIONSHIP?

In determining whether an employment relationship exists, each case must be considered on its own facts.

When looking at internship arrangements, it is more likely that there will be no employment relationship where the intern's role is primarily observational and the expectation or requirement to perform work is part of a meaningful learning experience. The work performed should not primarily be for the operational benefit of the business or organisation. Generally, a legitimate unpaid internship arrangement will occur over a short, or clearly defined, time period.

It is more likely that an employment relationship will exist when:

- the nature and purpose of the arrangement is to have an intern assist with the ordinary operation of the organisation and to perform productive work for the organisation;
- the arrangement has gone on for a long period of time (although even relatively short engagements can still be an employment relationship under some circumstances);

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- the work performed by the intern is normally performed by paid employees and is integral to the organisation;
- the intern is expected to be at the workplace at specified times and for a specified number of hours;
- the business is gaining a significant benefit from the arrangement, rather than the intern.

If an employment relationship exists, and the intern is not undertaking a vocational placement, then the intern is entitled to payment for their work. The minimum terms and conditions of employment contained in the Act and industrial instruments apply regardless of their experience. There is no option to pay an employee less than the legal minimum because they are engaged as an “intern”. Some industrial instruments do, however, provide a different rate of pay for graduates, so it’s important to refer to the applicable industrial instrument to determine the right rate of pay.

It is also important to remember that the nature of an internship arrangement may change over time, so make sure to review the nature of the relationship regularly. If the intern who used to come along to observe client meetings and court hearings is now directly helping you out with your caseload, it’s time to consider your obligations.

INTERNSHIPS AND THE FAIR WORK OMBUDSMAN

The Fair Work Ombudsman is the Commonwealth workplace relations regulator. Our role is to promote harmonious, productive and cooperative workplace relations and to ensure compliance with Australian workplace laws. We do this through educating people working in Australia about their rights and obligations, providing assistance in resolving workplace issues

and monitoring and enforcing compliance with workplace laws.

The Fair Work Ombudsman is concerned about the risk of young and other vulnerable workers being exploited through unpaid work arrangements and the potential impact on workplace participation, and is placing greater scrutiny on unpaid work arrangements.

FWO V CROCMEDIA PTY LTD (2015) FCCA 140

In June 2013, the Fair Work Ombudsman commenced proceedings against Crocmedia Pty Ltd, a sports media and entertainment business in Melbourne in respect of its engagement of two young workers as “volunteer” producers for various late night radio programs. The two workers did not receive any wages for their shift, but instead were given a fixed fee per shift to cover their “expenses”. The young workers, a university student and a recent university graduate, agreed to work for free in an effort to gain experience in the competitive media industry.

During the proceedings, Crocmedia admitted the two young workers were in fact performing work on a casual basis and were not legitimate volunteers. This resulted in underpayments and contraventions of the Act. In ordering penalties against Crocmedia, Judge Riethmuller of the Federal Circuit Court found that although Crocmedia did not engage in a deliberate strategy to exploit the young workers, the “volunteering” arrangement was, in itself, objectively exploitative. His Honour held that Crocmedia was content to receive the benefits that flowed from the unpaid work.

Judge Riethmuller also accepted that systematic use of unpaid internships can undermine the minimum protections in the Act and can potentially create barriers to entry to the labour market.

The Fair Work Ombudsman also

recently entered into an enforceable undertaking with a Sydney architecture firm which incorrectly relied on an alleged internship arrangement to underpay a student architect.

The Fair Work Ombudsman’s primary role is to assist employers in understanding their obligations. However, in the event workers are clearly being taken advantage of, it has and will act to protect the interests of those employees as well as seek deterrence through the imposition of penalties relating to that conduct.

TIPS FOR INTERNSHIP & WORK EXPERIENCE ARRANGEMENTS

If your business or organisation is considering engaging people for work experience or internship arrangements, these practical tips might assist.

- Clearly define the arrangement before an intern or work experience student commences their placement. Consider putting in place a written agreement that includes:
 - a role statement or position description
 - the duration of the arrangement
 - any obligations or requirements the intern must meet
 - whether the role will be paid
- Consider partnering with universities and other training providers that require their students to undertake vocational placements. Your organisation will have the benefit of a pool of work experience students and clear, defined arrangements.
- Always make sure to ask at the start and during an internship arrangement: who is getting the primary benefit out of the arrangement? If the person is doing work you would otherwise have to pay someone to perform, you should be cautious.
- The Fair Work Ombudsman has a range of educational material on its website. Look to www.fairwork.gov.au for fact sheets on unpaid internships and work experience, unpaid trials and vocational placements. B

(Endnotes)

- ¹ *Experience or Exploitation: The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Period in Australia*. Report for the Fair Work Ombudsman. Andrew Stewart and Rosemary Owens, paragraph 3.52.