INTERNSHIPS, THE CONTRACT OF EMPLOYMENT AND THE SCOPE OF LABOUR LAW

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Introduction

This paper considers the adequacy of the common law's concept of the contract of employment in relation to the growth of certain forms of work 'experience', notably 'internships'. This is a critical issue in terms either of the effective enforcement of the existing laws governing work or the facilitation of a policy response and regulatory reform. This paper focuses primarily on the law in Australia, but it also considers the law in the United Kingdom.

In a number of developed economies, such as Australia, Canada, New Zealand and many European countries including the United Kingdom, internships (sometimes paid, but more often unpaid) are becoming a more common feature of the labour market. Internships are already a well entrenched feature of the United States labour market (see Perlin 2011). In all these countries there is a perception amongst an increasing number of young people and others wishing to make a transition into a new type of work that participation in such internships (which are often unpaid) is a necessary bridge between formal study entry and either a chosen profession or a different career/arena of work. While there is a certain glamour attached to internships, the reality is that their growth also represents the transformation of what were once considered to be paid entry level jobs into a form of precarious work. Not only is the work frequently unpaid, but also it often fails to deliver on its promise of training, networking and gainful experience that translates into access to a more secure position in the labour market.

A key element of our research on unpaid work experience in the labour market is the role of the law in the construction of this form of precarious work. In an important recent contribution to scholarly work regarding the legal determinants of precarious work, Nicola Kountouris (see N Kountouris 'The Legal Determinants of Precarious Work in Personal Work Relations: A European Perspective' (2012) *34 Comp Lab L & Pol'y J* 21), argues that precariousness is not now, if it ever was, restricted to those workers who are in 'non-standard' work relations as often described. While precariousness has been shown all too often to be a feature of those relations (see Fudge and Owens, 2006; ILO, 2010; European Commission, 2007; Vosko 2010), Kountouris highlights the fact that precariousness now affects a vast range of personal work relations, be they dependent or autonomous, typical or atypical. Internships are a prime example of the transformation of work relationships that

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[*] This paper has been prepared for the purposes of discussion at the Labour Law Research Network – Inaugural Conference, at the Faculty of Law, Pompeu Fabra University (UPF), Barcelona, Spain, June 2013. This paper is part of an ongoing research study of unpaid work and the law by the authors. We welcome any comments and criticisms, as well as contacts from researchers with a general interest in the topic.

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in the past were more secure. Referring to some of Kahn-Freund's work ('A Note on Status and Contract in British Labour Law' (1967) 30 *Modern Law Review* 635), Kountouris also reminds us that precariousness is not a new phenomenon. Casualisation and discontinuity have also long been a feature of certain sectors of the labour market: dock work and outwork are notorious examples.

Kountouris's work on precariousness is part of a body of scholarly work that looks beyond sectors of the labour market and forms of employment to the factors which render work precarious. He identifies four key legal determinants of precariousness: immigration status, employment status, temporal precariousness, and income precariousness. At the same time Kountouris accepts, as do we, that personal work relations cannot be assessed in a vacuum – factors such as age or gender, also impact on whether work is more or less secure for a person. Acknowledging the key work of Campbell, MacDonald and Vosko (2009), he stresses (at 26) that the capacity of a legal system to encompass such dimensions is critical (see also Vosko, 2010). Kountouris also considers that the impact of the above legal determinants may be country specific.

A key element of our research on unpaid work experience in the labour market is the role of the law in the construction of this form of precarious work. The purpose of this paper is to examine employment status as one of the elements identified by Kountouris and consider its role in the construction and growth of certain forms of unpaid work experience, notably 'internships', by analysing the capacity of law to respond to this phenomenon. This paper elaborates and builds upon research on unpaid work experience we conducted in 2012 for Australia's Fair Work Ombudsman (FWO), the agency responsible for enforcement under the *Fair Work Act 2009* (Cth). Our research was presented in a report entitled *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* and its recommendations are now being acted upon by the FWO.[1]

This paper is organised into three main parts as follows. The first section outlines the research undertaken by us in 2012. As will be seen from this there are a number of aspects of the *Experience or Exploitation? Report* which are not highlighted in this paper, and yet which point to the significance of some of the insights of Kountouris. For example, a chapter of our *Report* is devoted to the intersection of Australia's migration law and labour law and demonstrates the particular vulnerability in relation to unpaid work of visa holders whose right to work in Australia is also regulated under migration law. Our *Report* also makes evident our view that the global context has played an important role in fostering the spread of unpaid internships. The context of globalisation is critical in understanding the growth of internships: including, its impacts on youth employment in the wake of the Global Financial Crisis; the role of the internet, social media and other technological developments not only in promoting the glamour of internships to young people but also in creating awareness among of their rights at work; the movement of people around the world (especially young people and students); the internationalisation of education services; and the establishment of global businesses involved in the outsourcing of these internships in a wide range of countries around the world.

[1] The report is available at www.fwo.gov.au/unpaidwork. The website also indicates the response action which the Office of the FWO is implementing.

The *Experience or Exploitation? Report* addressed two critical questions regarding the role of the law in relation to unpaid work experience such as internships: 'are such relationships understood by law as contractual?', and, if so, 'are such contractual relationships understood as a contract of employment?'. While our research indicated that in principle there was no reason not to answer these questions in the affirmative, and thereby indicating the importance of an active enforcement role for the FWO under the *Fair Work Act* in relation to the issue, nonetheless the existing case law was also somewhat mixed. Unsurprisingly, given the nature of the common law, the case law suggested that much depends on the particular facts of a case.

The second part of this paper builds upon our research in 2012. The *Experience or Exploitation? Report* focused most attention on the first (and in many senses often more problematic) issue: 'are such relationships understood by law as contractual?'. However, it presented a less detailed consideration of the question as to whether any such contracts were to be described as 'contracts of *employment'*. This is the subject of the second part of this paper, which examines the legal classification of a contract which is, or purports to be, about the 'experience' of work in a training and educative aspect. For present purposes the discussion here assumes that such a relationship is contractual, although, as indicated above, that issue– involving questions regarding the intention to create legal relations, consideration and mutuality of obligation - is in itself complex and by no means always unproblematic.

In asking whether the contract of employment is an adequate conceptual underpinning for law to respond to the problem of unpaid internships, this paper seeks to engage with scholarship addressing the issue of whether moving to a broader understanding of personal work relationships is necessary (and desirable) or whether modern regulation needs to move in the opposite direction and define the variety of different work relations with greater specificity in order to fulfil its policy purposes. In Australia, this is important for the contract of employment remains the touchstone for activating the various rights, protections and obligations under the principal regulatory statute, the *Fair Work Act 2009* (Cth).

In recent decades, modern labour law and those who study it have often been focussed on the distinction between employees and independent contractors and hence the boundary between labour markets and the world of commerce (for a recent Australian contribution to the critical literature, see Johnstone et al, *Beyond Employment*, Federation Press, 2011. See also Fudge, McCrystal and Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation*, Hart, 2012), as well as many of the essays in Davidov and Langille (eds), *The Idea of Labour Law*, (2012), and Davidov and Langille (eds), *Boundaries and Frontiers of Labour Law*, 2006). However, in academic texts and critical scholarly writing on the subject of the law of work there has been little attention devoted to examining the conceptualisation of work relations at the intersection between education and training and the labour market. This second part of the paper examines how case law in Australia and the United Kingdom has understood these relations, in particular whether they come within the concept of the

contract of employment.[2] While some Australian case law has held that there is no necessary dichotomy between a contract of employment and a contract for education and training, the approach by English courts appears to be different in so far as it seeks to identify the primary purpose of such arrangements when characterising them. In the light of the approach ordinarily taken by the courts in both countries when distinguishing contracts of service from contracts for services a focus on the factors in the relationship rather than its purposes offers not only greater conceptual coherence but also a stronger capacity to determine the reality of the relationship. At the same time we acknowledge that such an approach also opens up the classification of such work and training/education arrangements to all the criticisms ordinarily applied to the common law's drawing of the boundary between employees and independent contractors.

The paper concludes with some brief thoughts relating to law's classification of work/training and education relations and modern policy and regulatory objectives. As other scholars have observed (see eg Richard Mitchell and Richard Johnstone 'Regulating Labour Law' in Christie Parker et al, *Regulating Law*) the development of the conceptual categorisation of workers in relation to the contract of employment relationship (ie, as a matter of private law) has been a process intimately connected to, and perhaps even dominated by, the public regulation of the work relationships. The regulation of work in most countries these days seeks to embody a wide variety of objectives. In Australia, for instance, fairness to workers (including protecting those who are vulnerable and fostering social inclusion), providing flexibility for business, and promoting productivity and economic growth for the country, as well as taking account of international legal obligations are all aspects of the *Fair Work* legislation. Law's classification of workers not only impacts on but often determines it capacity to attainment this complex of goals. So at the very least the classification of workers in modern law has suggested a complex understanding of the relation between contract and status (see also Kahn-Freund's early 'Note on Status and Contract'). Scholars have also noted that the dominant role of the contract of employment in legal understandings of work relationships is a relatively recent phenomenon. In earlier times the differences between various work relationships were often more clearly delineated and articulated, and so perhaps more obvious. Over time many of the categories and classifications evolved in ways that absorbed some and redefined others, and that evolution was not necessarily identical in all jurisdictions (for an excellent account comparing that evolution in Britain and Australia, see Howe and Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113 and the various other scholars cited by them). In the light of these matters, a critical question is whether the regulation of work that also involves education and training is best undertaken through a more comprehensive definition of work relations or by an even greater attention to the specificity of work relations.

[2] In the United States, the 1947 case of *Walling v Portland Terminal Co* 330 US 148, 67 S Ct. 639 [1947] indicated that a consideration of six factors was relevant to determination of whether such work relations could be considered to be a 'contract of employment. Broadly the six factors require an assessment of: the similarity of the training to that provided in an educational institution; the beneficiary of the training; whether the trainee displaces existing staff or works under their supervision; whether there is any benefit to the employing business; whether the trainee is entitled to a job at the conclusion of the training; whether there is an entitlement to wages. The approach in *Walling v Portland Terminal Co* continues to be influential, not only in the United States but sometimes also in Canada. The *Experience of Exploitation?* Report provides a brief overview of the law in these jurisdictions (see Ch 8); however the focus of this paper is more limited.

The *Experience or Exploitation?* Report[3]

In mid-2011 the Office of the Fair Work Ombudsman (FWO) identified unpaid work in Australia as an emerging issue that warranted its attention. This was prompted in particular by a newspaper article advocating the value to businesses of the 'free labour' on offer from eager young interns. The FWO responded by developing additional educative materials on the topic and initiating contact and discussion with major stakeholders. But it also determined that further research would be of assistance in an area that raised complex legal issues, and in April 2012 commissioned us to undertake that research.

The report, *Experience or Exploitation?,* was presented in December 2012 and is organised into nine chapters, and the summary that follows outlines its findings and recommendations. Our research was restricted to examining three types of unpaid work in Australia: unpaid work experience, unpaid trial work and unpaid internships. Given that the *Fair Work Act* excludes those undertaking 'vocational placements', defined broadly as undertaken as part of a course of study approved by government and with no entitlement to remuneration (see s 12), from being treated as employees, we concentrated on *extracurricular* forms of unpaid work experience – that is, those undertaken other than for the purpose of a formal education or training course.

The research consisted of two strands. First, the report aimed to present a picture of the range, nature and prevalence of unpaid work in Australia. This involved examining policy materials and literature regarding unpaid work and labour market transitions, especially the transition between education and work for young people and migrant workers. There is no comprehensive statistical data on unpaid work experience in Australia. Nonetheless, the findings of our report were supported by a wide variety of other evidence: including unsolicited material from individuals who had direct experience of unpaid work and who responded to publicity generated about the research; interviews with FWO staff and material from FWO files; interviews with and material supplied by a variety of stakeholders, including trade unions, representatives of business organisations, representatives of those involved with work integrated learning in universities, and officers of government departments; and other publically available material, including advertisements. In addition, a number of surveys were undertaken with university students, and also with academics and other staff involved in work integrated learning. These were supplemented by another small scale survey prompted by this project and undertaken by the Young Workers Legal Service (YWLS) in South Australia.

Experience or Exploitation? was premised on the proposition that understanding the social and economic context, in which unpaid work occurs, and especially the phenomenon of globalisation, is critical to developing an effective regulatory response. The issue of unpaid work, particularly as a mechanism for facilitating transitions between education and work for young people, has become a topic of acute concern in developed economies around the

[3] This section of the paper is taken largely from the Executive Summary of the report: *Experience or Exploitation?*

world. This is especially so since the onset of the Global Financial Crisis (GFC). Concerns about unpaid work as a substitute for paid employment and its implications for social cohesion, especially equity of access to labour markets, have now been expressed around the developed world. These culminated in the adoption of a *Resolution concerning Youth Employment: A Call for Action* by the International Labour Conference in June 2012. The ILO has warned of the risks of this form of 'disguised employment' as a way of obtaining cheap labour or replacing existing workers.

The publication in 2011 of Ross Perlin's book *Intern Nation* also did much to draw attention not only to the growth of a particular form of unpaid work (internships) in the United States, but also to their development into a global phenomenon. Perlin's work usefully highlights the complexity of the web of interests – employers, parents, educational institutions, government agencies, interns themselves – invested in the phenomenon of internships. Interestingly Perlin's book concludes with the observation that the recent revolution in social media may mean that now is a particularly propitious moment for making a constructive intervention in relation to this form of unpaid work.

In the last two decades and more, globalisation has wrought an enormous transformation in the world of work and the way it is regulated. In part this has resulted in a challenge to the standard employment relationship and an increase in precarious forms of work. Internships and the other types of unpaid work examined in our report can be seen as a further example of this shift to precarious work. Where not regulated effectively, they become part of an informal economy where there is a heightened risk of social exclusion for those who cannot afford lengthy periods of unpaid work, or who do not have the contacts to obtain the 'best' internships. Australia fares generally well on social inclusion criteria, nonetheless a real challenge lies in ensuring that all people (and in particular, all young people) can successfully negotiate the major transitions relating to work (whether between education and work, or within the labour market, or from un- or under-employment to full participation). In particular, the intersection of education and labour market participation marks one of life's critical transitions, as recognised in Australian government policies such as the 'National Partnership on Youth Attainment and Transitions'. Although Australia has been less impacted than many other developed economies by the GFC, nonetheless there as elsewhere the GFC has impacted disproportionately on young people's labour market participation. At the same time the GFC has also increased the desirability of Australia as a destination for overseas workers, especially young workers.

While definitive conclusions cannot be drawn in the absence of reliable statics, the available evidence outlined in our report indicates that unpaid work exists on a scale substantial enough to warrant attention as a serious legal, practical and policy challenge in Australia. Our report concluded that significant numbers of workers, especially younger workers, are asked to undertake unpaid trials. This conclusion was supported by recent research and studies by others, including the YWLS survey, anecdotal reports from individuals made in response to publicity about our project, information from FWO's investigative files and also reported cases. The indication from the available evidence is that while unpaid trials may be more common in some industries – such as hair and beauty, retail and hospitality – they are in fact to be found across a wide range of industries.

Although work experience was reported as a fairly common feature of secondary school education in Australia from the 1990s (with 87% of students reported as participating in such programs), it has been less emphasised in recent years as the number of young people with part-time or casual jobs has increased. Available evidence seems to suggest that where still undertaken, it is normally seen as a time-limited (generally from one to two weeks) opportunity to experience career sampling, mainly through work shadowing or the undertaking of a very limited range of tasks under guidance, but in a wider range of industries than those in which young people typically hold casual or part-time jobs.

The *Experience or Exploited? Report* indicated that the real growth sector of unpaid work appeared to be in the area of internships. In Australia as elsewhere, the term 'internships' is without fixed content. It has a broad and uncertain meaning covering everything from unpaid or paid entry level jobs to volunteer work in the not-for-profit sector. The growth in internships has been fostered because various forms of work integrated learning have been enthusiastically embraced by post-secondary educational institutions, which in some cases are also responding to demand pressures from students. But the evidence showed that internships are by no means restricted to work opportunities integrated into specific learning connected to particular courses or subjects. The promotion of extracurricular internships or placements is now common. While some educational institutions have adopted policies that take account of the *Fair Work Act* and seek to limit extracurricular work placements to arrangements that involve volunteering for non-profit organisations, others appeared to be either unaware of the impact of the laws regulating work or confused as to their meaning for internships.

However, we found that not all internships are conducted under the auspices of educational institutions. There has also developed a range of organisations whose business is the promotion and facilitation of such work opportunities, and some other businesses recruit interns directly through advertisements. The operation of agencies that broker unpaid internships and job placements has been especially common with international students or graduates in Australia on temporary visas.

In light of the evidence, we concluded that a growing number of businesses are using unpaid interns to do work that, in many instances, would otherwise be performed by paid employees. Although it is not possible to say how many people are undertaking internships in Australia today, either paid or unpaid, a general picture of the phenomenon emerged. While internships are more common in particular industries, such as the print and broadcast media, there is scarcely an area of professional life that is untouched by them. Young people are the ones most often likely to be engaged in internships. But migrant workers, especially international students and those on temporary working visas, are also especially vulnerable to unpaid work, because they often have the additional urgency of seeking to maximise the possibility of securing access to permanent residency.

The second strand of our research analysed the law relating to unpaid work. Its main attention was on the relevant law in Australia – its focus was on the *Fair Work Act* as the foundation of the FWO's powers and duties, but we examined other statutes regulating work and relevant decisions by courts and tribunals. Our report placed this examination in the context of the international standards of the International Labour Organisation (ILO). It

also provided a brief overview of relevant legal developments in four common law jurisdictions, namely Canada, New Zealand, the United Kingdom and the United States of America.

As noted above, importantly for our research, the *Fair Work Act* provides an exception for those who are on a 'vocational placement' as defined in section 12. This covers a 'placement' that is undertaken as a 'requirement' of an 'education or training course' and 'authorised' under a law or an administrative arrangement of the Commonwealth, a State or a Territory, and under which they are 'not entitled to be paid any remuneration'. The potential ambiguity of some of these elements in this statutory definition has yet to be authoritatively determined by the courts. But it was clear to us at the very least that many internships or other work experience arrangements regularly advertised by businesses or promoted by tertiary educational institutions would not fall within the exception.

If a person undertaking work experience or an internship is in reality an employee working under a contract for service, and does not come within the vocational placement exception, then the legal consequence is that the *Fair Work Act* applies to the work relationship. This means that the worker is entitled to the rights and benefits, including pay, established by any relevant award, enterprise agreement or minimum wage order, as well as the entitlements provided by the National Employment Standards. Various other protections and rights will also apply, including the Act's 'general protections' against discriminatory or other wrongful treatment. Employers will also be obliged to provide the worker with a 'Fair Work Information Statement' and to keep appropriate records. Employers who are in breach of the legislation risk incurring substantial penalties for any non-compliance. In summary, the effect of the *Fair Work Act* is that if a person is engaged to work as an employee, it is necessarily unlawful not to pay them for that work.

In determining the application of the *Fair Work Act* (and to a greater or lesser extent other relevant legislation) to the forms of unpaid work examined in our report, the key legal issue is whether the person performing the work is doing so as an employee: that is, there must be a contract, and that contract must be one of employment. In the report we paid particular attention to the three issues most likely to be contested in this regard: whether there is an intention by the parties to create legal relations; the existence of 'consideration" (that is, some form of agreed exchange); and whether there is a 'mutuality of obligation', in the sense that the worker is obliged to work and the employer is obliged to provide something in return. In principle, we argued, there is no reason why these three criteria cannot be satisfied even when there is an understanding that the work will not be paid. The legal test to determine an intention to create legal relations is an objective one, and is not dependent on the subjective view of the parties. The requirement of valuable consideration does not mean that the payment of money is essential; indeed as several cases make clear, the provision of training or experience can be good consideration in the eyes of the law. As to 'mutuality of obligation', the Australian understanding of this has never been as rigid as that in the United Kingdom. There is also strong recent authority in Australia to suggest that in determining whether a worker is an employee, courts should focus on the 'practical reality' of the relationship, not necessarily any formal terms of the agreement as drafted by the employer (see eg *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of*

Taxation (2011) 279 ALR 341, [2011] FCA 366; *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3; and *Fair Work Ombudsman v Metro Northern Enterprises Pty Ltd* [2013] FCCA 216).

Nonetheless, an examination of the relevant case law revealed the complexity of the issues arising in relation to unpaid work. Because under the common law the outcome of any particular case is always dependent on its particular facts, it was not possible for the *Experience or Exploitation? Report* to state a simple or comprehensive proposition definitively encapsulating the legal status of the various forms of unpaid work. The decided cases show that those who undertake an unpaid trial do not always come within the law's concept of an employee. This is principally because it may not be possible to demonstrate the requisite intention to create legal relations or, as was demonstrated by the High Court's 1980 decision in *Dietrich v Dare*, because the requisite mutuality of obligation cannot always be established. However, some cases point in the other direction, and certainly the longer such a relationship is in place the more difficult it may be to resist the conclusion that an employment relationship exists. Significantly, and consistent with the objective nature of the law's test of intention to create legal relations, a benevolent motive on the part of the employer will not necessarily be relevant. Likewise we found that work experience, including where labelled an 'internship', does not always, but may sometimes be found to, involve an employment relationship. The longer the period of work, and the less observational the role, the more likely it will be that there is an employment relationship, even where the work has been unpaid.

In Australia generally it has been difficult to perceive a strong policy approach to the interpretive task performed by courts (absent perhaps a reluctance to find employment relations in relation to charitable, religious, or sporting organisations). There has been comparatively little express attention to the importance of statutory purpose(s) in articulating the concept of 'employee' when it occurs in a statute such as the *Fair Work Act*. However, we argued in our report, when statutory objectives are considered, courts would be justified in leaning towards finding a contract of employment in order to fulfil those objectives. Given that Parliament has already chosen to exempt only certain types of vocational placements, we considered that this suggests a strong argument that unpaid work relationships which fall outside the exception should be brought within the protection of the statutes.

A chapter of the *Experience or Exploitation? Report* was devoted to the intersection of migration legislation and labour legislation. The available evidence, including from investigations and prosecutions by FWO, indicated that migrant workers may well be some of the most vulnerable when it comes to unpaid work. The rights of those who are not Australian citizens or permanent residents to work in Australia are governed by the relevant provisions of the *Migration Act 1958* and the *Migration Regulations 1994*, and include conditions attached to visas (for instance, restrictions on the type of work or the amount of work that can be undertaken, or the places in which work can be performed). Work is defined in Australian migration legislation as 'any activity that normally attracts remuneration'. The decided cases clearly establish that this encompasses unpaid work, including where performed for benevolent, educational or community interests. However the Migration legislation also provides exemptions for undertaking certain work which has been specified as a requirement of a course when that course was registered. This wording

differs slightly from the 'vocational placement' exception under the *Fair Work Act*. Because of this, and because the Migration legislation defines work in a way that includes both paid and unpaid forms, there is the real potential for migrant workers to be confused as to the legality of such arrangements, and especially their rights and entitlements under the *Fair Work Act*. The potential for confusion is compounded further by some of the information available on the Department of Immigration and Citizenship (DIAC) website. Because the consequences of breach of work conditions attached to visas can be so drastic for some migrant workers, including most international students, we argued that in ensuring compliance with the Fair Work legislation the FWO must place a strong emphasis on its educative role and undertake its compliance activities in such a way as to instil a confidence in migrant workers that its focus is ensuring that workplace rights are respected.

Finally, there was also a comparative dimension to our research. We looked at unpaid internships in international organisations and in four common law countries, viz Canada, New Zealand, the United Kingdom and the United States of America, examining their prevalence and legal status, and policy initiatives in relation to them. In all jurisdictions existing statute and case law suggested that the response of the law to the phenomenon of unpaid work was either inadequate or at best unclear (see *Experience or Exploitation?*, Ch 8).

In summary some of the key conclusions of our report indicated that in Australia:

- significant numbers of workers are being asked to undertake unpaid job trials;
- unpaid internships and other forms of work experience are not confined to authorised education or training courses, or to 'volunteering' arrangements;
- in some industries, such as the print and broadcast media, such arrangements are a common prelude to paid work;
- some workers (predominantly international students or graduates) are paying agencies to place them in unpaid internships; and
- there is reason to suspect that a growing number of businesses are choosing to engage unpaid interns to perform work that might otherwise be done by paid employees.

While not overstating the scale of these practices, overseas experience suggests that Australia can expect these unpaid work arrangements to become more common, as competitive pressures force even unwilling organisations to go down this path.

On the basis of our findings, we made six recommendations to the FWO in the following terms:

1. The FWO needs to determine the legitimacy of unpaid work experience in order to inform its approach to education and its operational decisions regarding investigations and potentially prosecutions by assessing the seriousness of any unpaid work issues.

   This requires a view to be formed about each element of the 'vocational placement' exception in the *Fair Work Act*. In our view, the purpose of the exception is to ensure that where students in an authorised education or training course are placed with a host to undertake unpaid work that will satisfy an element of that course, or be credited towards that course, the relationship between the student and the host is not to be regarded as one of employment.

In any case falling outside the exception, the determination of whether there is a contract of employment is likely to be difficult. In some cases, perhaps even the majority, courts have simply assumed that the lack of remuneration indicates a lack of consideration and that absent a formal requirement to attend work, the requisite mutuality will not be found. However, we conclude that in many instances a contract of employment *can* be found. Indeed where a person is performing productive work for an organisation, under an arrangement whereby they will either gain experience or be considered for an ongoing job, it is appropriate to assume that they are doing so under an employment contract – unless there is clear evidence to the contrary. Such an approach is consistent with the purposes and policy of the *Fair Work Act*.

Where organisations are systematically using unpaid interns or unpaid job applicants, there is clearly a greater threat to the integrity of the *Fair Work* legislation. This should be treated as a significant factor in any decision as to whether to investigate a particular matter, or to take action. It is also important to recall that while those who are undertaking unpaid work experience are often amongst the most vulnerable workers, it may be important to pursue investigations even where a person has made a free and informed choice to accept unpaid work to secure greater opportunities in the labour market. The point of enforcing labour laws in this setting is not just to protect the individuals involved. 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. It is also to promote the goal of 'social inclusion' that is expressly made part of the objects of the *Fair Work Act*.

2. In relation to education and information, we applaud the agency for the steps it has already undertaken to increase awareness about the issue of unpaid work. However, we recommend that the FWO go further and develop more detailed guidance on this matter. This includes more detailed information regarding the elements of the 'vocational placement' exception. We also suggest that developing specific information targeted at particular industries would be valuable.
3. As a development of the last point, we recommend that the FWO institute one or more targeted campaigns or other compliance activities around extracurricular unpaid work. This is especially important, given the low rate of complaints that can be expected in this area. These campaigns or activities should include compliance audits, and involve contact not just with employers, but with individuals who either have been involved in work experience arrangements or may do so in the future.

   Based on our findings about the apparent prevalence of unpaid trials in the hair and beauty, retail and hospitality industries, we would recommend selecting at least one of those sectors for special attention. The purpose would be to uncover the use of such trials and assess whether they involve contraventions of the Fair Work Act, as well as to educate businesses about the issues involved.

   We also recommend choosing one or two further industries in which it appears to be commonplace for unpaid internships to be undertaken outside the scope of an authorised education or training course. The print and/or broadcast media should be one of those industries. A second might be legal services, or perhaps advertising, marketing or event management.
4. We suggest that FWO consider instigating, where appropriate, test cases to assist in providing greater clarity and certainty in understanding the application of the legislation to unpaid work arrangements. This should includes cases dealing both

with relatively short periods of unpaid trial work, and (at the other end of the spectrum) with lengthier internships that may have an element of training but mostly involve productive work.

5. We recommend that FWO develop more effective liaison with other government agencies interested in or in a position to influence the conduct of unpaid work arrangements. This includes encouraging DIAC to ensure that information provided to migrant workers does not confuse them in relation to unpaid work; and working with the Australian Competition and Consumer Commission (ACCC) to take a stronger position in relation to the advertisement of employment-like internships.
6. The experience overseas, especially in the United Kingdom, demonstrates the importance of engagement with a broad range of stakeholders, including young people and migrant workers themselves, educational institutions, and particular industry groups. Such engagement should involve more than a minimal conception of ensuring compliance with legislative obligations. A more effective approach would be for FWO to see itself as providing an enabling capacity, which assists others (be they individuals, groups or institutions) to comply with the legislation within a context of developing best practice approaches to the issue of work experience.

We concluded the *Exploitation or Experience? Report* by commenting on the need for legislative reform to identify more clearly the type of workers and work covered by *Fair Work* legislation and the scope of any exclusions. Many organisations are unable to be sure whether it is lawful to adopt arrangements (whether connected to an education or training course or not) that they regard as unexceptionable. It is also possible that certain types of work experience that we would regard as highly questionable, especially in terms of maintaining the integrity of the labour standards established by the *Fair Work Act*, may turn out to be lawful if managed in a certain way.

The Intersection of Work, Education and Training: The Scope of the Contract of Employment

An important question raised by the *Experience or Exploitation? Report* is the scope of the contract of employment in relation to those work relationships, such as internships, which are often presented in terms that suggest they are as much about education and training as they are about work. This section of the paper examines case law in Australia and the United Kingdom which indicates that there may be a different approach taken to this question in the two jurisdictions.

The approach in the Australian cases

An examination of the Australian case law suggest that courts there would have had no difficulty in understanding that a contract might be simultaneously one for education and training as well as one for employment. This was precisely the approach in the important case of *Rowe v Capital Territory Health Commission* ((1982) 39 ALR 39 Justice Keely in the Federal Court; and (1982) 2 IR 27 aff'd on appeal by the Full Court of the Federal Court

(FCAFC)) which concerned trainee nurses. All four judges of the Federal Court, who considered the matter, held that the trainee nurses, who were undertaking their training at the hospital, were employees and thus entitled to guaranteed award rates of pay. The evidence revealed that, although treated as 'supernumerary' and so not counted on the ward rosters, the trainee nurses performed a variety of tasks that could be described as general nursing work under the direction of the hospital's other employed staff (*Rowe,* at 43-47 per Keely J). This work was part of the service provided by the hospital to its patients. It was work that, if not done by the student nurses, would have had to be done by the hospital's employees (at 47 and 50). However, this did not mean that the hospital would have needed to employ additional staff to do the work, because experienced staff would do the jobs more quickly than a trainee and they would also be freed of some of the inevitable supervisory roles that were required when the trainees did the work. On appeal, the judges of the Full Bench of the Federal Court in *Rowe* emphasised (at 29) that 'the nature and extent of the work performed ... and the circumstances of the performance of that work' were critical.

The argument presented by the hospital in the case had sought unsuccessfully to persuade the Court to treat work that was a 'learning experience' as distinct or different from work that was 'ward service'. At first instance, Keely J held there was no mutual exclusivity between the two (at 48), and indeed that the disaggregation of work that was part of training or 'clinical experience' was particularly difficult in a context where there was life-long learning at work. This was especially so where there was no specification of quantitative or qualitative measures of when skills are achieved. As Justice Keely commented:

> 'It is not correct to assume (either as a matter of logic or language) that the one activity by a student nurse cannot be accurately described as falling within both categories [ie, 'clinical experience' and 'ward service']. An activity of an apprentice (or an articled law clerk) may well be both valid practical experience for him [sic] as part of the process of learning his trade (or profession) and yet, at the same time, be fairly described as providing a service to his master or as providing on behalf of his master, a service to the master's client. Nor is it any less a 'service' that the activity of the apprentice has to be supervised by the master (directly or through other employees) or that the 'service' provided by the apprentice or law clerk, either to or on behalf of his master, has to be checked or counter-signed or certified by the master or someone on his behalf.' (at 50 per Keely J)

In taking this approach, Justice Keely in *Rowe* relied (at 50) on earlier Australian precedent, the *Junior Constables Case* (1943) 17 SAIR 334. In response to a similar argument that the junior constables were engaged in training not employment, a neat separation learning, training and work was rejected. The apprentice and someone who improves at their work was ample illustration.

> 'A person may enter a contract of service, the purpose of which is to teach him an occupation, and in fact that person may learn all the time he carries out his service, and yet be an employee.' (at 346 per Morgan J)

Morgan J identified at least three different interactions between of work, education and training: training which does not involve any work at all; work which involved learning activity; and work done that rendered service and did not involve learning. In the *Junior*

Constables Case, Morgan J held that the constables were involved in all three. Nor was it considered important to disaggregate the times when these various work activities might predominate, Morgan J considering that it was the liability of a junior constable to serve that was relevant, even though they may not serve all the time.

Since *Rowe* there have been a number of Australian cases that have simply accepted that a trainee may have a contract of employment although the issues are often not elaborated (see eg *Popoovski v Purity Property Services Pty Ltd* PR957865 [2005] AIRC 453; and *Phung v Advanced Arbor Services Pty Ltd* [201] NSWCA 215).

Perhaps more pertinently, there has been a long legislative history in Australia of regulating apprentices under industrial awards. One of the earliest High Court cases in Australia, *The Commonwealth Court of Conciliation and Arbitration and the President thereof and the Boot Trade Employés Federation; ex parte Whybrow & Co* (*Whybrow*) (1910) 11 CLR 1 dealt with a dispute over apprentices wages as regulated in the relevant award. No issue was raised as to the appropriateness of regulating the wages of apprentices in awards. That did not necessarily mean, as Keely J appears to have assumed (at 57), that apprentices were in fact considered as coming within the category of workers described as employees. In *Whybrow* context was everything (see eg per Griffith CJ at 31). Indeed, under the relevant *Conciliation and Arbitration* legislation, the important issue was whether the dispute could be classed as 'industrial', and in regard to that the court expressed no doubt (see per O'Connor J at 45-46; per Isaacs J at 58 and 59-60). Indeed in almost all of these cases the terms of the legislation have been significant. In the *Junior Constables case,* the relevant industrial legislation defined industrial matters as not only concerning the rights and obligations of employers and employees but also of those who proposed to be employers and employees (see at 337). Nonetheless, what *Whybrow* and other later cases demonstrated (eg *John Heine & Son Ltd v Pickard* (1921) 29 CLR 592 – concerning a conviction of an employer for not paying award wages to an apprentice. See also *Fletcher v AH McDonald & Co Pty Ltd* (1927) 39 CLR 174; and *Culbert v Clyde Engineering Co Ltd* (1936) 54 CLR 544.) was that the Australian regulatory system establishing wages and conditions has long applied to those who are apprentices or trainees of some description. Indeed, in *Rowe* it was these cases that Justice Keely took as supporting the principle in the *Junior Constables case*, that:

> 'the fact that an apprentice (or other person) is performing duties under a contract the primary purpose of which is to teach that person an occupation, does not prevent that person from being an employee.' (at 57, per Keely J)

It is therefore not surprising that scholars in Australia have confidently stated that for the purposes of the law the contract of apprenticeship has been treated as an employment contract (see Irving, *The Contract of Employment*, LexisNexis, 2012, at [3.43]) and that 'apprentices can ordinarily be regarded as employees' and 'the same is generally true of other trainees' (Creighton and Stewart *Labour Law*, 5th edition, Federation Press, 2012 at 213).

One of the factors in *Rowe,* was only touched upon briefly the court, was that the trainee nurses had previously been treated as employees of the hospital and had had their conditions of work regulated under the relevant award. The hospital had then revamped several of the aspects of the training program and updated its accompanying documentation. Rather than being paid by award wages, the trainee nurses were now paid

a lower scholarship allowance. On appeal, the judges of the Full Bench of the Federal Court made it clear that the decision in *Rowe* indicated nothing regarding the situation where student nurses undertaking a course at another training institution were placed at the hospital (at 29).

Re Crown Employees (Technical Teachers) Award (1974) 74 AR (NSW) 450 was just such a case. At issue there was whether teacher education scholarship holders at institutions of tertiary education universities and colleges of advanced education were employees to whom the award applied. In particular, there was discussion of the fact that during periods where the students were assigned to schools for practical teaching they performed a range of tasks under direction, such as undertaking 'yard duty', which amount to the rendering of service rather than the receipt of training and education. This case as argued required a determination as to there was 'control' sufficient to characterise the relationship as one of employment. The Industrial Commission of New South Wales (Beattie J, President, Sheehy and Sheldon JJ) approving dicta of Dixon J in *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552 referring to *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 1 ALL ER 433 at 440-441) held that control was a necessary but not sufficient element to establish the employment relationship. All the circumstances of the relationship, including that the trainee teachers spent the great part of their time undertaking training and only a small part on practical placement, were considered to identify the nature of the relationship. Any control exercised, it was held, was ancillary to the provision of training. In addition, any practical teaching was undertaken as part of tertiary education courses and was clearly not part of the teaching service as defined in the *Teaching Service Act*. The contracts between the Education Department and the trainee teachers were contracts to provide a scholarship during a period of training.

The approach in the United Kingdom cases

In contrast to the approach in the Australian cases, the reasoning in the cases in the United Kingdom reveals a much stronger sense of a dichotomy between employment contracts and contracts of training and education (although this is not necessarily to suggest that the all of the already decided cases would have been determined differently if brought before the courts of the other jurisdiction).

The UK Situation – training contracts – not employees ie separation of contracts

In Rowe, Keely J had distinguished *Wiltshire Police Authority v Wynn* [1981] 1 QB 95, one of the leading English cases. *Wynn* dealt with a question as to whether a police cadet was an 'employee' under s30(1) of the *Trade Union and Labour Relations Act 1974* and thereby enabled to make a claim for a remedy for unfair dismissal. In argument it had been pointed out that in many instances the services rendered to employers are not very useful to the employer – training or probationary periods (at 102)

Lord Denning MR applied a test which looked to identifying the primary purpose of the contract:

> 'The distinction between the cases where teaching and learning is the primary purpose - and the cases where the work done is the primary purpose – is helpful in the present context. ... throughout the cadetship the primary purpose is to teach and to learn – not a trade – but as part of general education. It is divided into two phases. In the first year he or she is being given further education. In the second year he or she is there to watch – to see how things are done. We are told that sometimes they help in a minor way: such as holding the tape when there is a measurement to be taken at an accident, or something of that kind. They are giving minor assistance in the work. They are not being taught a trade such as would make them an apprentice'. They are not doing work for the employer such as to be under a 'contract of service' They are neither apprentices nor servants. They are in a class by themselves – police cadets.' (at 109 per Denning MR; see also Waller J at 111, and Dunn J at 113)

The Court of Appeal thus indicated that where the primary purpose is teaching or learning there is no contract of employment of the contract. Despite argument from counsel that reliance on old cases was not of assistance in understanding the work conditions of the times (see summary of argument at 102), in so determining the Court relied on some of the older settlement cases from the late 18th and early 19th century concerning apprentices, *R v Inhabitants of Laindon* (1799) 8 Term Rep 379 and *R v Inhabitants of Crediton* (1831) 2 B & Ad 493. In each the question was whether a pauper was working in a master- servant relationship or as an apprentice. In *R v Inhabitants of Crediton* Taunton J provided an overview of a number of even earlier cases (some concerning teacher/scholar relationships, such as *Rex v Bilborough* 1 B & A 115; *Rex v St Mary Kidwelly* 2 B & C 750; and *Rex v The Hamlet of Walton* Carth 200 2 Bott pl 267; and others concerning a contract of service *Rex v Hitcham* Burr SC 489) and concluded:

> 'I take the true distinction in these cases to be this: where teaching on the part of the master, or learning on the part of the pauper is not the primary, but only the secondary object of the parties, that will not prevent (where work is to be done for the master) the contract being considered one of hiring and service. ... where teaching and learning are the principal objects of the parties, though there was a service, the contract is to be considered one of apprenticeship.' (at 497-498)

Horan v Hayhoe [1904] 1 KB 288, also relied upon in *Wynn*, also held that that a person who had a deed of apprenticeship as a riding groom but also carried out work of a stable hand had a contract of apprenticeship not a contract of service and therefore not a 'servant' for certain tax legislation.

Thus it has long been accepted in English law that an apprenticeship is a special kind of contract different from an ordinary contract of service. In *Dunk v George Waller & Son Ltd* [1970] 2 QB 163 this was illustrated in the context of a decision regarding the appropriate damages to be awarded for breach of a contract of apprenticeship. There a plaintiff who had been offered a low-skilled job on the factory floor after his apprenticeship was terminated claimed damages for breach of his contract. In overturning the decision of the Court below to award only nominal damages, the Court of Appeal awarded substantial damages because such a contract was of a special kind – not only was the apprentice to be paid under it, but training was promised the completion of which would provide enhanced status for entering the labour market. Breach of the contract was not only failure to pay the wage, but meant also a failure to deliver the training and consequent diminution to

prospects upon entering the labour market. More recently the Court of Appeal in *Edmonds v Lawson* [2000] 2 WLR 1091 has described the contract of apprenticeship thus:

> 'A contract of apprenticeship or any equivalent contract is in our judgment a synallagmatic contract in which the master undertakes to educate and train the apprentice (or pupil) in the practical and other skills needed to practice a skilled trade (or learned profession) and the apprentice (or pupil) binds himself [sic] to serve and work for the master and comply with all reasonable directions. These mutual covenants are in our judgment cardinal features of such a relationship.' (at 1102-1103 [30])

Thus even though legislation has often assimilated the apprenticeship to employee, in the United Kingdom the cases are more apt to remind us that the contract of apprenticeship was "a distinct entity at common law' with its first purpose training and execution of work as only second purpose (see also *Wallace v CA Roofing Services Ltd* [1996] IRLR 435 (Sedly J): concerning an applicant who was found to be an apprentice and hence dismissal law did not apply because an apprenticeship was a fixed term contract not terminable at will). (See also Deakin and Morris pp172-174 for a summary of the position of apprentices and trainees under laws governing work in the United Kingdom.)

However, the point that we wish to emphasize here is that the courts in the United Kingdom have continued to examine the purposes of the education, training and work arrangements in determining the nature of a work relationship. This was also the approach in *Daley v Allied Suppliers Ltd* [1983] ICR 90 concerning a young person on a 'Youth Opportunities programme'. This was a government program in which a young person accepted into it was paid a small amount from a sponsoring business which was in turn reimbursed from the Manpower Services Commission. Although the decision in the case was based on a failure to establish a contract at all because there was no relevant mutuality, it was noted that even if a contract had been established it would not have been a contract of employment because the primary purpose of the relationship was training rather than the establishment of an employment relationship. (This meant that the trainee had no protection under *Race Relations Act 1976* which covered those 'employed'. The legislation has since been amended in response to the case.) The primary purpose of the relationship was also used in deciding another unfair dismissal application in *GE Caledonian Ltd v McCandliss* [2011] EAT (22 November 2011) UKEAT /2011/0069_10_221. In this case too mutuality blurred the issues. There a business offered their apprentice was offered a scholarship to complete an engineering degree and work for it over the summer break. When he withdrew from the engineering course he was not taken back into employment, the business telling him that he could either resume the course or take an internship. The claimant had argued he had two contracts – a contract of scholarship and contract of employment for the summer period (like seasonal work). It was held that under the contract an offer of scholarship was made to take course, and there was no obligation to take up summer work. He was obliged to offer services for two years – they could take it up but no obligation to offer contract of employment. 'That arrangement bore all the hallmarks of a training contract. The overarching and primary purpose was, plainly, to advance the Claimant's training and education with a view to him obtaining a further qualification, namely a university degree.'(at 43])

By way of contrast, in *Rowe,* Keely J had rejected the invitation to determine the case by considering the primary object of the contract (at 55-56) as had been done by Denning MR in *Wynn*. While accepting that there is a distinction between contracts of service and contracts of apprenticeship and that such a distinction is critical for some purposes, such as the settlement of paupers at the turn of the 19th century, Keely J held that it did not follow that this distinction was at all relevant when determining whether someone was an employee for the purposes of an award. In the result *Wiltshire Police Authority v Wynn* was distinguished in *Rowe* (at 53 per Keely J) on the basis of the different statutory context, and also because of the observational nature of the role performed along with minor tasks.

Some (Tentative) Concluding Thoughts

From the brief discussion of the cases above, there are a number of more general issues.

First, the approach taken by the Australian courts to characterising contractual relations that concern education, training and work, emphasises examining all of the relevant circumstances in order to determine the true nature of the relationship (see eg *Rowe* (FCAFC) at 28). Importantly an examination of the written documentation establishing these relations alone has not been adequate. In *Rowe* the Full Bench of the Federal Court (Northrop, Deane and Fisher JJ) held that examining all the circumstances showed that the nurses were performing work in the context of a nursing course. The fact that the signed written contract indicated a mere student relationship did not preclude a finding that there was also an employment relationship. The Court held that the relationship between the nurses and the hospital was a contractual one from the outset (*Rowe* at 28), but while the reason for the nurses doing the work (ie, to gain a qualification) was relevant to the determination of the nature of the contract, that

> 'does not preclude the conclusion that the work in the wards done under the contract between the commission and the particular nurse was of such a nature and done in such circumstances as to lead to a finding that it was done as an employee of the Commission' (at 29).

The Court concluded that the relationship of service 'was more the result of the acting out of the relevant contract by the performance of that work than the result of any pre-existing contractual obligation to perform it' (*Rowe* (FCAFC) at 28). It is not easy to understand exactly what the court means by this. Perhaps anticipating an objection relating to an argument about mutuality and that there was no way to ensure the student trainee nurses would do this work, the Full Court accepted that the contract may have been terminable at will by them, but that while it subsisted the work was done under it.

This decision in *Rowe* was thus not constrained by any 'arid identification of pre-existing contractual obligations' (*Rowe* (FCAFC) at 28). In light of more recent cases both in Australia and the United Kingdom delineating the boundary between employees and independent contractors, this has a peculiarly modern ring to it (as to which see for Australia: *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341, [2011] FCA 366; *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3; and *Fair Work Ombudsman v Metro Northern Enterprises Pty Ltd* [2013]FCCA 216. For the UK see especially the decision of the Supreme Court in *Autoclenz Limited v Belcher* [2011] UKSC 41). The Court took

account of the nature and extent of the work actually performed and the circumstances under which it was performed (control etc) to understand the real nature of the contractual relationship. Given this, it was to no avail to label the consideration as a 'scholarship' and thereby hope to convert the relationship to something it was not. But in adopting this approach the Court did not conceive that it was acting in any revolutionary manner. Indeed, the judges referred to long established precedent. (See *Rowe* at 59 per Keely J, citing *Chitty on Contracts*, *AMP Society Case* also citing Denning MR in *Massey v Crown Life Insurance Co* (4 November 1977 unreported); and *Rowe* (FCAFC) at 28 citing *R v Foster; ex parte Commonwealth Life (Amalgamated) Assurance Ltd* (1952) 85 CLR 138; and *AMP Society v Allan* (1978) 52 ALJR 407 (Privy Council) and also *R v Allan; ex parte AMP Society* (1968) 16 SASR 237 at 247 per Bray CJ).

By way of contrast, although it is true that many of the UK cases, including *Wynn*, that are examined in this paper may in fact have looked at the wide variety of relevant facts or circumstances, the approach of the UK Courts as articulated suggests a more limited focus that risks placing too much emphasis on the parties' articulated purposes in contractual documents than examining the reality of their relationship. In situations where, say, young people are attempting to break into a highly competitive labour market, their vulnerability in those circumstances should not be ignored. Further their vulnerability in the face of standard form contracts from organisations that broker of offer internship and other arrangements should not be underestimated.

However, none of the above comments should be taken to indicate that we underestimate the difficulties that are also inherent in an approach to the characterisation of work relationships that seeks to balance a wide variety of factors.

It is also clear from the cases that many are decided in the context of the application of statutory standards. In various of the cases it has been critical that the issue at stake has been the application of important labour legislation to the parties. In *Rowe* the Full Court also referred to earlier authority indicating the important social policy dimensions of its approach. Hence, while it might be one thing for parties to make a declaration as to the label of their relationship as between themselves, the Court indicated it was quite another thing to do so in the context which amounted to contracting out of important social and economic or fiscal legislation (see *Rowe* FCAFC at 28 citing at *R V Allan; ex parte AMP Society* (1968) 16 SASR 237 at 247 per Bray CJ; in turn citing *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2QB 497; and *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213).

The interpretation of statutes regulating work in the light of their policy goals is important. In undertaking our research into unpaid work we were frequently met with an objection that there was already too much regulation and that by seeking to regulate work experience it would become too costly for business to offer and therefore we would be denying opportunities to young people entering the labour market. Contra these arguments, in the *Experience or Exploitation? Report* we took the view, that an important policy dimension of the *Fair Work* legislation was the goal of social inclusion. Social inclusion suggests that unpaid work not only impacts in a disproportionately negative way on those from lower socio-economic backgrounds and who cannot afford to access such work or do not have the

contacts to initiate the opportunities, but also undermines law's guarantee of minimum wages and conditions for all employees.

However, it may be conceded that there is a wide range of policy goals underpinning modern labour law. Kountouris's argument was that some of these goals in fact promote precarious work. He contrasts fundamental rights social dialogue with European labour regulation and policy discourse. In summary, he argues that European regulation has broadly adopted an 'equal treatment approach' between standard and non-standard workers, and that one of the reasons this often fails to alleviate precariousness is because it is also dependent upon the adequacy of national notions of contract or employment relationships. Likewise he critiques EU Employment Policy which has often favoured embedding a broad based 'flexicurity', and thereby trading off security *within* work relations (ie, no longer a job for life) for great buoyancy or overall security in the labour market (in which transitions between, say, training, work, career breaks or self employment are facilitated), as well as further de-regulation to eliminate 'insiders versus outsiders'. Such policies, suggest Kountouris, have effectively encouraged more precariousness. In conclusion, Kountouris favoured taking a universalistic approach to protecting all who provide personal work.

In earlier work Freedland and Kountouris referred to the fact that legal characterisation of work relations is a 'complex activity' in which taxonomy and regulation are deeply entwined (Freedland and Kountouris in Davidov and Langille (eds) *The Idea of Labour Law*, 2011, p192). The regulation of the labour market is not a new phenomenon. Indeed, as Mitchell and Johnstone (in Parker et al, *Regulating Law*, OUP 2004) have shown in English law, for example, statutes regulating apprenticeships date back to the middle ages. Mitchell and Johnstone argue (at 108-109) that it was the period 1900-1980s that employment status was consolidated into the two main categories on 'employee' and 'independent contractor' and, although the process was a lengthy one, it was largely completed in Britain and Australia by the 1930s. In their conclusion Mitchell and Johnstone thought contract had ceded ground to statute and it was up to statute to respond. But that has never been entirely accurate in relation to much precarious work (see A Stewart ''Atypical' Employment and the Failure of Labour Law' (1992) 18 *ABL* 217). While Mitchell and Johnstone could comment accurately that 'the great weight of regulation in the Australian award and statutory agreement system barely seems to have impacted on the way that the common law contract of employment has evolved in Australian courts' (at 116), the analysis of Australian law in this paper suggests that in subtle ways courts in Australia have demonstrated some capacity to recognise certain training and work arrangements as contracts of employment that are deserving protection. Nonetheless, the contract of employment remains for Australia the 'juridical gatekeeper' (see Mitchell and Johnstone. See also O Kahn-Freund, 'A Note on Status and Contract in British Labour Law' ((1967) 30 *Modern Law Review* 635).

While many recent judgments show an awareness by at least some judges that the identification of a contract of employment is not be divorced from the issues in a case (see eg the judgment of Buchanan J in *Trifunovski*). In the context of this paper the real issue is whether that is enough to ensure the adequate protection of, say, young unpaid workers. In considering the growth of work experience such as internships that are unpaid, an

important question is how policy makers should proceed if they wish to ensure social inclusion. Our observation of legislation in other jurisdictions suggests to us that there may be merit in defining the worker more broadly than an employee with a contract of employment. While as we have shown in this paper there is evidence that Australian courts have taken a realistic approach to classification of the education, training and work contract where it exists, the research in our report indicates that more significant problems remain is establishing its very existence.