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**EXPERIENCE ESSENTIAL, REMUNERATION: NONE
THE LEGAL STATUS OF INTERNSHIPS**

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EXPERIENCE ESSENTIAL, REMUNERATION: NONE THE LEGAL STATUS OF INTERNSHIPS

IS THE CURRENT LEVEL OF PROTECTION GIVEN TO INTERNS BY VICTORIAN LABOUR LAW SUFFICIENT, OR
SHOULD CHANGES BE MADE?

CLARA JORDAN-BAIRD*

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* Student, Melbourne Law School. Many thanks to Anna Chapman and Beth Gaze for their comments on an earlier draft. This essay was submitted for assessment in November 2012, and reflects the field at that time.

I INTRODUCTION

'We seek 3rd year Undergraduate Interns to come onboard and join our dynamic team... Best-fit candidates will be bright university students willing to contribute creatively and perform quality *unpaid* work to build up their experience base'.¹ Over the past decade, an increasing number of these advertisements have appeared in Australia, on university noticeboards, in classified advertising, and with offers of study abroad. They're internships, and they involve an eager individual working (often unpaid) for an organisation, hoping to gain knowledge and experience that leads to future employment.

Unlike the United States, where internships are so common they are fast becoming the only route to a graduate career,² Australia's market for internships has traditionally been small, with only 19% of Australian students having undertaken an internship.³ But the practice of internships is increasing rapidly, heightened by calls from universities and employers for a National Internship Scheme to address critical skills shortages.⁴ Despite these developments, there is a severe lack of academic research on internships⁵ – and it is uncertain whether the mostly young, inexperienced interns undertaking this work are afforded any protections under Victorian labour law.

This paper examines the current protections afforded to interns in Victoria by labour law, and assesses the adequacy of this protection in order to determine whether the law should be changed. After addressing the complex issue of who qualifies as an 'intern', it examines the possible classifications of an intern under the *Fair Work Act 2009* (Cth) ("*Fair Work Act*") and any possible employment protections that would apply. It also examines Victorian occupational health and safety and discrimination legislation to conclude that the protections offered to interns under Victorian law are unclear and so are open to manipulation. This unclear position is concerning as it leaves interns outside the scope of labour law (like many other precarious workers), and so prevents their access to labour law's protections. But a simple expansion of the definition of 'employee' will not solve all the problems of interns – we must take the role of intern, one that is notoriously difficult to classify, and create a new classification in order to offer the best protection to interns under Victorian labour law.

II WHO IS AN 'INTERN'?

¹ Private Advertiser, *Online Content Publishing Internships* (12 October 2012) Seek <<http://www.seek.com.au/Job/online-content-publishing-internships/in/sydney-cbd-inner-west-eastern-suburbs/23320166>>

² David C Yamada, 'The Employment Rights of Student Interns' 35 *Connecticut Law Review* 215, 246-147.

³ Caroline Milburn, 'Push for Intern Scheme', *The Age* (online), 26 April 2010 <<http://www.theage.com.au/national/push-for-intern-scheme-20100425-tloh.html?skin=text-only>>.

⁴ Universities Australia, 'A National Internship Scheme: Enhancing the skills and work-readiness of Australian University Graduates' (Position Paper No 3/08, May 2008) 15. See also Ross Perlin, *Intern Nation* (Verso, 2011) xiii.

⁵ See Rosemary Owens' comments that "nobody's done any work like this to date": ABC Radio National, 'Fair Work Ombudsman: Internships Could be Illegal', *PM*, 10 April 2012 (Tom Nightingale)

Before we can address the level of protection that an intern may receive, it is necessary to first establish who falls into the definition of intern. Who, exactly, is an intern? The question is a widely debated one around the world, but comprehensive definitions are most readily found in the United States, where internships are most prevalent. A starting point is the one provided by the National Association of Colleges and Employers (USA), which defines an internship as:

...a form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting.⁶

This definition highlights both the work component and the educational component of an internship - internships are seen as containing an element of workplace training, whether or not arranged by universities for this express purpose. Other definitions are more cynical, with Ross Perlin in *Intern Nation* commenting that in the United States an internship can apply to a wide range of work arrangements,⁷ with many employers branding their work arrangements as internships to make them seem desirable.⁸ In Australia, the relatively new concept of internships explains the lack of available definitions, particularly in the legal sphere – statutory definitions of ‘intern’ are still restricted to the more traditional conception of medical interns.⁹ But analogies can be drawn between internships and concepts of ‘work experience’ or ‘trainee positions’ seen in Victorian law. For the purposes of this paper the laws surrounding apprenticeships and VET courses are not considered, as they are of a sufficiently different nature to internships (particularly as they are always paid) and are regulated by a different set of state laws. This paper investigates both paid and unpaid internships. It also examines both internships taken as a requirement of an educational course and internships taken for experience purposes only. This encompassing definition best captures the class of workers who undertake the work of internships and are subject to similar vulnerabilities – youth, naivety, and unawareness of the real price of labour.¹⁰

III THE LEGAL CHARACTERISATION OF AN INTERN AND THEIR PROTECTIONS UNDER LABOUR LAW

A *The Fair Work Act*

The key area of labour law that interns may expect to receive protection from is in the area of employment law – relief from unfair dismissal, a minimum wage, the right to

⁶ National Association of Colleges and Employers, as quoted in CCH International, *Australian Managing Training and Development*, vol 1 (at 08-02-12) ¶86-500.

⁷ Ross Perlin, above n4, xii; 26.

⁸ Ibid 24.

⁹ See for example *Health Insurance Act 1973* (Cth) S 19AA (5).

¹⁰ See Perlin, above n4, 125, discussing a recent UK study where 86% of graduates and prospective graduates were willing to work for free. Note, however, that interns are not exclusively young – many are older workers seeking a career change, and have often been subject to discrimination on this front. See Yamada, above n2, 221-222.

request time off, and so on. However the classification of an intern under the *Fair Work Act* is very unclear. There are three possible classifications of interns under the Act, each having different consequences for the protection of interns' rights: vocational placement, unpaid arrangement or employment.

1 *Classification 1: The Internship as Vocational Placement*

The debate around classification centres on the definition of an 'employee', because the employment protections of the *Fair Work Act* only apply to national system employees under the ordinary definition of 'employee'.¹¹ There is a clear exemption to this definition under the *Fair Work Act*. Under sections 13 and 15, an intern is not an employee if he/she¹² is undertaking a 'vocational placement'.¹³ Vocational placement is further defined in section 12 as involving three key elements: that the placement is unpaid work undertaken with an employer, it is undertaken as a requirement of an education course, and that it is authorised under a law or an administrative arrangement of the Commonwealth, a state or a territory.¹⁴ This definition has not been further elaborated upon by case law, and so it is unclear whether this educational course requirement includes placements undertaken as an optional course requirement (for example as an elective for a degree) or just placements undertaken as a compulsory course requirement (such as training courses with a compulsory work placement).¹⁵ In any case, it is clear that the classification covers a very small proportion of interns. Firstly, it excludes all paid internships. In addition, the requirement for the specific arrangement to be authorised under state or federal law envisages a specific kind of arrangement, such as a placement at a hospital as part of a medical degree.¹⁶ For the small proportion of interns that are covered by this classification, the direct consequence is that they are not considered an employee under the *Fair Work Act*. As such, they are not entitled to protection from unfair dismissal, minimum wage standards, time off, or flexible hours, and have no right to collective bargaining. They are given very little protection by the *Fair Work Act*.

¹¹ Note that some protections also exist under the *Fair Work Act* for independent contractors, for example *Fair Work Act* s 342.

¹² For this paper the phrase he/she will be used for clarity, although it is interesting to note that in the United States over 75% of unpaid interns are women. See Ross Perlin, above n4, 27.

¹³ *Fair Work Act* s 13.

¹⁴ *Ibid* s 4.

¹⁵ Evidence of the interpretation of this provision in policy is mixed. The University of Melbourne states in their 'Guidelines for Professional Placements' that 'for a placement to meet the [*Fair Work Act*] requirements of a professional placement [and so not pay minimum wage], it must be undertaken as a (compulsory or elective) component of a subject or course', but states in their 'Guidelines for Unpaid Placements, Internships and Volunteering for Students' that 'for a placement to meet the [*Fair Work Act*] requirements of a vocational placement, it must be undertaken as a compulsory part of a subject or a course': see The University of Melbourne, *Guidelines for Professional Placements* <http://provost.unimelb.edu.au/_data/assets/pdf_file/0011/518771/Professional_Placements_Guidelines.pdf>; and The University of Melbourne, *Guidelines for Unpaid Placements, Internships and Volunteering for Students* <http://provost.unimelb.edu.au/_data/assets/pdf_file/0005/462128/Volunteering_Guidelines_FINAL_v4.pdf>.

¹⁶ See Example 1, Fair Work Ombudsman, *Internships, Vocational Placements and Unpaid Work* (August 2011) <<http://www.fairwork.gov.au/resources/fact-sheets/employer-obligations/Pages/internships-vocational-placements-and-unpaid-work.aspx>>.

2 Classification 2: The Internship as Unpaid Arrangement

As the classification of internships as vocational placements applies to very few, it remains to be seen whether interns are afforded protection in any other way under the *Fair Work Act*. A second characterisation of an internship is as an ‘unpaid arrangement’, where the intern is indirectly excluded from the Act by not falling under the definition of ‘employee’ under sections 13 and 15. An ‘employee’ under the Act is determined by reference to the common law,¹⁷ meaning that an intern will only be found to be an employee if he/she is subject to an employment contract or a ‘contract of service’ in order for the *Fair Work Act* to apply.¹⁸ The problems with establishing a contract of employment occur with the formation of the contract, if it is not clear that there has been sufficient intention, agreement, consideration, capacity, or consideration for a contract of employment to exist.¹⁹ Two of these criteria present particular difficulties for workers undertaking unpaid labour in establishing whether an employment contract exists – consideration and intention.²⁰ An intern will often have difficulties in establishing consideration – that they have entered into a contract of service in order to receive a benefit.²¹ Traditionally, consideration in employment contracts was the exchange of wages for an employee’s services, and this position is still articulated in tribunal decisions today.²² For unpaid interns, this criterion is particularly difficult to establish – as benefits other than wages are often not considered sufficient consideration (particularly in commercial settings).²³ Issues also exist on a conceptual level with the requirement of intention. Unlike the UK, where an intention to enter into legal relations can lead to the creation of a contract different to that of a contract of employment,²⁴ in Australia if there is no intention to enter into a contract of employment no contractual relationship exists.²⁵ The requirement that the parties each intend to establish legal relations and enter into a contract of employment can be easily subverted if the employer structures the internship relationship so that the intern does not appear to be an employee, and the intern is not aware he/she could be considered as such.

¹⁷ *Fair Work Act* s 15(1); Stephen J Adler, ‘Expanding the Scope of Employment Law’ in Roger Blanpain (ed), *Labour Law, Human Rights and Social Justice: Liber Amicorum in Honour of Ruth Ben-Israel* (Kluwer Law International, 2001) 40, 40.

¹⁸ Jill Murray, ‘Legal Regulation of Volunteer Work’ in Christopher Arup, John Howe et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 696, 702.

¹⁹ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 172.

²⁰ *Ibid* 217.

²¹ *Ibid* 174.

²² See *Milson v Amalgamated Pest Control Pty Ltd* [2011] FWA 1626 (23 March 2011) (“*Milson v APC*”) where Commissioner Bissett stated at [46]: ‘the formation of any contract requires some valuable consideration. In an employment context this is the exchange of labour for fair payment of wages.’ Similar views are also seen in the UK, see Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003): ‘[There is] a disposition on the part of the courts to assume... employment law is concerned with and only with relationships which are about the exchange of work and remuneration...’

²³ Murray, above n18, 705-706.

²⁴ Murray, above n18, 713. See also discussion of *Edmonds v Lawson* [2000] ICR 567 where a contractual arrangement was found to exist, but was not one of employment, in Freedland, above n21, 65.

²⁵ Murray, above n18, 707.

Conceptually, then, we see problems for interns being included in the definition of 'employee' – and case law on the subject has kept the distinction very unclear. While there is no case law that addresses directly whether an internship is considered a contract of employment, cases considering whether 'work experience' is considered employment provide some useful principles. It is important to note, though, that the majority of cases stress that an employment relationship is one that must be determined on a 'case-by-case' basis²⁶ while considering the 'whole of the relationship'.²⁷ This adds to the confusion already evident in the law about the classification of an intern. Nevertheless, there are three key factors that are evident in judicial reasoning.

First, judges consider whether **there is an obligation for the worker to perform the work**. In the High Court decision of *Dietrich v Dare*,²⁸ the court examined a contract which promised a worker \$2 per hour if he completed a trial run of work.²⁹ The court determined that there was no obligation on the worker to perform any work,³⁰ and this lack of 'mutuality of obligation' meant that no employment contract existed.³¹ Similarly, the lack of an obligation to perform work was a key consideration in *Teen Ranch Pty Ltd v Brown*.³² The court highlighted the fact that Brown was able to choose which summer camps he worked at³³ (despite being subject to camp control when he commenced work³⁴) and characterised his labour as voluntary work.³⁵ This lack of obligation can therefore be a key reason to find that a relationship of employment does not exist,³⁶ despite the worker having a uniform,³⁷ business cards,³⁸ attending training sessions,³⁹ engaging in telemarketing,⁴⁰ and being listed in a company's advertisements,⁴¹ (as occurred in *Williamson*).⁴² Thus if there is any difficulty establishing an intern's obligation to work it will pose problems for recognising a contract of employment.

Second, judges often consider **whether productive work is sufficient consideration for a contract of employment to exist**. The clearest example that productive work is

²⁶ *Frattini v Mission Imports* [2000] SAIRComm 20 (16 May 2000); *Robert Roberts v Stewart Hicks Real Estate* [2000] NSWIRComm 138 (11 August 2000) [36] ("*Roberts*").

²⁷ *Roberts* [2000] NSWIRComm 138 (11 August 2000) [36]

²⁸ (1980) 30 ALR 407

²⁹ *Ibid* 408, 409

³⁰ *Ibid* 411.

³¹ *Ibid*.

³² (Unreported, New South Wales Court of Appeal, Handley JA, 10 March 1995) ("*Teen Ranch v Brown*")

³³ *Ibid* 2.

³⁴ *Ibid*.

³⁵ *Ibid* 3.

³⁶ *Williamson v Paul and Kalamboyas (T/as Century 21 Eden Estates)* [2002] SAIRC 43 (4 November 2002). ("*Williamson*").

³⁷ *Ibid* [12].

³⁸ *Ibid* [13].

³⁹ *Ibid* [39].

⁴⁰ *Ibid* [11].

⁴¹ *Ibid* [15].

⁴² *Ibid* [70].

not sufficient consideration in *Frattini v Mission Imports*, where work experience was not considered enough to establish an employment relationship, despite ‘meaningful and productive’⁴³ work having been performed.⁴⁴ In *Roberts* a similar conclusion was reached – despite the worker using a desk and office and performing productive work (for which he received a commission),⁴⁵ the relationship was not that of employment⁴⁶ although it was unclear whether the alternative contemplated was one of work experience or of a contract for services.⁴⁷ The situation was less clear in the recent Fair Work Australia (“FWA”) decision of *Milson v APC*. The Commissioner clearly found that there was insufficient consideration for an employment relationship to exist, despite the worker undertaking ‘practical training’⁴⁸ with the company during this time.⁴⁹ An important exemption to this, however, is *Natasha Schultz v Tania Vlack (t/a Mega Hair and Beauty)*,⁵⁰ where an employment contract was found to exist despite initial agreement for the worker to undertake productive work at a hairdresser in exchange for a reference and a free haircut.⁵¹ Thus the case law remains inconclusive. While it could be argued that interns undertake productive work for a recommendation, as in *Schultz v Vlack*, and so could be considered an employee, other (more recent) situations where productive work has been undertaken have not characterised the workers as employees. Thus the importance of an intern’s productive work in establishing a contract is unclear.

The third factor that judges consider is **the length of a work experience placement**, with courts generally finding that the longer the work continues, the more likely it is that a contract of employment exists.⁵² This was explicitly stated by Justice Rowland in *Pacesetter Homes Pty Ltd t/as Pacesetter the Homebuilder v Australian Builders Labourers Federated Union of Workers (WA Branch)*⁵³, when he commented:

In cases where the length of work experience is longer and where more work is required to be undertaken than when the period where 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.⁵⁴

This view was reiterated in *Cossich v G Rosetto and Co Pty Ltd (t/as Skye Cellars)*,⁵⁵ where it was clearer that the work experience in question had turned into a contract of

⁴³ *Frattini v Mission Imports* [2000] SAIRComm 20 (16 May 2000) [40].

⁴⁴ *Ibid* [40]; cited in Jill Murray, above n18, 699.

⁴⁵ *Roberts* [2000] NSWIRComm 138 (11 August 2000) [8].

⁴⁶ *Ibid* [36].

⁴⁷ See discussion at *Roberts* [2000] NSWIRComm 138 (11 August 2000) [20].

⁴⁸ *Milson v APC*, above n22, [12].

⁴⁹ *Ibid* [47].

⁵⁰ [1996] SAIRC 44 (30 August 1996).

⁵¹ *Ibid* 11.

⁵² Creighton and Stewart, above n19, 176

⁵³ (1994) 57 IR 449.

⁵⁴ *Ibid* 455 as quoted in Creighton and Stewart, above n19, 176.

⁵⁵ [2001] SAIRC 37 (26 October 2001).

employment after a certain amount of time had passed.⁵⁶ The judge also condemned all those who used work experience ‘as a smokescreen for genuine employment’.⁵⁷ Correspondingly, short periods of unpaid work will often lack sufficient intention to be considered a contract of employment, as in *Pierce v Workcover/QBE Mercantile Mutual (Dark’s Cleaning Services Pty Ltd)*⁵⁸, where a lack of intention during a short work experience placement was the key reason an employment relationship wasn’t found.⁵⁹ But it is also important to consider the two cases of *Roberts* and *Williamson*, where periods of 5 months⁶⁰ and 2 years⁶¹ respectively were not considered sufficient time periods to establish an employment relationship. Thus, evidence would tend to suggest the longer the intern works, the more likely that an employment relationship will be established (as long as there are no issues with consideration).

What can be concluded from the above analysis is that it is extremely unclear whether most intern relationships will be classified as employment relationships. This in itself becomes an issue, as the inability of interns to conclusively classify themselves leaves them vulnerable to businesses wishing to exploit this lack of clarity, and leaves them unsure of whether they are protected by the Fair Work Act.⁶² The consequences of a lack of employment relationship, however, are clear – if an intern is not classed as an employee, then he/she does not fall under the ambit of the *Fair Work Act* and so receives no protection under the Act. Once classified as a non-employee, he/she then falls into one of two further categories:

(a) *Volunteer*

If an intern is not an employee, he/she may be considered a volunteer. Volunteer status is desirable as volunteers are afforded additional protections under the law, such as limitations on personal liability⁶³ and the availability of worker’s compensation for injury and property destruction.⁶⁴ These protections are not afforded to other non-

⁵⁶ Ibid [37].

⁵⁷ Ibid] [36].

⁵⁸ [2001] SAWCT 98 (31 August 2001).

⁵⁹ Ibid [19].

⁶⁰ *Williamson* [2002] SAIRC 43(4 November 2002) [3].

⁶¹ *Roberts* [2000] NSWIRComm 138(11 August 2000) [1].

⁶² Guy Davidov, ‘Re-Matching Labour Laws with Their Purpose’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 179, 186.

⁶³ A limitation on a volunteer’s personal liability exists for anything done while performing a service to an organisation: *Wrongs Act 1958* (Vic) s 38. Note that this only applies for volunteering in relation to ‘community work’ (s 35(1)). However community work is defined in the Act, and includes political work, conserving the environment and promoting or encouraging literature or the arts (s 36(1)). Considering the prevalence of political, environmental and cultural internships, it is possible that some interns may fall into this category. Further protection from liability exists for volunteer emergency workers under s 42(1) of the *Victorian State Emergency Service Act 2005* (Vic) and s 37 of the *Emergency Management Act 1986* (Vic), although these are unlikely to apply to interns.

⁶⁴ Compensation is available for personal injury and property damage under s 63(1) of the *Country Fire Authority Act 1958* (Vic), s 47 of the *Victoria State Emergency Service Act 2005* (Vic) and s 27 of the *Emergency Management Act 1986* (Vic), although these are unlikely to be areas where volunteering is undertaken for internships.

employees. But the rights and requirements of volunteers are also unclear.⁶⁵ In order to receive volunteer status, there *may* be a requirement of altruism in the intern's activities – that the intern has undertaken the work for altruistic purposes rather than personal gain.⁶⁶ This principle is drawn from *Teen Ranch v Brown*, where the Brown's altruistic purposes in undertaking the work was a prime consideration for his classification as a volunteer.⁶⁷ Thus volunteer status may only capture a certain type of intern – those interning for altruistic as well as career-motivated reasons.

(b) *Informal Work Arrangement*

If an intern is not interning for altruistic reasons, or is interning for a for-profit business,⁶⁸ an intern would likely be working under informal work arrangements. Under this classification, interns are afforded no protections under the *Fair Work Act*. It is likely that a significant percentage of interns fall into this category.

3 *Classification 3: The Internship as Employment*

If an intern is found to fall into the definition of an employee (successfully avoiding the pitfalls that arise with contract issues of consideration and intention), then the intern will fall under the *Fair Work Act*. And so the intern will be afforded some protection by the law, such as relief from unfair dismissal,⁶⁹ minimum wage,⁷⁰ and certain rights in relation to enterprise agreements.⁷¹ Even so, interns are likely to be classified as casual employees, due to their typically short periods of employment and typical inability to demand a more secure employment status. In this situation, it is less likely that minimum employment protections apply.⁷²

B *The Occupational Health and Safety Act 2004 (Vic) ("OH&S Act")*

Issues with the definition of 'employee' are still present under occupational health and safety laws, but some protections exist for interns who cannot be defined as employees. It is true that the most protections under the *OH&S Act* apply only to employees for whom an employer must provide a safe working environment,⁷³ monitor their health

⁶⁵ Melanie Oppenheimer, 'Changes in the Nature of Work and Employment Relations: An Historical Perspective' in Ron Callus and Russell Lansbury (eds), *Working Futures: The Changing Nature of Work and Employment Relations in Australia* (Federation Press, 2002) 39, 42.

⁶⁶ Murray, above n18, 704.

⁶⁷ *Teen Ranch v Brown* (Unreported, New South Wales Court of Appeal, Handley JA, 10 March 1995) 2; Creighton and Stewart, above n19, 173.

⁶⁸ Murray, above n18, 697.

⁶⁹ *Fair Work Act* s 382.

⁷⁰ *Fair Work Act* s 294(3), (4). Note that an internship may be classified as 'training arrangements' (a term not defined in the Act) and so be subject to the 'special national minimum wage' under s 294(4).

⁷¹ Employees have the right to be represented by a bargaining representative at the negotiation of a new enterprise agreement: *Fair Work Act* s 173(1); employees have the right to vote on a proposed enterprise agreement: *Fair Work Act* s 181 (2).

⁷² Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 3rd ed, 2011) 62.

⁷³ *OH&S Act* s 21(1).

and safety,⁷⁴ and consult with on health and safety affairs.⁷⁵ But additional protections exist for interns who do not fall under the definition of employee. This is because the *OH&S Act* provides additional protection for ‘persons other than employees of the employer’⁷⁶ who must not be exposed to risks to their health and safety under section 23 (1). This blanket provision would include all interns and would ensure that they were not subject to an unsafe workplace.

Additionally, it is interesting to note that the Model Work Health and Safety Bill (which has been passed in New South Wales, Queensland, the Australian Capital Territory, the Northern Territory and the Commonwealth,⁷⁷ but not in Victoria⁷⁸) includes additional protections for interns. The definition of ‘employee’ is statutorily extended to include ‘volunteer’,⁷⁹ ‘student going on work experience’,⁸⁰ and ‘trainee’⁸¹ – categories which would cover most interns. This increased status allows additional protection for interns, including the right to be consulted in relation to occupational health and safety matters⁸² and the right to cease unsafe work.⁸³ However despite the Victorian Government rejecting these enhanced protections,⁸⁴ occupational health and safety legislation in Victorian still provides some level of protection for interns.

C *The Equal Opportunity Act 2010 (Vic) (“Equal Opportunity Act”)*⁸⁵

Unfortunately, the recent formulation and amendments to the Equal Opportunity Act do not increase the level of protection for interns, and so only limited protections apply. The definition of ‘employee’ in the Equal Opportunity Act explicitly excludes volunteers and unpaid workers as employees from its definition,⁸⁶ meaning that a contract of employment must clearly be found to exist before the (not insubstantial) discrimination provisions apply. The sole exception to this is Part 6 of the Act, or the sexual harassment

⁷⁴Ibid s 22(1).

⁷⁵Ibid s 35(1).

⁷⁶ Ibid s 23(1).

⁷⁷ *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Cth)

⁷⁸ WorkSafe Victoria, *National Work Health and Safety Reform* < <http://www.worksafe.vic.gov.au/laws-and-regulations/occupational-health-and-safety/national-work-health-and-safety-reform>>.

⁷⁹Model Work Health and Safety Bill cl 7(1)(h).

⁸⁰Ibid cl 7(1)(g).

⁸¹ Ibid cl 7(1).

⁸² Ibid cl 47.

⁸³ Ibid cl 84.

⁸⁴ Ted Bailleu and Gordon Rich-Phillips, ‘Proposed Commonwealth OH&S Laws to hit Victorian businesses hard’ (Media Release, Thursday 12 April 2012).

⁸⁵ Please note that Commonwealth statutes do exist which regulate discrimination in the workplace, but they will not be considered as they are currently undergoing a process of review and consolidation: see Attorney General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws* (18 November 2011) <<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx>>

⁸⁶ *Equal Opportunity Act 2010* (Vic) s 4 (“employee”).

provisions, where the exclusion of volunteers does not apply to the definition of employee.⁸⁷ Interns classified as volunteers therefore receive the benefit of protection of sexual harassment under Victorian law,⁸⁸ but no relief from discrimination.

IV AN ADEQUATE LEGAL CHARACTERISATION?

An assessment of the current statutory provisions in Victoria leads to serious concerns. While protections may be present under the *Fair Work Act*, *OH&S Act* and *Equal Opportunity Act*, they only apply when interns fall into the narrow definition of an employee – and the inconsistent case law has confused rather than clarified the issue. Whether an intern is afforded sufficient protection under the law is therefore unclear and open to exploitation, which organisations can take advantage of by classifying their internships as informal arrangements, preventing their interns from receiving protection from the law.⁸⁹ Despite this bleak situation, it is heartening to see that a level of protection in the realms of discrimination and occupational health and safety still exists. However, it is apparent that most of the protections that exist for interns are not clearly set out and so are open to manipulation.

This is particularly concerning because interns are vulnerable workers – and so their unclear employment status places them squarely in the rubric of precarious employment. An intern will undertake many types of productive work that will often benefit the company or organisation they are working for. Indeed, many organisations in the United States (where interning is more prevalent) say that it would be hard to survive without their interns⁹⁰ and that they are integral to the operation of their company.⁹¹ Interns are workers, and they are vulnerable workers – often (though not always) young, idealistic, with little experience of the working world and so little awareness of the value of their labour.⁹² More importantly, they are often at the bottom of the company hierarchy, anxious to be hired into a more permanent job – and this position leaves them unwilling to speak up to report abuses of their rights and more willing to put up with menial jobs.⁹³ Some US studies have also shown interns are more vulnerable to sexual harassment.⁹⁴ But interns are part of a wider category of vulnerable workers who lack clarity about their level of protection – precarious workers. This group includes workers such as casual employees and independent contractors, where the nature of their employment (or lack thereof) exposes them to uncertainty and risk.⁹⁵ Involvement of interns in movements for the rights of precarious

⁸⁷Ibid.

⁸⁸ Ibid ss 92 - 102.

⁸⁹ Davidov, above n63, 243

⁹⁰ See the comments of Eva in Perlin, above n4, 121: ‘we would fall apart if we didn’t have these interns’.

⁹¹ Perlin, above n4, 140.

⁹² See Perlin, above n4, 123-125 for a general discussion on interns and their perception of the value of their labour.

⁹³ Yamada, above n2, 232.

⁹⁴ Ibid 220.

⁹⁵ Perlin, above n4, 197.

labour⁹⁶ demonstrates that they identify as a type of precarious worker – unable to plan their lives due to the uncertainty of where their next pay check is coming from, and receiving little protection in the eyes of labour law.

It is this latter point where precarious workers find most common ground (and most cause for complaint): they are offered little protection by Australian (and global) labour law. This is because the scope of labour law is based upon a contractual relationship: that of employer and employee.⁹⁷ This is evident not just in common law but in statute, where the articulation of a worker’s rights overwhelmingly reflects the framework of employer/employee rights.⁹⁸ Courts are notoriously hesitant to look outside this established binary category.⁹⁹ But if labour law protections flow from the contract of employment, those who do not have a contract of employment do not have those protections – and so are outside the scope of labour law.¹⁰⁰ Precarious workers either do not have a contract of employment, or have one which limits their rights, making them unable to enjoy the protections of labour law because they are outside its scope.¹⁰¹

By placing Australia’s most vulnerable workers outside the scope of the law, labour law ignores the workers that most need its protection. It is well established that one of the main objectives of labour law is the protection of workers,¹⁰² with notions of fairness and guarantees of safety nets for workers evident throughout the objectives of the *Fair Work Act*.¹⁰³ And yet this purpose contrasts directly with that of freedom of contract – or the principle that the parties should be at liberty to choose the exact conditions under which they govern their working relationship.¹⁰⁴ Labour law has often modified the principle of freedom of contract¹⁰⁵ in order to allow for the protection of workers, such as with minimum wage requirements,¹⁰⁶ national minimum standards of employment,¹⁰⁷ and the requirement that Enterprise Agreements must be approved by Fair Work Australia.¹⁰⁸ But while labour law conceptualises worker relationships as only being created by employment contracts, there will be problems. Not only can

⁹⁶ Ibid 198.

⁹⁷ Rosemary Owens, Joellen Riley et al, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 198; Adler, above n17, 40.

⁹⁸ See discussion of the *Fair Work Act 2009* (Cth), *Occupational Health and Safety Legislation 2004* (Vic) and *Equal Opportunity Act 2010* (Vic) above.

⁹⁹ Mark Freedland and Nicola Kountouris, ‘The Legal Characterization of Personal Work Relations and the Idea of Labour Law’, in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 192, 199.

¹⁰⁰ Noah D Zatz, ‘The Impossibility of Work Law’, in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 234, 243. See also Guy Davidov, above n63, 188, who notes that many workers around the globe “find themselves excluded (completely or partially) from the protection of [labour] laws”; Freedland and Kountouris, above n101, 207.

¹⁰¹ See Adler, above n17, 43: “Many working people have been deprived of their rights under protective labour legislation and international conventions because they are not defined as ‘employees’.

¹⁰² Owens, Riley et al, above n99, 21.

¹⁰³ *Fair Work Act* s 3

¹⁰⁴ Hugh Collins, *Employment Law* (Oxford University Press, 2nd ed, 2010) 14-15.

¹⁰⁵ Ibid 33.

¹⁰⁶ *Fair Work Act* s 294(3).

¹⁰⁷ Ibid pt 2-2.

¹⁰⁸ Ibid pt 2-4 div 4.

businesses disguise potential employees by characterising contractual relationships as non-employment,¹⁰⁹ but worker relationships which legitimately fall outside the narrow definition of employment are excluded from any labour law protections.¹¹⁰ Thus by conceptualising worker relationships only in terms of employer/employee, the principle of freedom of contract is emphasised and objective of protection of workers is ignored. Interns and bosses are free to agree to whatever rights they wish (no *requirement* to show up to work, for example), but they sacrifice access to the law's protection, making their precarious situation even more delicate. Internships also prevent labour law from achieving its goal of the redistribution of wealth:¹¹¹ as unpaid internships can only be undertaken by those with financial support,¹¹² internships are only available to the wealthy and well-connected,¹¹³ widening the gap between rich and poor¹¹⁴ and making it impossible for those from less advantaged backgrounds to break into certain industries.¹¹⁵

Thus in order to truly achieve the protective aims of labour law, interns and other precarious workers must be brought inside the scope of labour law. The arguments for widening the scope of labour law are becoming more and more common in academic literature,¹¹⁶ as scholars argue that labour law provides the best framework for protecting vulnerable members of society, such as precarious workers. With an expansion of the scope of labour law, interns will receive true protection,¹¹⁷ allowing labour law to adequately achieve its goal of protecting workers.

V A MORE APPROPRIATE LEGAL CHARACTERISATION

So if the scope of labour law must be expanded to properly protect interns, what is the best way to do so? A simple solution would be to expand the definition of 'employee' to include interns.¹¹⁸ If an intern was considered an employee, all the labour protections outlined above would apply to interns – they would receive a minimum wage, they would have rights against dismissal, the right to award rates in their industry, and they would receive further protection from occupational health and safety and discrimination legislation. While this definition would have to be drafted carefully to exclude true volunteers or mentoring situations, interns would receive strong protection from the law and a fair wage for their work, whether or not it is done for academic credit.

But such a simplistic shift in the law could have unintended consequences for interns. By labelling all internships as employment, there is a possibility that 'good' internships

¹⁰⁹ Zatz, above n102, 241.

¹¹⁰ Ibid 241.

¹¹¹ Collins, above n106, 13

¹¹² See comments of Andrew Stewart in Sophie Gosper, 'FWA launches investigation of firms exploiting unpaid interns' *The Australian* (Sydney), 12 April 2012, 1.

¹¹³ Ben Yagoda, 'Will Work for Academic Credit', 54(28) *Chronicle of Higher Education* A36, A36.

¹¹⁴ Yamada, above n2, 219

¹¹⁵ Perlin, above n4, 162.

¹¹⁶ Ibid 240; Owens, Riley et al, above n99, 204.

¹¹⁷ Owens, Riley et al, above n99, 198-199, 203-204.

¹¹⁸ Freedland and Kountouris, above n101, 195.

could be penalised with 'bad' internships– that positive interning experiences run by organisations that cannot afford to pay a band of interns will be lost along with any exploitative work masquerading as an internship.¹¹⁹ There already has been evidence that companies are less likely to take interns if they are concerned about the enforcement of employment protections¹²⁰ – no punishment for bad internships but a problem for all internships that benefit students and those newly entering the workforce willing to learn. In addition, organisations with internships focusing on education and experience as well as some substantive work may be forced to make the internship more productive in order to justify the money spent on the interns. Both these outcomes have negative consequences for interns. On a broader level, too, by moving interns into the employer/employee framework, the problems with the framework itself are not addressed.¹²¹ Labour law protections continue to apply only to the employment relationship, not all labour relationships, meaning those left outside the definition are still left outside the scope of labour law.¹²² Other workers in precarious circumstances are still outside the protections of labour law, and clever businesses will find new ways to put their interns on the non-employee side of the employment relationship. Even for those interns caught within the broader definition of employee, problems may arise. Employment law protections were designed with the traditional employee in mind, meaning some of the problems that interns face may not be dealt with by traditional employee protections.¹²³

What is therefore required is a new legal characterisation for interns, expanding the scope of labour law to include both employees and interns.¹²⁴ This paper has explored the different possible legal characterisations of interns and demonstrated that no current characterisation (vocational placement, informal work arrangement, and now employee) offers a characterisation that best protects intern's rights without sacrificing some of their benefits. But as Davidov argues, there is no requirement that a new type of worker has to fit into pre-established patterns – they can have some elements (and so protections) of one group of workers and some of others.¹²⁵ This has approach has been seen in the UK. Not only has the additional legal category of 'worker' been created, providing additional protections for workers that fall outside the 'employee' framework,¹²⁶ but European Commission Directives are beginning to create categories of worker which have a selection of labour law protections that best fit the worker's situation.¹²⁷ More research is required to establish what these protections should be, but as an example, interns could receive the protections of unfair dismissal and

¹¹⁹Sarah Braun, 'The Obama "Crackdown": Another Failed Attempt to Regulate the Exploitation of Unpaid Internships' (2012) 41 *Southwestern Law Review* 281, 293.

¹²⁰ *Ibid* 307.

¹²¹ Owens, Riley et al, above n99, 200.

¹²² *Ibid*.

¹²³ Anne Davies, *Perspectives on Labour Law* (Cambridge University Press, 2004) 92.

¹²⁴ Analogy can be drawn to McHugh J's dissent in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, where he calls for a development of the law of vicarious liability, rather than an expansion of the definition of employee (at [72]) (see also discussion in Owens, Riley et al, above n99, 201). See also Oppenheimer, above n66, 44.

¹²⁵ Guy Davidov, above n63, 185-186

¹²⁶ Deirdre McCann, *Regulating Flexible Work* (Oxford University Press, 2008) 43.

¹²⁷ Adler, above n17, 45.

discrimination legislation, but not all protections of employees (wages only in certain cases, for example). And as a change in legal classification can be an effective way of regulating personal work relations, and specific regulation is the change that will best protect the labour rights of interns, a specific legal characterisation should be created. With strong protections, and a clearly defined group of workers, interns will finally receive the protections in Victorian law that they deserve.

VI CONCLUSION

Are interns adequately protected under Victorian law? With the increasing use of internships throughout Australia, this question is increasingly being asked. The current level of protection for interns under Victorian law is unclear. With the exception of vocational placements, much depends on whether an intern is found to be an 'employee' under the *Fair Work Act* and state discrimination and health and safety legislation. After examining case law the distinction remains uncertain, with some cases found to be employment relationships and others only work experience placements. The level of protection for interns in Victoria is therefore unclear and vulnerable to exploitation (much like the interns themselves).

This level of protection is not sufficient because it allows interns to perform work in situations where they are outside the scope of labour law – and so do not receive labour law's protection. Interns are part of the wider category of precarious workers, unable to access the protections of labour law due to the supremacy of freedom of contract. But if the most vulnerable workers have not been protected, then labour law has failed in one of its key objectives. To remedy this situation, the scope of labour law must be extended to include interns. But merely including interns in the definition of 'employee' will not be enough, as it will sacrifice genuinely beneficial internships and allow the employee/employer relationship to continue to dictate the scope of labour law. A new legal classification of intern is the most appropriate direction in which the law should move. It will allow for the employment protections best suited to interns to be chosen, while still allowing flexibility within the internship framework. With the right protections, the world of internships in Victoria should continue to grow, to the benefit of businesses, organisations, and the interns themselves.

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