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Hon Mark Coure MP
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Parliament of New South Wales
Macquarie St
Sydney NSW 2000

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Inquiry into volunteering and unpaid work placements among children and young people in New South Wales

Dear Mr Coure

Thank you for your letter of 24 September 2014, requesting our views on a number of matters relevant to your Committee's deliberations.

In answering the questions below, we draw upon research suggesting that unpaid work placements are a growing phenomenon in Australia, and that extracurricular arrangements in particular raise challenging legal and social questions. That research is extensively traversed in the 2013 report that we were commissioned to prepare for the Fair Work Ombudsman (FWO), entitled *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*.

Besides the report itself, we would draw the Committee's attention to an update released by the FWO on 12 August 2014 and available at http://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/august-2014/20140812-interns-unpaid-work-update. This summarises various initiatives undertaken by the FWO in response to our report and includes examples of what the FWO regards as unlawful forms of work experience.

Please find our specific responses to your questions as follows:

1. In your view what constitutes a legitimate and beneficial unpaid work placement and what makes an unpaid work placement unethical and unlawful?

The terms 'legitimate', 'beneficial', unethical', and unlawful' are each broad and can potentially cover a wide range of matters. How they are defined is critical in responding to this question. That being so, our response to this question is not intended to be comprehensive, but rather to provide some illustrative observations.

'Legitimate' and '(un)lawful'

We take the term 'legitimate' to be synonymous with 'lawful'. Self evidently, an 'unlawful' unpaid work placement is one where the relevant actors do not comply with the law. This can most obviously occur if the worker is in reality an 'employee' and is not accorded the minimum pay or

other entitlements required under industrial statutes such as the federal Fair Work Act 2009 or the Industrial Relations Act 1996 (NSW).

As we endeavoured to explain in our report, the legal status of many work experience arrangements may be far from clear. The type of arrangement that is easiest to characterise is one that falls within the 'vocational placement' exception created by the Fair Work Act (see pp 75–82 of the report). This covers an arrangement whereby a student or trainee is placed with a business or organisation to undertake unpaid work as part of an authorised education or training course. Provided each of the requirements of the exception are met, the worker cannot be regarded as an employee for the purpose of the Fair Work Act.

Where the exception does not apply, it is generally a matter of determining whether work has been arranged under what the common law would regard as a contract of employment. As we stress in chapters 6 and 9 of the report, this does not necessarily depend on what the parties call the arrangement, or on their actual intentions. As a number of cases noted in our report reveal, as well as some of the examples in the recent FWO update, it is possible to characterise an arrangement as one of employment even where the worker concerned has apparently agreed to work without pay. If so, then the industrial statutes apply – and require that payment be made at the minimum rate set by (usually) an award.

Without going into further detail on this point, we would agree with a helpful summation by the FWO in its recent update. It is said there that to be lawful, a work experience arrangement

> 'should constitute mainly observation, rather than productive work, not run for a long period of time, not be work that a normal employee would perform, not require the person to come to work or perform productive activities and mostly benefit the person, not the business/organisation.'

There is a spectrum here of arrangements. At one end is the type of work experience typically undertaken by high school students, which generally involves a short period in a business or organisation and mostly observation or 'shadowing' rather than the performance of 'real' tasks. Even if not caught by the 'vocational placement' exception in the Fair Work Act, it is unlikely that such an arrangement would be considered to involve an employment contract. At the other end of the scale, it is far easier to infer such a contract if a worker commits to undertaking work that is necessary for a business to function or service its clients and that would otherwise be done by a paid employee or an external contractor – especially if the arrangement is a lengthy one, and/or does not pull other employees away from their regular tasks to provide close supervision or instruction.

In saying all this, we should recognise one important qualification. A great deal of valuable unpaid work is performed for non-for-profit organisations (such as charities, sporting clubs, schools and churches) by volunteers. The line between 'volunteering' and 'work experience' can often be hard to draw. But in general, if the primary reason for a person offering their labour without pay is to benefit someone else, or to further a cause or belief, it is unlikely that they will be regarded as an employee – even if they may incidentally benefit by gaining valuable experience or contacts.

'Beneficial'
For us, an unpaid work placement can most obviously be said to be valuable or 'beneficial' if it offers a real educational experience to the individual concerned. In broad terms, this can be expected to occur where the placement is connected with an authorised education or training program. This is not to deny that the quality of such programs may in fact be variable. Our impression, however, is that educational institutions and registered training organisations generally strive to ensure that placements are properly supervised and deliver specified outcomes, in accordance with the objectives of the relevant course or program.

It is certainly possible for an extracurricular work experience arrangement – that is, one not connected to a recognised education or training course – to be well designed and to deliver valuable outcomes by way of enhanced skills and capabilities. Indeed the more that such an arrangement focuses on training or upskilling the worker, so that the benefit to them effectively comes at a net cost to the business or organisation, the greater the likelihood that it will be a lawful arrangement – even if outside the vocational placement exception.

We consider, however, that there is a great danger in people thinking that just by labelling a program as 'educational', or as involving 'training', it will necessarily be of benefit to those who go through it – especially in the for-profit sector, where the primary drivers are likely to be commercial goals rather than a concern for educational outcomes.

Finally on this point, it must be conceded that even the most poorly designed, exploitative and/or unlawful arrangement may turn out to be beneficial to a particular individual if it gives them the crucial 'break' that allows them to go on to secure paid work in their chosen field. But any benefit to such persons has to be counterbalanced not only by the cost to those who are not so fortunate, but by the overall effects that unregulated work experience arrangements may have in reducing paid work opportunities and/or in (further) disadvantaging job-seekers from less affluent backgrounds. We return to such 'social' costs in answer to question 2 below.

'Unethical'
It is especially difficult to agree on what constitutes an 'unethical' arrangement in this area. For example, where a job-seeker approaches a small business and pesters it into letting them do unpaid work so as to improve their chances of finding a regular job, we would not necessarily regard it as unethical for the business to agree – especially if the business owner feels it is doing a particular job-seeker a favour. On the other hand, our attitude would be entirely different if a business relied upon the desperation of such job-seekers to fill a series of unpaid 'internships', each performing work that the business would otherwise need to pay to have done.

Another area of contention concerns arrangements whereby job-seekers pay what may be quite substantial sums of money for the 'opportunity' to undertake an unpaid work placement. The most common example of such a practice, as noted in our report (pp 61–62), involves agencies charging fees to broker unpaid internships, especially for international students. While many would question the ethics of such a practice, the agencies concerned maintain that they are simply providing a commercial service for which clients are prepared to pay, and that they ensure the placements involve meaningful and properly supervised training. Nevertheless, the notion that job opportunities can be enhanced by paying large sums of money is scarcely consistent with any notion of equality of opportunity in the labour market. The same point can be made about the practice of auctioning off unpaid internships in certain 'glamour' industries to the highest bidder, which seems to have spread here from other countries (see eg Royce Kurmelovs, 'Asking interns to pay for the privilege: charitable offer, or a bit rich?', *Crikey*, 10 March 2014).

At any event, while there is no 'bright line' between an ethical and an unethical unpaid work placement, we would reserve our strongest criticisms for arrangements that involve one or more of the following features:

- a business directly making profits from work undertaken for no payment – for instance, where a law firm or a barrister charges a client for research undertaken by an unpaid law student or clerk;

- a business deriving a competitive advantage by obtaining productive 'backroom' work from a series of unpaid interns who are desperate for work experience and who are filling positions that would otherwise go to paid employees;

- the making of false or overly optimistic representations regarding the outcomes of a placement – for example, that it will secure the offer of a paid job, or (for a visa-holder) provide a means to permanent residency in Australia;
- the promise of on-the-job training or a chance to acquire or enhance valuable skills, for what turns out to be a 'dogsbody' role that involves the performance of menial tasks.

In many instances, it may be observed, such features would also be likely to increase the chances of an arrangement being unlawful, at least where the vocational placement exception does not apply.

2. How are young people and the wider workforce impacted by the growing prevalence of unethical and unlawful unpaid work placements?

We need to preface our comments here by emphasising that, despite the research we have undertaken in this area, it remains hard to make categorical or definitive statements about the prevalence and impact of unpaid work placements – especially those that are outside formal education or training programs and that may be unlawful and/or unethical (in one or more of the senses articulated above). In the absence of reliable data, we can only offer impressions based on anecdotal evidence – albeit, as we explain in our report (pp 69–71), that evidence strongly points in certain directions.

It seems clear that many young people believe that they will not be successful in getting work in their chosen field without being prepared to undertake unpaid work. In some fields, such as journalism, this may well be true. But what is equally or more true is that for the majority of job-seekers, undertaking a placement or internship is not a guaranteed pathway to employment. In many fields now, law being an obvious example, there are far more graduates each year than jobs available in the profession most directly connected to the area of study. No amount of access to unpaid work experience can change that reality.

The time devoted to such placements may also impact adversely on job-seekers in multiple ways: for example on their health, through tiredness from the demands of study, holding down a job to earn money and doing an unpaid placement on top; or through the financial strain – often spread to partners or family – of managing for what may be an extended period without income.

More broadly, the growth of unpaid work placements, especially those outside of formal education or training, poses two major challenges to the operation of the labour market, and indeed our social and economic fabric.

One is the prospect of a 'race to the bottom', as employers who derive an advantage through the non-payment of trainees and interns force their competitors to move away from offering paid entry-level positions. The net effect, ironically in the name of giving job-seekers more 'opportunities', may be a reduction in the number of (paid) jobs.

The other major challenge is one of equity and access. The more that undertaking what may be a series of unpaid placements or internships becomes a rite of passage not just in 'creative' industries such as film or fashion, but in an ever-widening range of professions or occupations, the greater the barriers for those from less affluent backgrounds. For those already struggling to succeed in the face of social and/or economic disadvantages, the perceived need to do at least a day job without pay for weeks or months on end may be the last straw. This is, in our view, the single most important reason to put some limits on the practice of unpaid work experience.

3. **A number of submissions to the Committee's inquiry recommended that a State-wide code of practice be put in place to support legitimate, safe and beneficial unpaid work placements, and to protect young people from exploitation in the workplace. In your view would a code of practice be effective in achieving this objective?**

The answer to this question depends in part on the nature and effect of the 'code of practice' in question. Some codes are enacted as statutory instruments, with binding legal force. Others operate as purely aspirational guidelines. In between these two extremes there can be codes that have no direct legal status, but that persons or organisations are encouraged to observe, for example (as with certain procurement rules) to preserve eligibility for government funding or contracts. We will start, however, by considering the possibility of legislation.

The reality today is that, with some exceptions, wages and employment entitlements in the private (non-government) sector in Australia are subject to uniform national regulation, through the Fair Work Act 2009. There are clear benefits in such an approach, not least in terms of efficiency. Ideally, therefore, any regulatory response to the issue of unpaid work experience should primarily involve the Commonwealth and its agencies.

It is true that, under section 27(2)(e) of the Fair Work Act, New South Wales and other States may still pass laws on 'child labour'. Such laws may not only apply to 'national system employers' who are otherwise subject to the federal statute, but operate (at least as a general rule) to override contrary provisions in federal awards or enterprise agreements (see Fair Work Act s 29(2) and reg 1.14 of the Fair Work Regulations 2009).

However, while this might allow New South Wales to amend its existing child employment laws to deal with the issue of unpaid work experience, such legislation could by definition apply in the private sector only to 'children'. Even on the broadest view of that term, which might extend to persons under the age of 21, such laws would not catch many of the more problematic arrangements involving university graduates or mature-age students. Even for younger job-seekers, difficult questions would remain as to the extent to which a State child labour law could regulate a work experience arrangement otherwise subject to the Fair Work Act – especially if it fell within the vocational placement exception.

For this and other reasons, we would hesitate to recommend any legislated code of practice for the private sector. Nevertheless, even without going down that track, we suggest that there remain a number of ways in which New South Wales could make a positive contribution to the regulation of unpaid work experience in the State.

One option, which we would strongly support, would be the development of a **code of practice for internships and other work placements in the State public sector and in local government** – the two areas of employment in New South Wales that are outside the coverage of the federal Fair Work Act. Such a code would set out 'best practice' guidelines for a high quality placement, including the circumstances in which a person interning with a State or local government agency should be entitled to be paid for their work. In our report (pp 219–223), we discuss useful examples of such codes in the United Kingdom. There, as we note, the present coalition government has sought to 'lead by example' in formalising and properly structuring all government-based internships.

An interesting feature of the British government's approach has been its willingness to develop resources and standards in conjunction with Intern Aware, a 'grassroots' organisation established by young people to campaign for fair, paid internships. While its Australian equivalent, Interns Australia (http://www.internsaustralia.org/), is still at an early stage in its development, we would recommend that it be included in the process of developing any new code of practice for New South Wales government agencies.

Secondly, and as an extension of the approach we have just outlined, the New South Wales government could seek to **support and contribute to the work of the FWO** in helping to develop educational materials and guidelines for businesses and organisations covered by the Fair Work Act. This is a process that, as the FWO's update makes clear, is already well under way. But it could only benefit that process, as well as any parallel work undertaken for the State and local government sectors, for there to be liaison and mutual assistance between the FWO and the relevant New South Wales agencies or departments, beyond the level of cooperation and information exchange that already exists.

In our opinion, the value of codes of practice in this space is that they can help organisations – whether in government or the private sector – understand the various options and challenges associated with the establishment and operation of internships and work placements. Our impression is that many managers or business owners who are asked to take on unpaid trainees, or who wish to help job-seekers in gaining work experience, have good intentions and want to do the right thing, but are not always clear what to do or alert to the full range of legal issues that such arrangements may entail.

We should add that while we see merit in having codes of practice or guidelines that are not in themselves legally binding, in the sense that no direct sanction attaches if many of their requirements are breached, this is not to say that the establishment of such codes should be seen as a substitute for appropriate monitoring of, and compliance with, legal standards. As with the material already being developed by the FWO, we would envisage even 'voluntary' codes of practice for internships and work experience being clear about the legal obligations involved and the potential sanctions for non-compliance. To us, a stand alone voluntary code is not as useful as one which forms part of a 'regulatory pyramid', allowing for infringements to be investigated and pursued by those with appropriate authority.

Thirdly, the New South Wales government might seek, within the Council of Australian Governments or other intergovernmental forums, to **press the Commonwealth to review and clarify the treatment of unpaid work arrangements under the Fair Work Act**, so as to address some of the uncertainties identified in our report (see pp 261–262).

Fourthly, consideration might be given to **reviewing the application of State legislation to unpaid work arrangements**. One of the more obvious steps would be to consider whether to amend the Industrial Relations Act 1996 to include a vocational placement exception, as per the federal Fair Work Act. The absence of such an exception at present means that if a New South Wales government agency or local council accepts a student or trainee to perform unpaid work, as part of an authorised education or training course, the agency or council does not have the same protection that a non-government business or organisation would have against a claim that the arrangement is in reality one of employment. In raising this possibility, we recognise that the present federal exception is not as well-drafted as it might be, and that calls have been made both to broaden and narrow its scope (see pp 50–51 and 77–79 of our report). But in the interests of comity, it would make sense to use the elements of the present federal exception, if not its precise wording, as a template for any State equivalent.

Other legislation that might be reviewed include the Children and Young Persons (Care and Protection) Act 1998 (NSW), s 221(1) of which limits 'employment' to '*paid* employment or employment under which some other *material benefit* is provided' (emphasis added); and the Anti-Discrimination Act 1977 (NSW), which expressly protects 'unpaid trainees' only against sexual harassment (s 22B), but not other forms of discrimination.

4. **In the *Experience or Exploitation?* report you suggest that the Fair Work Ombudsman develop specific information targeted at particular industries and that it undertake a targeted campaign or compliance activities in relation to unpaid work (p xxiv). What measures could be taken by other government and non-government agencies to support and promote lawful, safe and beneficial unpaid work opportunities for young people?**

As noted in our answer to the previous question, we would urge the adoption of codes of practice to promote and enhance not just the level of legal compliance, but the educational quality of internships and work placements.

5. **How might vulnerable or at-risk young people be educated in relation to their rights in the workplace?**

It is obviously important that students, trainees and job-seekers, as well as those seeking to use their services, have access to useful and accessible information about their rights and responsibilities at work. Besides any more detailed guidelines, of the type we have already discussed, we see value in the development of some simple "do's and don'ts' around the use of unpaid work placements. At the risk of oversimplification, this might include the central message that it is:

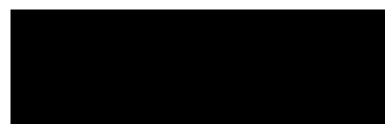
- ✓ ok to do an unpaid work placement as part of an authorised education or training course,
- ✓ ok to volunteer your services for a cause or organisation you support,
- ✓ ok to do unpaid work experience that largely involves observation or practice tasks, but
- ✗ <u>not</u> ok in other situations to do productive work that benefits a business or organisation, even to gain work experience, without being paid the applicable minimum wage.

Ideally, this is a view that should be adopted and widely disseminated both by and within government and non-government organisations. It is important that consistent messages are sent about what is and what is not acceptable: hence our emphasis on the value of State governments liaising with the FWO and with grassroots organisations such as Interns Australia, as well as with more established stakeholders such as business groups and trade unions, plus of course the major educational and training institutions. It is also important to connect with young people through a wide range of media, including through the major social networking platforms, both directly (through government presence on relevant sites) and through willing intermediaries.

Of course, none of this is easy. But we have found already, in the wake of our report for the FWO, that the word is slowly getting around that there are issues and problems with unpaid work experience. If governments at both State and federal level can adopt clear, consistent and simple messages it is not too much to hope that more people and organisations will get to hear them.

That concludes our submission. If the Committee has any queries, or would like to pursue other issues relevant to the Committee's inquiry, please do not hesitate to get back in touch with us.

Sincerely



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