

## **The vulnerable worker? A labor law challenge for WIL and work experience**

CRAIG CAMERON<sup>1</sup>

*Griffith University, Australia*

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The Fair Work Act (2009) in Australia deregulates “work” in work-integrated learning (WIL) by distinguishing “vocational placement” from “employee”. Following concerns about the legal position of WIL and work experience, the Fair Work Ombudsman (FWO) published a fact sheet and commenced a joint research project into unpaid work practices. Nevertheless, the student remains vulnerable to exploitation. This article examines, through the lenses of flexibility and worker protection, the labor regulation of WIL and work experience in Australia and the United States. In particular, the author argues that deregulation in Australia and the legal uncertainty surrounding work experience is inconsistent with the protective function of labor law. Drawing on this examination as well as Australian migration law, the author recommends that the Fair Work Act (2009) be amended to strengthen the criteria for “vocational placement” and to provide a definition of “work experience” in the interests of a balanced regulatory framework. (*Asia-Pacific Journal of Cooperative Education*, 2013, 14(3), 135-146)

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The exploitation by employers of students undertaking work experience (also badged as “internships”, “work placements” and “trials”) has received significant media exposure in Australia (Cullen, 2011; Souter, 2012). Whereas the casualization of the workforce was a phenomenon of the 1980s and 1990s (Owens & Riley, 2007), the “studentization” of the workforce may be the catch cry of the twenty first century labor market. Students pursue work experience and work-integrated learning (WIL) programs to improve their employment prospects on graduation in a competitive labor market and in the case of WIL programs, to also meet course or program requirements. It is in this context that the student is vulnerable to exploitation by employers seeking free labor (Gregory, 1998). Tertiary institutions are similarly concerned with the regulation of work experience and WIL. The respective labor departments of the US and Australian governments responded in 2010 and 2011 respectively by publishing information sheets that, although not legally binding, were intended to clarify the position. Further, the Fair Work Ombudsman (FWO) in Australia commissioned a joint research project with two prominent labor law academics, Professor Andrew Stewart and Professor Rosemary Owens, into unpaid work practices. The report entitled “The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia: Experience or Exploitation?” was released in February 2013 (Stewart & Owens, 2013). Drawing on their research concerning the regulation of unpaid work arrangements, they conclude that the law is uncertain and call for law reform:

Nevertheless we are bound to say that we believe it would be advisable for Parliament to lay down clearer rules on the legality of unpaid trials, internships and other forms of work experience. At the very least, the existing vocational placement exception that has been retained in the Fair Work Act could usefully be clarified. (Stewart & Owens, 2013, p. 261)

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<sup>1</sup> Author contact details: Craig Cameron: [craig.cameron@griffith.edu.au](mailto:craig.cameron@griffith.edu.au)

This article examines, through the lenses of flexibility (deregulation) and worker protection (State regulation), the labor regulation of WIL and work experience in Australia and the US. As such the article is a legal analysis and not an empirical study of student exploitation in WIL and work experience arrangements. The author adopts a purposive approach to regulation throughout this legal analysis, that is, the purpose of labor law is to strike a fair balance between the protection of student interests and the flexibility for tertiary institutions and organizations to design, implement and manage work experience and WIL arrangements. It commences with defining WIL and work experience and describing the mutual benefits associated with both practices. This is followed by an examination of the Fair Work Act (2009) in Australia and the Fair Labor Standards Act (1938) (FLSA) in the United States as well as relevant government advice and literature in both countries. An analysis of the US system is instructive because unlike Australia, the US has a developed jurisprudence and literature concerning the regulation of WIL and work experience. Further, the US has a co-regulatory model with respect to WIL, that is the State (through case law) and the tertiary institution are responsible for the labor rules and practices governing WIL. This enables a comparative analysis with the “laissez-faire” model of deregulation which currently exists in Australia.

The author argues that deregulation in Australia and the legal uncertainty surrounding work experience is inconsistent with the protective function of labor law. Conversely, the co-regulatory model in the US is preferred but ultimately flawed because of its failure to distinguish the two activities. Students are protected but the inflexibility of the model (assuming that it is properly enforced) is likely to hinder WIL and work experience opportunities. Drawing on this examination as well as Australian migration law, the author recommends that the Commonwealth government amend the Fair Work Act to strengthen the criteria for “vocational placement” and to provide a definition of “work experience”. These law reforms are designed to balance the objectives of protecting the student as vulnerable worker and providing sufficient flexibility to facilitate WIL and work experience programs.

#### WIL AND WORK EXPERIENCE: DEFINITION AND BENEFITS

WIL and work experience are distinguished throughout this article. “Work experience” is defined as “an activity which is not work or part of a WIL program”. “Work” is defined as “an activity that normally attracts remuneration”. The definition of “work” is adopted from the Migration Regulations (1994) in Australia and will be discussed further in the recommendations section. The author defines WIL for the purpose of this article as “a tertiary program which combines and integrates learning with its workplace application in the workplace”. Tertiary institutions include universities, technical and further education (TAFE) institutes, and private higher education providers. This definition is adapted from Atchison, Pollock, Reeders and Rizzetti (2002). It distinguishes: WIL from work experience, whether that experience is coordinated by the institution or not; non-tertiary education programs (e.g., employer training programs); real from simulated integration of work and learning; WIL activities in the workplace from WIL activities in the tertiary institution; and paid from unpaid WIL programs to ensure consistency with the definition of “vocational placement” under the Fair Work Act (s 12). There are a number of programs that constitute WIL including: cooperative education; service learning; internships; supervised work experience; mentored employment and accredited workplace learning (Atchison et al., 2002).

Students can derive a number of benefits from WIL and work experience. The author's own experience and research is consistent with the literature which suggests that WIL programs can improve students' generic skills, career skills and prospects, self-efficacy and professional awareness and reduce the student risk of selecting the wrong career path (Freudenberg, Brimble & Cameron, 2010, 2011). The benefits are not a one way street however. WIL and work experience provide employers with the opportunity to assess a future employee(s) in the workplace (Gregory, 1998). Employers can reduce recruitment costs and the wage costs associated with hiring those same students during a probationary period who may later turn out to be unsuitable. This is a distinct advantage for small businesses that have limited recruitment budgets (Bacon, 2010-11). The sections which follow will examine the Australian and US labor regulation of WIL and work experience.

#### AUSTRALIA LABOR REGULATION OF WIL AND WORK EXPERIENCE

The Fair Work Act regulates the terms and conditions of employment for "national system employees" (ss 13 & 30C). National system employees include: all employees in the state of Victoria, the Australian Capital Territory and the Northern Territory; all private sector employees in the states of New South Wales, Queensland and South Australia; all private sector and local government employees in the state of Tasmania; and all employees of constitutional corporations in the state of Western Australia. The Fair Work Act expressly excludes "vocational placement" from the definition of national system employee (s 15(1)(b)). "Vocational placement", as defined in section 12, means a placement that is:

- (a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
- (b) undertaken as a requirement of an education or training course; and
- (c) authorized under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

Three important observations can be made. First, the Fair Work Act distinguishes WIL from work experience by specifically excluding WIL students as employees. A work experience participant could still be deemed an employee provided they meet the "ordinary meaning", that is the common law definition of employee (Fair Work Act, ss 11 & 15). Second, the common law and not legislation regulates work experience arrangements. Third, the Fair Work Act deregulates the "work" in WIL and places the responsibility for regulating WIL programs on tertiary institutions. As a consequence, any work by a student for a national system employer is excluded from the Fair Work Act provided that it is conducted during a vocational placement. The sections which follow examine the FWO's response to the position of work experience and the exclusion of WIL under the Fair Work Act.

#### *Work Experience*

The FWO released a fact sheet in August 2011 entitled "Internships, Vocational Placements and Unpaid Work" (FWO, 2011). In particular, the fact sheet defines work experience and internships using contract law principles of intention. Legal intention is one component of a binding contract. The FWO provides a list of indicators to assist parties in assessing whether they intended to form a legally binding employment contract, as set out in Table 1.

TABLE 1. Contract indicators for employment contracts as recommended by the Australian Fair Work Ombudsman (adapted from FWO, 2011, p.1)

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| 1. | Purpose of the arrangement. Was it to provide work experience to the person or was it to get the person to do work to assist with the business outputs and productivity?  |
| 2. | Length of time. Generally, the longer the period of placement, the more likely the person is an employee  |
| 3. | The person's obligations in the workplace. Although the person may do some productive activities during a placement, they are less likely to be considered an employee if there is no expectation or requirement of productivity in the workplace   |
| 4. | Who benefits from the arrangement? The main benefit of a genuine work placement or internship should flow to the person doing the placement. If a business is gaining a significant benefit as a result of engaging the person, this may indicate an employment relationship has been formed. Unpaid work experience programs are less likely to involve employment if they are primarily observational |
| 5. | Was the placement entered into through a university or vocational training organisation program? If so, then it is unlikely that an employment relationship exists.   |

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The FWO then provides two examples which apply the indicators. Notwithstanding the complexity of existing legal principles and the absence of test cases on unpaid work arrangements (Stewart & Owens, 2013), the Commonwealth government has not sufficiently clarified the position of work experience in labor law. The fact sheet does not provide case law to support the indicators, it is not a legally binding document and the indicators involve a subjective balancing act that blur the line between “work” and “work experience”. For instance, indicator 4 (Table 1) requires the employer to measure the benefit it received against the benefit to the participant. A “significant” employer benefit indicates an employment relationship. Further, it is implied in indicator 4 and expressed in indicator 3 that participants can do “some productive activities” (i.e. work) for the employer but a “primarily observational” arrangement is more likely to be considered work experience. This contradicts advice provided by the Australian Government to the Australian Collaborative Education Network (ACEN) in November 2011:

As did the Workplace Relations Act 1996 before it, the Fair Work Act adopts the common law meaning of an employee. Under common law, the parties to an unpaid work experience arrangement intend a relationship where, in return for labor, the hirer provided training and the on-the-job experience. The law does not allow such an arrangement to continue indefinitely. Conversely, if a person undertaking work experience is doing productive work that would otherwise be undertaken by a paid employee, the relationship is legally one of employment and the person is entitled to appropriate remuneration. (Boyle, 2011, p.1)

The contradiction lies in the final sentence. According to the advice, a participant engaging in any productive work creates an employment relationship. The advice clearly distinguishes production (work) from observation (work experience). In this current environment of uncertainty, institutions and employers need to seek legal advice before entering any arrangement. In fact the author is aware of one Australian university that no longer coordinates work experience arrangements presumably because of the litigation risk. Uncertainty also heightens the risk of student exploitation.

*Work-Integrated Learning*

The traditional function of labor regulation was to protect the vulnerable worker from employer exploitation by redressing the power imbalance between capital and labor (Mitchell, 2011; Owens & Riley, 2007). However in more recent times the protective function of labor regulation has been challenged by a libertarian or individualist philosophy of deregulation. State intervention should be minimized so that workers are free to make their own choices concerning terms and conditions (Stewart, 2009a). Johnstone and Mitchell (2004) describe this as a shift from State-based to market-ordered regulation. This philosophy was encapsulated in the Workplace Relations Amendment (Work Choices) Act (2005) passed by the previous Australian Government. Workers had the “choice” to enter into individual and collective agreements but without the traditional State protection of a comprehensive safety net of terms and conditions. The Fair Work Act was designed to provide “a balanced framework for cooperative and productive workplace relations” (s 3). Balance operates on a number of levels (Cameron, 2012; Stewart, 2009b) and is conceptualized by the Fair Work Act as “fairness” (Mourell & Cameron, 2009). At the level of regulation, the balance is between State regulation and deregulation. For instance the Fair Work Act provides a guaranteed safety net of employment conditions to protect the vulnerable worker (State regulation) (s 3(b)) as well as the flexibility to enter individual agreements for the purpose of balancing work and family responsibilities (deregulation) (s 3(d)).

The Australian Government has deregulated the “work” in WIL by excluding it from coverage under the Fair Work Act. Students in WIL programs are not as vulnerable as work experience participants to exploitation because the institution mediates the relationship between student and employer. Nevertheless, potential exists for exploitation where the WIL program is not properly managed by the institution and/or employer. Proper management entails (amongst other things) appropriate academic and employer supervision arrangements and that any work performed is consistent with the program learning objectives. Two examples of potential exploitation illustrate this point, one drawn from the literature and the other adapted from the author’s experience in managing a WIL program. In a study of reflective journals by undergraduate youth work students completing a practicum, Emslie found that some students had to “take on the work of staff who had left or were absent, and expressed disappointment at not having the opportunity to achieve their own learning outcomes”. Other students reported receiving no formal supervision or poor supervision (Emslie, 2009, p.70). In the second example, suppose that a student who spends 1 day per week in an organization during a semester in a project-based business internship either: finishes their research project early; or they are asked by the employer to come in for an additional day every week “as part of their internship”. In an effort to appease a potential employer in this competitive job market and perhaps gain a reference, the student agrees. The student then spends time in the organization performing clerical duties for the employer. This work would ordinarily receive the minimum adult or junior payment (depending on the student’s age) under the *Clerks – Private Sector Award 2010*. However, the “vocational placement” exclusion leaves the student in the youth work practicum and business internship with no statutory safety net of employment conditions. Provided that the work is performed in the course of a vocational placement, the employer can potentially exploit the exclusion to their advantage. Perhaps the student could take action against the employer at common law for breaching an implied term of the employment contract to pay wages for work performed outside the scope of the WIL program and therefore be entitled to “reasonable remuneration.” However few (if any) students would be aware of this common

law right and fewer still would exercise it based on the time, financial and potential career cost associated with suing an employer.

The deregulation of “work” in WIL programs is inconsistent with a balanced regulatory framework which is designed to protect workers from exploitation. Instead the responsibility for regulating WIL programs rests with the tertiary institution. Their regulatory responsibilities include the negotiation of individual arrangements with the employer which may (as a matter of good WIL practice) or may not specify the “work” the student performs for the employer. The issue is this: is the institution, which itself is vulnerable because it is dependent on the employer to be part of the WIL program, the most appropriate body to regulate “work”? Further, is it appropriate for the institution to regulate “work” when the State has assumed responsibility for regulating “work” under the Fair Work Act? Simply put, the Fair Work Act allows individual agreement making in WIL programs without affording any statutory protection for students.

Unlike Australia, the United States adopts a co-regulatory approach to WIL programs involving the institution and the State. The co-regulation of WIL programs and State regulation of work experience is described and analyzed in the section which follows.

#### UNITED STATES LABOR REGULATION OF WIL AND WORK EXPERIENCE

The Fair Labor Standards Act (1938) (FLSA) is the primary mechanism which regulates labor in the United States. Unlike the Fair Work Act, the FLSA does not exclude WIL programs from the legislation. Employee is broadly defined as “any individual employed by an employer” and “employ” includes to “suffer or permit to work” (ss 203(e) and 203(g)(1)). A person who volunteers to perform services for a public agency without compensation (other than a nominal fee) is excluded from the definition of employee (s 204(4)(a)). There are also statutory exemptions for “learners” and “apprentices” (s 214) but it does not appear that this extends to work experience or WIL students. “Internship” is the term used in the United States to describe both WIL and work experience. In the absence of a statutory definition of internship, case law is left to regulate the distinction between intern and employee. The US has a developed jurisprudence in this area when compared to Australia. The seminal case is *Walling v Portland Terminal Co* (1947) (subsequently referred to as *Walling*). In *Walling*, the Court held that unpaid railway trainees who completed a one week training course for railway yard brakeman prior to employment were not employees under the FLSA. Six criteria were derived from *Walling* to determine whether a person is a trainee, as set out in Table 2 (the *Walling Test*).

Whilst United States courts have not specifically addressed the circumstances in which a student is an employee or intern, the *Walling Test* has been considered in the context of trainee programs. Two competing interpretations have emerged. Courts have either required employers to comply with all six criteria (“all or nothing test”) or they have considered the “totality of the circumstances” (Braun, 2012, p. 290). The latter interpretation enables the Court to accord different weight to the six criteria and does not require the employer to satisfy all six criteria for a person to be deemed a trainee. During this time the US Department of Labor Wage and Hour Division (DOL) has published a series of opinions in response to tertiary education and employer queries concerning the legal position of their programs, the most recent being 17 May 2004 (DOL, 2004).

TABLE 2. Walling Test (adapted from DOL, 2004)

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1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
  2. The training is for the benefit of the trainee;
  3. The trainees do not displace regular employees, but work under close observation;
  4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;
  5. The trainees are not necessarily entitled to a job at the completion of the training period; and
  6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.
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The Walling Test and its conflicting interpretations have attracted strong criticism (Braun, 2012; Curiale, 2010; Schoepfer & Dodds, 2010; Yamada, 2002). Given the legal uncertainty, there is evidence of employer reluctance to engage interns for fear of violating labor laws (Bacon, 2010-2011; Kalyuzhny, 2012). Students are not necessarily protected from exploitation, nor does the test address the perpetuation of inequality associated with internships (Yamada, 2002). Students may be reluctant to sue employers for fear of not receiving that prized reference, being "blacklisted" by the employer and/or deemed a "troublemaker" in their field (Bacon, 2010-2011). Further, students from lower socio-economic backgrounds do not have the same financial capacity to take unpaid internships compared to their wealthier peers, who have the financial support through scholarships, parents or other family members (Bacon, 2010-2011; Curiale, 2010; Feeley, 2007). This puts the student at a competitive disadvantage in the job market compared to those who can afford to provide "free labor" (Yamada, 2002).

In light of this uncertainty and increasing concerns about the exploitation of students, the DOL issued "Fact Sheet #71: Internship Programs under the FLSA" in April 2010. As with the FWO fact sheet in Australia (FWO, 2011), Fact Sheet #71 is not legally binding but is designed to provide "general information to help determine whether interns must be paid the minimum wage and overtime" (DOL, 2010). The DOL guidelines restate the Walling test (refer Table 2) in the context of internships and support the "all or nothing" test (Braun, 2012). For example, "interns" and "internships" replace references to "trainees" and "training" and "vocational school" is replaced by "educational environment". The purposes of Fact Sheet #71 were to clarify the legal position and send "a clear message to for-profit firms that the current administration is likely to increase its enforcement of the rules" (Bacon, 2010-2011, p. 67). Nevertheless, the criticisms that existed prior to Fact Sheet #71 remain because the law has not changed. For instance, criterion 4 (see Table 2) prohibits an intern from activities that derive "an immediate advantage" for the employer. As previously discussed, WIL and work experience provides valuable consideration for both employer (identifying prospective employees) and student (experiential learning). According to Braun, "regulators are effectively requiring corporations to eliminate any or all of the potential value that can be gleaned through these experiences" which is "entirely antithetical to the experiential value inherent in the internship process" (Braun, 2012, p. 294). Should a US Court apply the "all or nothing" test, an employer who derives a benefit or advantage would be breaching the FLSA and liable to pay the minimum wage.

A number of reforms have been suggested including: a balancing test in which the employer cost of hosting the individual is measured against the individual benefit to determine whether the individual is an intern or employee (Edwards & Hertel-Fernandez, 2010); the

abolition of the public agency exclusion in the FLSA and the adoption of what Bacon describes as a “laissez-faire policy” in which the rules are abolished and regulation is left to educational institutions (Bacon, 2010-2011). The laissez-faire model reflects the current Australian system with respect to WIL programs. According to Bacon (2010-2011) it recognizes that the primary source of interns is students and gives educational institutions flexibility in setting their own rules. Conversely, Yamada (2002) recommends the continuing labor law regulation of internships but a simpler test for “school-sponsored internship programs”. A student intern who participates in the program would not be deemed an employee under the FLSA provided that: academic credit is granted; the educational institution imposes a requirement on the employer that the student will develop skills related to the educational program during their internship; and there is direct institutional supervision of the internship. The requirements are intended to emphasize the educational primacy of the internship (Yamada, 2002).

Both the criticisms and proposed reforms highlight the fundamental problem with US regulation - it makes no distinction between work experience and WIL. The main criticism of inequality is more relevant to work experience than WIL. Compared to work experience, the provision of academic credit for WIL programs somewhat levels the playing field because it removes financial capacity as a major factor in student considerations as to whether to participate in WIL. In terms of the Walling test, a properly structured WIL program of a fixed duration which incorporates clear learning objectives and supervisory arrangements would satisfy all six criteria except “immediate advantage” (criterion 4, Table 2). Clearly criterion 4 was designed to prevent employer exploitation of interns yet it contradicts the notion of mutual benefit associated with WIL programs. This is where the distinction between WIL and work experience becomes relevant. Unlike work experience, students in WIL programs enjoy an additional level of protection from employer exploitation – the institution. Simply put, labor law and the institution co-regulate the WIL program. This makes sense in the unique circumstances of WIL. The regulation of work is the province of labor law whereas learning is regulated by the institution (as well as government and other bodies). As work is integrated with learning, regulation by the State and institutions is integrated to form a co-regulatory response to WIL programs. Therefore whilst criterion 4 may be necessary for regulating work experience, it is unnecessary for WIL given the protection afforded to students by institutions under criteria 1, 2 and 3 (see Table 2).

In summary, the “laissez-faire” model of deregulation in Australia is antithetical to the purposes of the Fair Work Act whereas the US model of co-regulation makes no distinction between work experience and WIL thereby rendering the system inflexible. Two recommendations designed to achieve a more balanced regulatory framework will now be assessed: a revised criterion for “vocational placement” and the inclusion of a definition of “work experience”. In conjunction with the FWO report by Stewart and Owens, it is hoped that the recommendations generate future discussion and support for law reform in WIL and work experience from peak tertiary and industry bodies such as the Australian Collaborative Education Network (ACEN), Universities Australia and Australian Council of Trade Unions (ACTU). Whilst the recommendations are directed at the Fair Work Act, they can be considered in other jurisdictions.

## RECOMMENDATIONS

The first recommendation is adding three criteria to the definition of “vocational placement”. A vocational placement under section 12 Fair Work Act would also include a placement:

1. Supervised by the institution and employer at a level considered appropriate by the institution taking into account all the circumstances of the placement;
2. in which the work, the learning objectives and supervision arrangements are agreed to in writing by the institution and the employer prior to commencement of the placement; and
3. in which the work is consistent with the agreed learning objectives of the placement.

“Institution” would be defined with reference to the existing criteria for vocational placement (Fair Work Act, ss 12(b) and 12(c)). The recommendation is consistent with a co-regulatory approach to WIL. Tertiary institutions would be responsible for ensuring the integration of work and learning and that the supervision arrangement is appropriate. Unlike the United States, co-regulation provides flexibility. The institution and the employer agree on supervision and the “I” or the integrated aspect of WIL. Criterion 3 of the Walling Test (Table 2) in the US requires employers to engage in “close supervision” not appropriate supervision. The reality is that different WIL programs require different degrees of supervision. For example, a student teacher involved in taking a class requires a different level of supervision compared to a business student completing a research project in the workplace or a hospitality student working on the front desk of a hotel as part of their WIL program. The new criteria recognize that the tertiary institution, not the State, is best positioned to determine the appropriateness of the supervision and the student’s learning outcomes. Flexibility is balanced by new regulation which protects students from exploitation. Students must receive appropriate supervision and if the work (which would otherwise be paid) is not consistent with the agreed learning objectives of the WIL program, the WIL program would not constitute a vocational placement. If the WIL program is not a vocational placement or “work experience”, then the student would be considered an employee for the purpose of the Fair Work Act and entitled to the minimum rate of pay under the Fair Work Act or relevant Award that applied to the student’s work. In this way the State and the institution are regulating the “work” of WIL. Whilst the amended definition may deter employers from participating in WIL programs, the author sees this as a clear advantage. Institutions engaging in good WIL practice already have in place the measures recommended above. What the amended definition will do is to minimize the incidence of poor WIL practice and employers that exploit the vulnerabilities of the student worker.

The second recommendation is to insert definitions of “work” and “work experience” in the Fair Work Act to clarify its current uncertainty at common law. Like vocational placement, the Fair Work Act would specifically exclude participants engaging in “work experience” from the definition of national system employee. Work experience would be defined as “an activity which is not work and not part of a vocational placement”. “Work” would be defined as “an activity that normally attracts remuneration”. The definition of “work” is drawn from Regulation 1.03 of the Migration Regulations (1994) and is used as part of the conditions attached to the issuing of visas for persons entering Australia. For example a common condition of a Tourist Visa is that “the holder must not engage in work in Australia” (Sch 8, Condition 8101) whereas the student holder of a Higher Education Sector Visa issued after 26 April 2008 can engage in work for up to 40 hours per fortnight (and

unlimited hours outside teaching periods) (Sch 8, Conditions 8104 & 8105). The Minister has the power to cancel a visa if the holder breaches the work condition (Migration Act (1958), s 116).

The definition of work would lead to disputes concerning the phrase “normally attracts remuneration”. Nevertheless it provides greater certainty than the current list of factors provided by the FWO and derived from the common law. The definition makes a clear distinction between production (work) and observation (experience) which is consistent with FWO’s advice and examples. It is a fundamental principle of labor law that unless the context provides otherwise, a person should be paid for his or her labor. For example if a student does four hours of observation followed by four hours of clerical duties they should be paid at the minimum wage rate under the *Clerks – Private Sector Award 2010* for the four hours of work. The definition also recognizes context. Volunteer and charity work, being “unpaid work that is performed with the primary purpose of benefiting someone else or furthering a particular belief” (Stewart & Owens, 2013, p. 5), domestic work or “reproductive labor” (Owens & Riley, 2007, p. 135), work of a social nature (*Braun v MILGEA* [1991]) as well as work experience would fall outside the work definition.

The work experience definition is designed to protect students from exploitation. State regulation ensures that a clear line is drawn between “work” and “work experience” and creates a fairer balance between student protection and employer flexibility to offer work experience. A current criticism of the recommendation is that it may have the effect of decreasing the pool of work experience opportunities for students, particularly those from disadvantaged backgrounds. However this argument perpetuates the vulnerability of the student worker – that is, employers will not offer work experience if students cannot engage in free productive labor. Employers do incur time and opportunity costs in supervising the student in the workplace but this should not be considered a fair trade-off for free labor. As Stewart notes, “why should it be legal to put your hand up to work for nothing, assuming you’re not volunteering in the broader sense?” (Souter, 2012). In fact state regulation of work experience may encourage employers to enter WIL programs given the “vocational placement” exemption from wage liability under the Fair Work Act. In fact an employer shift from work experience arrangements to WIL programs in which the work is aligned to learning objectives and the student is protected by university supervision can only but benefit students and may contribute to the growth of WIL.

## CONCLUSION

This article has examined, through the lenses of flexibility (deregulation) and protection (State regulation), the labor law regulation of WIL and work experience in Australia and the United States. The student is the vulnerable worker in Australia. The deregulation of the “work” in work-integrated learning exposes the student to potential exploitation and the common law position on work experience is complex and unclear. The US co-regulatory model is too inflexible to address the nuances of WIL programs with evidence of employer reluctance to participate in WIL. This leaves the student vulnerable to missing out on WIL opportunities and its associated benefits. The recommendations attempt to address the current labor law challenges for WIL and work experience by creating a more balanced regulatory framework. In particular, “vocational placement” is regulated in a way which provides employers and institutions with flexibility to agree on supervisory arrangements and learning objectives appropriate to the WIL program, but also ensures that any work

performed is integrated with the learning objectives. A definition for “work experience” protects the student as vulnerable worker, provides greater legal certainty for those offering these arrangements and is consistent with the fundamental principle that workers should be paid for productive labor. By amending the Fair Work Act as recommended in this article, the Commonwealth Government would not only create a more balanced regulatory framework but provide stakeholders with the legal clarity in unpaid work arrangements that Stewart and Owens (2013) allude to.

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# Asia-Pacific Journal of Cooperative Education

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In this Journal, Co-op/WIL is defined as an educational approach that uses relevant work-based projects that form an integrated and assessed part of an academic program of study (e.g., work placements, internships, practicum). These programs should have clear linkages with, or add to, the knowledge and skill base of the academic program. These programs can be described by a variety of names, such as work-based learning, workplace learning, professional training, industry-based learning, engaged industry learning, career and technical education, internships, experiential education, experiential learning, vocational education and training, fieldwork education, and service learning.

The Journal's main aim is to allow specialists working in these areas to disseminate their findings and share their knowledge for the benefit of institutions, co-op/WIL practitioners, and researchers. The Journal desires to encourage quality research and explorative critical discussion that will lead to the advancement of effective practices, development of further understanding of co-op/WIL, and promote further research.

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