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Work Experience in Higher Education: Assessing the Legal Risks in Australia, Canada and the UK

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Acknowledgments

- ARC funded Discovery Project
 - ❖ *Work Experience: Labour Law at the Intersection of Work and Education*

- See also
 - ❖ Owens & Stewart, 'Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern' (2016) 155 *International Labour Review* 679
 - ❖ Hewitt, Owens, Stewart & Howe, 'At the Intersection of Education and Work: Young People, Equality and Regulation of the Labour Market' in Howe, Chapman & Landau (eds), *The Evolving Project of Labour Law* (Federation Press, 2017)

Overview

- Forms of work experience
- Issues and concerns
- What we know about work experience: some recent reports from Australia, Canada and the UK
- The legal framework in each country
- Managing risks: some gratuitous advice

Forms of work experience

- Combining work and training
 - ❖ apprenticeships
 - ❖ vocational education and training
 - ❖ work experience for school students
 - ❖ ‘work integrated learning’ (WIL) in universities
 - ❖ support programs for unemployed or injured workers – mandated or facilitated by governments
 - ❖ ‘open market’ internships – established by businesses, not-for-profit sector, governments

Work experience and universities

- Growth of both mandatory and optional work placements within courses
 - ❖ requirements for professional training
 - ❖ enthusiasm for WIL amongst educators
 - ❖ industry demand for ‘job ready’ graduates
- Many universities also facilitate extracurricular internships or ‘voluntary’ work experience for students or graduates
 - ❖ both externally and on campus

Work experience – the issues

- Gap between promise and reality
 - ❖ not all internships/placements provide quality learning experiences
 - ❖ no clear evidence that they enhance employability
- Problems of social exclusion
 - ❖ may promote inequality, especially in gaining access to the labour market
- May undermine labour standards
 - ❖ promotion of precarious form of work
 - ❖ replacement of paid entry-level positions

The FWO report

- Stewart & Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*
 - ❖ commissioned by Fair Work Ombudsman, released February 2013
 - ❖ available at www.fairwork.gov.au/pay/unpaid-work

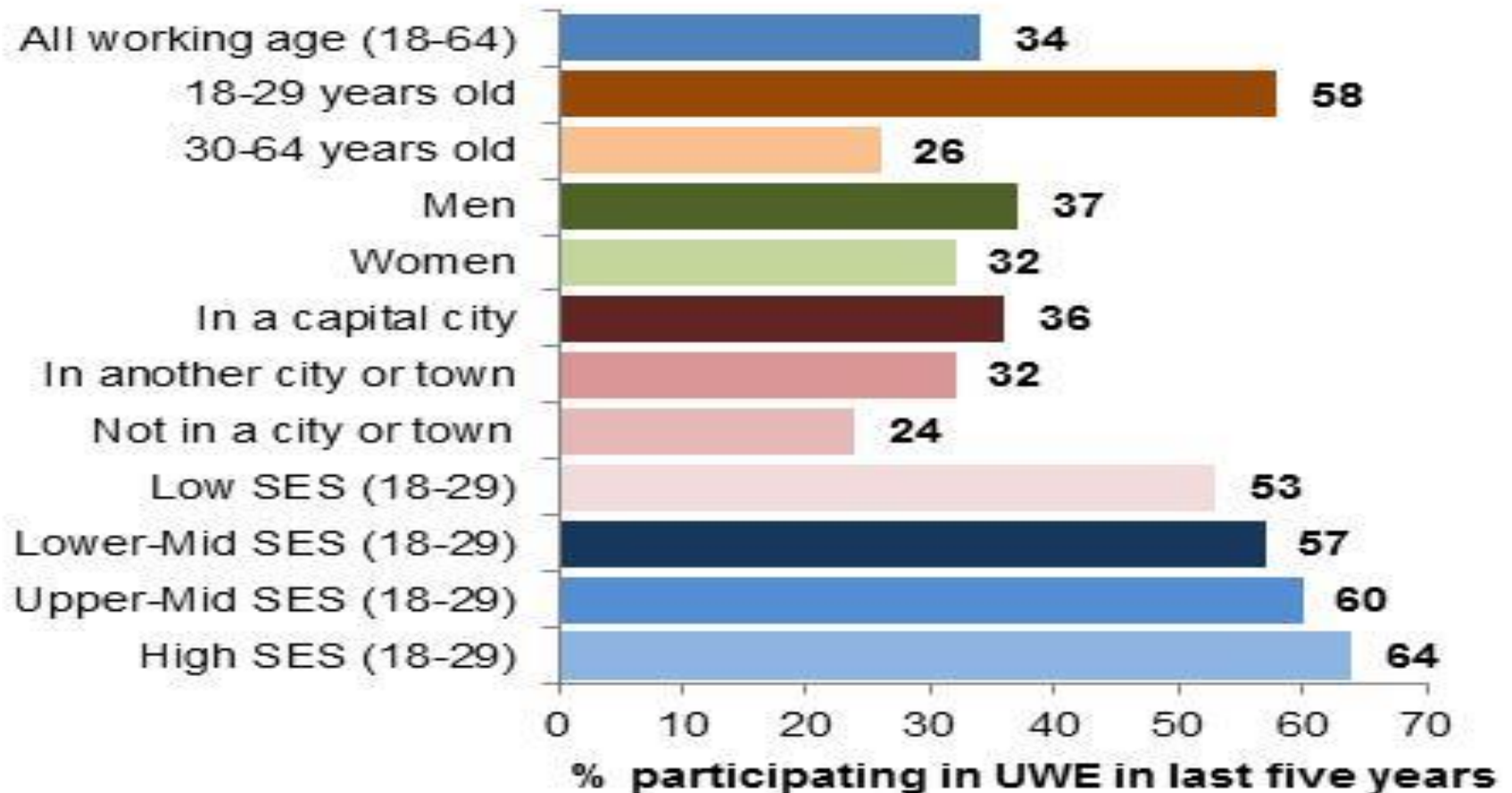
The FWO report

- Report found significant evidence of
 - ❖ use of unpaid trials/training, especially in certain industries
 - ❖ use of unpaid interns to replace paid employees, well established in some sectors, on the rise in many others
- Recommendations (adopted by FWO) to test out the law by taking exploitative arrangements to court

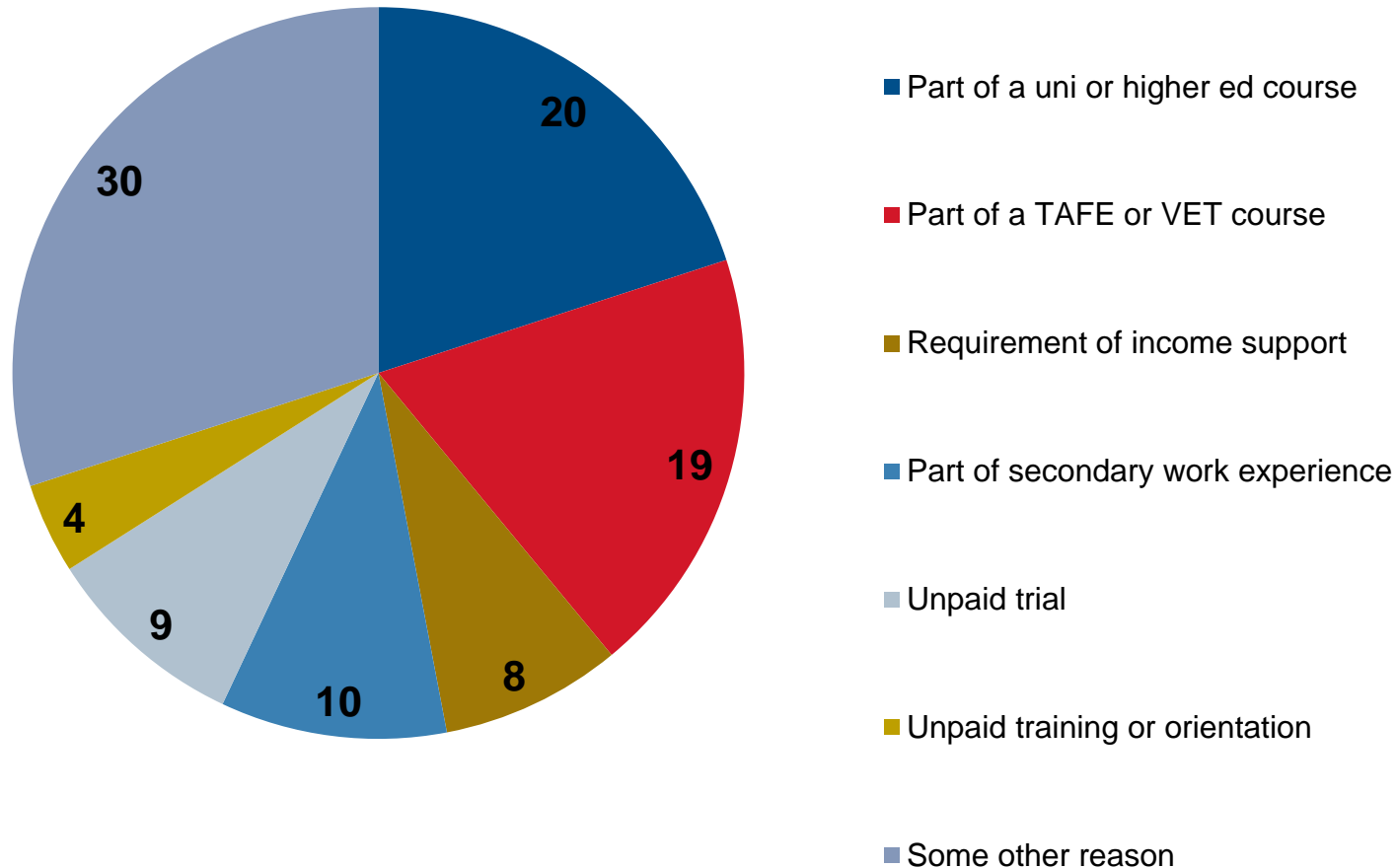
The UWE national survey

- Oliver, McDonald, Stewart & Hewitt, *Unpaid Work Experience in Australia: Prevalence, Nature and Impact*
 - ❖ survey of 3800 working age Australians (18-64)
 - ❖ funded by Commonwealth Department of Employment
 - ❖ published in December 2016, available at www.employment.gov.au/news/unpaid-work-experience-australia-report-december-2016

Key findings – prevalence



Key findings – reasons for UWE



Key findings – outcomes

- Participants undertaking UWE in connection with university studies were generally positive about their experience
 - ❖ 74% were satisfied or very satisfied
 - ❖ 80% reported developing new skills or gaining new knowledge
 - ❖ 28% received offers of paid employment

HEQCO report (Canada)

- Turcotte, Nicholls & Phillips, *Maximising Opportunity, Mitigating Risk: Aligning Law, Policy and Practice to Strengthen Work-Integrated Learning in Ontario*
 - ❖ published in 2016 by Higher Education Quality Council of Ontario, available at www.heqco.ca/SiteCollectionDocuments/Maximizing-Opportunity-Mitigating-Risk.pdf
 - ❖ explores need to balance benefits of WIL from a human capital perspective with risk of creating precarious employment

European Commission survey

- *The Experience of Traineeships in the EU*, Flash Eurobarometer 378, 2013
 - ❖ http://ec.europa.eu/public_opinion/flash/fl_378_en.pdf
 - ❖ 56% of UK respondents aged 18 to 35 had undertaken at least one 'traineeship' (46% EU)
 - ❖ 78% thought their most recent experience was or will be useful in helping them find a job (71% EU)
 - ❖ 28% were offered employment after their most recent traineeship (27% EU)

IPPR report (UK)

- Roberts, *The Inbetweeners: The New Role of Internships in the Graduate Labour Market*, Institute for Public Policy Research, April 2017
 - ❖ www.ippr.org/publications/the-inbetweeners
 - ❖ focus on inequality of access
 - ❖ recommends (among other things) that universities offer brokered work placements to all students, prioritising disadvantaged groups
 - ❖ and that placements lasting more than four weeks be banned

When is work experience unlawful ?

- In all three countries, when
 - ❖ work is undertaken pursuant to what the law regards as an employment relationship
 - ❖ no statutory exception applies
 - ❖ and trainee/intern is paid below the applicable minimum wage

Work experience as employment

- On a broad view there is scope for identifying an employment relationship, even for unpaid work experience, so long as
 - ❖ there is a commitment to work in return for experience/opportunity
 - ❖ work is of value to the ‘employer’
 - ❖ and the trainee/intern is not seen as ‘volunteering’ their services

Work experience as employment

- FWO has successfully pursued Australian firms for not paying/underpaying interns
 - ❖ *FWO v Crocmedia* [2015] FCCA 140 (radio producers)
 - ❖ *FWO v Aldred* [2016] FCCA 220 (marketing interns)
 - ❖ *FWO v AIMG BQ* [2016] FCCA 1024 (event coordinators)
 - liability was conceded in these cases, though note strength of judicial comments about exploitation

Work experience as employment

- Some Canadian interns have been found to be employed and thus protected by minimum labour standards
 - ❖ see eg *Girex Bancorp Inc v Hsieh & Sip* 2004 CanLII 24679 (Ontario Lab Rel Bd) (student software programmers engaged in place of employees)
 - ❖ but cf *Sarmiento v Wilding & Rampage Entertainment* [2008] CanLII BCPC 232 ('Head of Department' at a film production company was an intern being trained, not an employee)

Work experience as employment

- Similarly, UK interns have successfully claimed the national minimum wage
 - ❖ see eg *Vetta v London Dreams Motion Pictures* ET/2703377/08 (2008) (art director's assistant)
 - ❖ and *Hudson v TPG Web Publishing Ltd* ET/2200565/11 (2011) (website editor)
 - ❖ but again, cf *Drozd v Money Matters* [2014] NIIT 287_14IT (intern providing sales support to mortgage finance advisor, initially on a placement for her business administration course, held to have volunteered her services)

Exceptions for education/training

- In Australia, Fair Work Act 2009 does not apply to ‘vocational placements’
 - ❖ an unpaid placement undertaken as a requirement of an education or training course and authorised under a federal, State or Territory law or administrative arrangement
 - ❖ see eg *Upton v Geraldton Resource Centre* [2013] FWC 7827

Exceptions for education/training

- In Canada, various exceptions
 - ❖ eg Ontario's Employment Standards Act does not apply to
 - 'an individual who performs work under a program approved by a college of applied arts and technology or a university' (s 3(5))
 - any unpaid trainee who meets six specified criteria, including requirement that training benefit them, not the organisation training them (s 1(2))
 - ❖ note also similar but as yet inoperative exceptions to Part III of the Canada Labour Code, added by Economic Action Plan 2015 Act, No 1

Exceptions for education/training

- In UK, exceptions include
 - ❖ students required to do an internship for less than one year as part of a higher education course
 - see eg National Minimum Wage Regulations 2015 reg 53
 - ❖ unpaid work undertaken on a voluntary basis for a charity, a voluntary organisation, an associated fund-raising body or a statutory body
 - see eg National Minimum Wage Act 1998 s 44

Health and safety laws

- Interns/trainees will generally be covered by health and safety laws, even if not employed
 - ❖ Work Health and Safety Act 2011 (NSW) ss 19(1) (primary duty of care), 7(1) (definition of ‘worker’)
 - ❖ Occupational Health and Safety Act (Ont) s 1, Canada Labour Code s 123(3)
 - ❖ Health and Safety (Training for Employment) Regulations 1990 (UK) reg 4

Anti-discrimination laws

- In Australia, federal anti-discrimination laws would not apply to non-employed interns, if complaining about work-based (as opposed to education-based) discrimination
- But some State or Territory laws do apply to unpaid workers
 - ❖ eg Anti-Discrimination Act 1991 (Qld) ('work' specifically defined to include work experience)
 - ❖ Equal Opportunity Act 1984 (SA) ('employment' defined to include unpaid work)

Anti-discrimination laws

- By comparison, employment provisions in Canadian human rights laws have generally been broadly interpreted to include unpaid or voluntary workers
 - ❖ see eg *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601
 - ❖ *Rocha v Pardons and Waivers of Canada* 2012 HRTO 2234

Anti-discrimination laws

- Equality Act 2010 (UK) s 55 prohibits discrimination, harassment or victimisation by an ‘employment service-provider’
 - ❖ defined in s 56 to include provision of vocational training and work experience
 - ❖ see eg *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust* [2016] EWCA Civ 607 (students on work placement)

Risk management – some advice

- In the short term – review existing programs for legal compliance
 - ❖ not just in-course placements
- In the longer term – as HEQCO report notes, challenge to find the right balance between
 - ❖ meeting the demand for WIL, and
 - ❖ managing a trend with profound implications for both labour standards and social mobility