Legal issues in defining a volunteer and other unpaid work

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Introduction
What we will cover today

• The spectrum of people engaged by NFPs
• Legal difference between volunteer and employee
• Legal definition or characteristics of a volunteer
• Other unpaid work: internships, work experience, Work for the Dole etc.
• Summary, questions, more about Not-for-Profit Law
Introduction

About today’s session

• Legal information not legal advice
• Focus today is on the law as it applies in NSW – the law in other states may differ
• Questions any time – but if complex or very specific we might defer or refer
• NFP Law Update – sign-up!
1. The spectrum of people engaged by a NFP
The spectrum

“...the infinite variety of human affairs means that work relationships present as a spectrum, some of which are clearly relationships of employment and others of which are clearly relationships of independent contract [and some of which are clearly volunteer relationships] but some of which are less clear cut...

French Accent v Do Rozario [2011] FWAFB 830
(with colour emphasis and words in italics added by me!)
“Mr Bell says Mr de Castella owes him $100,000 in wages for 20 months work but Mr de Castella says Mr Bell was a volunteer and declined to accept money so as not to affect a disability pension...”

Alice Springs News Online  18 June 2012
# The spectrum

## Legal entitlements of people an organisation engages

<table>
<thead>
<tr>
<th>Issue</th>
<th>Contractor</th>
<th>Employee [ongoing or fixed term]</th>
<th>Casual employee</th>
<th>Volunteer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment for work</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>x</td>
</tr>
<tr>
<td>National Employment Standards /award etc.</td>
<td>x</td>
<td>✓</td>
<td>✓</td>
<td>x</td>
</tr>
<tr>
<td>Superannuation</td>
<td>possibly 1</td>
<td>✓</td>
<td>✓</td>
<td>x</td>
</tr>
<tr>
<td>Workers compensation</td>
<td>possibly 2</td>
<td>✓</td>
<td>✓</td>
<td>x</td>
</tr>
<tr>
<td>Paid sick and annual leave</td>
<td>x</td>
<td>✓</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Paid long service leave</td>
<td>x</td>
<td>✓</td>
<td>✓</td>
<td>x</td>
</tr>
<tr>
<td>Termination rights</td>
<td>Contractual</td>
<td>Redundancy / Unfair dismissal</td>
<td>Unfair dismissal</td>
<td>x</td>
</tr>
</tbody>
</table>

1. Possibly entitlements may vary based on state or territory.
2. Possibly entitlements may vary based on state or territory.
3. In some states, long service leave may be paid.
Further issues

- In addition to entitlements, there are other legal issues which will turn on status of person engaged:
  - Insurance
  - Workplace health and safety laws
  - Vicarious liability for actions
  - Workplace behaviour laws
  - Other benefits (government payments / visas)
The spectrum

Step 1

Is there a contract?

Step 2

Yes
- If yes, what kind of contract is it?

No

Step 3

Contract of service?
- Yes
  - Contract for services?
    - Yes
      - Volunteer
    - No
      - Other?
        - Yes
          - Other?
            - Yes
              - Independent consultant
            - No
              - Member of public
          - No
            - Employee
Is there a contract?

• A few preliminary points:
  ❖ A written document is not necessary – a contract can be verbal or inferred from conduct
  ❖ You do need ‘consideration’, but it doesn’t have to be money
  ❖ ‘Substance is more important than form’
  ❖ Court will look at the whole relationship over time
Is there a contract?

• 3 things are needed to show a contract

- Intention to create legal relations
- Consideration
- Mutuality of obligation

= contract
The spectrum

Is there a contract?

• Some case examples:

  Case example: the volunteer and the horseriding camp
  Teen Ranch Pty Ltd v Brown (1995) 87 IR 3068 NSW SCA

  Case example: the camp caretakers
  Morris v Anglican Community Services (2000) SA IRC 24
The spectrum

Step 1
- Is there a contract?

Step 2
- Yes
  - If yes, what kind of contract is it?
- No

Step 3
- Contract of service?
  - Yes
    - Contract for services?
    - Yes
      - Employee
    - No
      - Independent consultant
  - No
    - Volunteer
    - Other?
    - Member of public
If no contract, what’s the person’s status?

• If there is no contract and the person is undertaking voluntary tasks for the NFP – they are probably a volunteer

• No set definition of volunteer in law or legislation

• Case law indicates there will be a volunteer relationship if:
  
  ❖ the parties did not intend to create a legal relationship of any kind
  
  ❖ the person is under no obligation to attend the workplace or perform work – attendance should be truly voluntary
  
  ❖ the person doesn’t expect to be paid for their work
If no contract, what’s the person’s status? (cont’d)

• It is possible that the person may have some other kind of status – such as intern or work experience student – we will discuss these later in the session

• Because your organisation is legally responsible for the actions of your volunteers, it is also important to distinguish a volunteer from a member of the public (who may spontaneously volunteer)
Example 1: Volunteer Agreement

[Your organisation may want to commence the agreement with a statement about your organisation; its history and objectives; the organisation’s reasons for engaging volunteers and the value of volunteers to the organisation etc. Also delete sections not relevant to you.]

This document is not intended to be a legally binding contract between us and may be cancelled at any time at the discretion of either party. Neither party (ie. [org name] or [vol name]) intend any employment relationship to be created either now or at any time in the future.

You are a volunteer

The [role] at [org name] is a volunteer position. This means that you perform all duties on a voluntary basis, of your own free will, and you will not receive payment for your work. You are not an employee of [org name] and you are not entitled to a salary or any other entitlements associated with employment.

Role description and details

[inset role tasks and estimated hours, time commitment or roster details and location] or attach
2. Defining other forms of unpaid work
Other forms of unpaid work

Spectrum

Potential or spontaneous volunteers

Spontaneous Volunteer

Volunteer

Voluntary work under Court Order

Mutual obligation volunteering / work (related to government payment or court order)

Voluntary work

Work activity for Govt. payment

Work for the dole
Work experience
Voluntary work
Green Corps

Mutual obligation volunteering / work

Vocational placement or Internship / work experience or Unpaid work trial

Unpaid ‘work’

Casual employee

Fixed-term contract employee

Ongoing or permanent employee

Employment relationship

Contract of service

Contractor relationship

Contract for services

Independent contractor or consultant

Member of public

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Other forms of unpaid work

Student vocational placements

- Lawful where arrangement meets express exception to the definition of ‘employee’ in *Fair Work Act*:
  - placement is undertaken with an employer and no entitlement to payment; and
  - placement is a requirement of an education or training course; and
  - the education or training course is authorised under a law or an administrative arrangement of Commonwealth, State or Territory
Other forms of unpaid work

Unpaid work trial

• The FWO has made it clear that unpaid work trials are unlawful under the *Fair Work Act*:
  
  ❖ It is OK to test the skills of a worker (e.g., ask for a skills demonstration) where they are directly relevant to a vacant position
  
  ❖ It is unlawful to engage a person to work for 3 weeks while organisation decides whether they are suitable for the role – must pay casual rates
Other forms of unpaid work

Internship (and non-vocational work experience)

• The Fair Work Ombudsman’s (FWO) indicia of a lawful placement are:
  ❖ the true reason for arrangement is to give person experience not help with ordinary operation of business
  ❖ placement is primarily observational and supervised and would not be normally undertaken by an employee
  ❖ no output expected – benefit is to intern
  ❖ length of time considered

• FWO v Crocmedia Pty Ltd [2015] FCCA 1
Other forms of unpaid work

Work for the dole (WFTD) participants

• Program run by Cth Dept. of Employment, via Work for the Dole Coordinators and ‘Jobactive agencies’ (e.g. JSA)

• Significant increase in WFTD numbers from 1 July 2015

• Issues for host organisation to watch out for:
  ❖ contract or agreement
  ❖ payment for hosting WFTD role
  ❖ insurance (and limits)
  ❖ legal responsibility for WFTD’s actions
  ❖ background checks
  ❖ WHS
  ❖ discrimination
  ❖ change of status – e.g. if employed by host organisation
Other forms of unpaid work

Further information available at:

Other forms of unpaid work

Mutual obligation volunteers

Volunteering or work experience for govt. payment

Timebanking

Green Corps
### Other forms of unpaid work

#### Top tips:

1. **Be clear about the basis on which your organisation is engaging someone:** before you engage, analyse the role and the work required and determine the best fit.

2. **Documentation is not enough, but is good evidence:** have written contracts for employees, independent contractors; and consider a volunteer agreement.

3. **Be very careful with people whose status changes:** if your organisation hires a volunteer or a work experience student, so all are clear about when the change occurred.
Summary, questions and evaluation
Questions?
NFP Law Information Hub

Not-for-profit Law

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• If you would like to receive NFP Law’s Update – provide us with email address and we will subscribe you to this e-bulletin

• You’ll receive information about changes to the law, upcoming training, and new resources on our Info Hub...

• Thank you to today’s hosts

• Finally, thank you for your participation!
Summary and questions

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