

RISK MANAGEMENT BY UNIVERSITY LAWYERS IN WORK INTEGRATED LEARNING PROGRAMS

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The strategic expansion of work integrated learning ('WIL') programs by Australian universities is not without legal risk. The primary sources of that legal risk are the participation of third party entities that host students in the workplace and the placement of students in a workplace environment that they may be unfamiliar with. Managing the legal risks associated with WIL is not only a commercial imperative, but is mandatory under higher education law. University lawyers, a relatively unknown category of in-house counsel, have a central role in risk management. A case study involving 13 Australian university lawyers represents the first known systematic study of risk management in WIL from the perspective of university lawyers. The insights and recommendations provided by university lawyers can educate stakeholders about risk management and the role of university lawyers, and can be used as a basis for evaluating and improving risk management in WIL programs.

I INTRODUCTION

Previous work by the author has explained the legal risks encountered by university lawyers within the specific context of work integrated learning ('WIL') programs.¹ This article explores how university lawyers manage the legal risks associated with WIL, more specifically, their risk management practices. WIL, a curriculum design which combines formal learning with student exposure to professional, work or other practice settings,² is delivered by universities as an elective or compulsory subject in most university degrees. WIL is also described by different academic disciplines and in different jurisdictions as internship,

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1 This article draws upon the same case study as the previous works explaining legal risk. See Craig Cameron, 'The Contract Risks to Universities of Work-Integrated Learning Programs' (2017) 45(5) *Australian Business Law Review* 405; Craig Cameron et al, 'The Program Risks of Work-Integrated Learning: A Study of Australian University Lawyers' (2018) 40(1) *Journal of Higher Education Policy and Management* 67.

2 This definition is adapted from Calvin Smith, 'Evaluating the Quality of Work-Integrated Learning Curricula: A Comprehensive Framework' (2012) 31(2) *Higher Education Research & Development* 247, 247; Denise Jackson, 'Employability Skill Development in Work-Integrated Learning: Barriers and Best Practice' (2015) 40(2) *Studies in Higher Education* 350, 350.

cadetship, cooperative education, placement, practicum, clinical rotations/program/internship/clerkship, sandwich course/year, professional practice, service learning, experiential learning and fieldwork.³ WIL can be distinguished from other forms of work-based learning that do not integrate university study and practice,⁴ such as volunteer work and work experience, which pose specific labour-related risks in Australia⁵ as demonstrated by recent case law.⁶

A purported advantage of WIL is the facilitation of generic and technical skill development by students in the workplace, providing students with ‘real-world’ insight into professional practice.⁷ From a stakeholder perspective, WIL can be seen as a strategic response by universities to government, employer and community demand for more ‘work-ready’ graduates.⁸ For instance, the Fair Work Ombudsman notes that ‘[u]nder these arrangements students can gain the skills they need to transition successfully from study to work, while giving industry the opportunity to enrich student learning experiences and increase the number of work-ready graduates’.⁹ The strategic value of WIL has been formally recognised by many Australian universities as objectives in university learning and teaching and strategic plans, which are directed at expanding the delivery of, and student access to, WIL programs.¹⁰

Despite the strategic value of WIL, student exposure to workplace settings exposes universities to legal risk. In this article, legal risk is an event or circumstance that exposes the university to the possibility of liability or non-compliance with external or internal rules and regulations. Empirical studies have identified legal risks involving the conduct of the student, the host organisation¹¹ and the university before, during and after a WIL placement,¹² as well as student characteristics that

3 See Lesley Cooper, Janice Orrell and Margaret Bowden, *Work Integrated Learning: A Guide to Effective Practice* (Routledge, 2010) 37–9.

4 Smith (n 2) 248.

5 See, eg, Andrew Stewart and Rosemary Owens, ‘The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia: Experience or Exploitation?’ (Report for the Fair Work Ombudsman, Adelaide Law School, University of Adelaide, January 2013) <www.fairwork.gov.au/ArticleDocuments/763/UW-complete-report.pdf.aspx>; Craig Cameron, ‘The Vulnerable Worker? A Labor Law Challenge for WIL and Work Experience’ (2013) 14(3) *Asia-Pacific Journal of Cooperative Education* 135.

6 *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140; *Fair Work Ombudsman v Aldred* [2016] FCCA 220; *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024.

7 Denise Jackson, ‘Deepening Industry Engagement with International Students through Work-Integrated Learning’ (2016) 42(1) *Australian Bulletin of Labour* 38, 39.

8 Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155(4) *International Labour Review* 679, 683.

9 ‘Student Placements’, *Fair Work Ombudsman* (Web Page) <www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/student-placements>.

10 Cooper, Orrell and Bowden (n 3) 23; Craig John Cameron, ‘Work Integrated Learning: A Study of Risk Management by University Lawyers’ (PhD Thesis, Griffith University, 2016) 200–2 (‘Work Integrated Learning’).

11 ‘Host organisation’: the legal entity that accepts the student into the workplace as part of a WIL placement.

12 ‘WIL placement’: the time when students are in the workplace as part of a WIL program.

expose the university to legal risk.¹³ It is therefore not surprising that some of these legal risks have resulted in litigation. For instance, the author has previously identified 12 reported decisions between 1998 and 2016 involving student action against Australian universities, in particular, student claims of discrimination and applications for judicial review of an academic decision related to the WIL program.¹⁴ The costs to the university of resolving these legal risks, whether through internal complaints handling mechanisms or via external bodies, may include legal costs, reputation costs and the labour and emotional costs associated with staff involvement in the dispute.¹⁵

Risk management in WIL programs is an important issue for universities, bearing in mind the strategic value of WIL, the legal risks of WIL and the costs arising from the materialisation of a legal risk. Not only does risk management make good business sense for universities, but it is also mandatory in the prevailing regulatory environment. To maintain registration as a higher education provider with the Tertiary Education Quality and Standards Agency, the national regulator of the higher education sector, the university must demonstrate that ‘risks to higher education operations have been identified and material risks are being managed and mitigated effectively’,¹⁶ and that WIL programs are quality assured,¹⁷ which includes managing risks that can undermine quality.¹⁸ Government funding to public universities is also contingent on complying with these requirements.¹⁹

In this article, university lawyers are the unit of analysis for studying the phenomenon of risk management in WIL programs. University lawyers, being qualified lawyers employed by the university, are involved with risk management in WIL programs as part of their delivery of in-house legal services. The case study of university lawyers reported in this article is designed to address a gap in the literature — the absence of any systematic study of risk management in WIL programs from the perspective of university lawyers. It is argued that university lawyers can provide valuable insights that can assist university stakeholders

13 For a table of legal risks, see Craig Cameron, ‘The Strategic and Legal Risks of Work-Integrated Learning: An Enterprise Risk Management Perspective’ (2017) 18(3) *Asia-Pacific Journal of Cooperative Education* 243, 246, 254–5 (‘The Strategic and Legal Risks of Work-Integrated Learning’).

14 *Ibid* 246–7, 256.

15 Hilary Astor, ‘Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation’ (2008) 19(3) *Australasian Dispute Resolution Journal* 156, 157.

16 *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) standard 6.2.1(e).

17 *Ibid* standard 5.4.1.

18 Tertiary Education Quality and Standards Agency, *Guidance Note: Work Integrated Learning* (11 October 2017) 3–4.

19 *Higher Education Support Act 2003* (Cth) s 19-65.

including management, WIL disciplines,²⁰ WIL staff,²¹ and university lawyers with evaluating and improving risk management in WIL programs. A further aim of this research is to provide greater awareness among university stakeholders, and the legal community, about the role of university lawyers in higher education.

The remainder of this article is structured as follows. The next Part reviews the literature about university lawyers in Australia, issues ventilated by university lawyers about their role, risk management as it applies to higher education, and risk management by university lawyers in WIL programs. The literature review is followed by a description of the case study design, after which the case study is presented and discussed. In particular, the case study reveals three issues which may impact the risk management practices of university lawyers: the sophistication of the host organisation; the legal awareness of WIL staff; and communication by WIL staff. This article concludes with recommendations to university stakeholders for improving risk management, and outlines future research opportunities.

II LITERATURE REVIEW

A *The Role of University Lawyers in Australia*

University lawyers are an integral part of educational management in Australian universities, but their prevalence and role are largely absent from the literature. Unlike the United States of America ('USA'),²² there is a scarcity of research and consideration of Australian university lawyers. A 1999 conference paper, a 2008 conference presentation and a 2015 survey are the only known Australian sources addressing the topic. Hammond reflected on the perceived and actual role of university lawyers, providing a series of general tips on defining and carrying out the university lawyer's role.²³ Fleming addressed a number of issues relevant to the role of university lawyers including professional responsibilities, legal professional privilege, the impact of quality assurance in higher education, resource limitations and charging fees to academic units for in-house services.²⁴ Cameron and Klopper conducted a survey of university lawyers with respect to legal risk,

20 'WIL discipline': the academic discipline responsible for delivering the WIL program.

21 'WIL staff': university employees involved with the management and/or delivery of WIL programs. WIL staff are members of a WIL discipline. They include WIL convenors, university supervisors (who may also be the WIL convenor), WIL support staff (administrative, liaison or placement officers) and the management attached to a discipline delivering the WIL program.

22 For a review of USA studies of university lawyers, see Cameron, 'Work Integrated Learning' (n 10) 48–60.

23 Email from Celia Hammond to Craig Cameron, 13 January 2014.

24 Helen Fleming, 'A Most Peculiar Practice? The Role of the University Lawyer: Challenges for the New Millennium' (Conference Paper, ATEM and AAPP Conference, 29 September 1999).

risk management and the role they play in WIL programs.²⁵ The authors found that a majority of university lawyers' work involves review, drafting, education and advice in relation to contracts, intellectual property ('IP'), confidentiality, privacy law, policy and workplace health and safety — all areas of legal risk.²⁶

Given the scarcity of research, a content analysis of 39 Australian university websites was conducted to gain further insight about Australian university lawyers. The analysis shows that university lawyers are prevalent in almost every university in Australia and are generally centralised within one operational division of the university. Under a centralised model, the legal office is an operating division which reports to a senior figure with the title Chief Operating Officer, Director, Deputy Vice-Chancellor or Vice-President, or in some cases the legal office is situated within university administration and reports directly to the Vice-Chancellor or President. Australian university lawyers deliver legal services to their sole client, the university. Six general categories of legal services can be discerned. University lawyers provide legal advice; draft and/or review contracts, policies and agreements; engage in dispute resolution and litigation; train and educate university staff; deal with subpoenas and other court documents; and coordinate external counsel where the legal office does not have the resources or expertise to handle a legal matter. They therefore play a proactive role in managing legal risks associated with university activities, which includes WIL.

Despite the USA-centric nature of the literature, there appear to be clear parallels between the prevalence, organisational structure and work of university lawyers in Australia and the USA, which supports a review of the USA literature. The next section identifies a series of issues ventilated by university lawyers about their role in higher education, with specific analysis devoted to those issues relevant to risk management.

B Issues with the Role of University Lawyers

University lawyers deliver their services in a distinctive context that impacts on the roles they play. The issues that university lawyers have articulated include the mix of legal services delivered by university lawyers and external counsel,²⁷

25 Craig Cameron and Christopher Klopper, 'University Lawyers: A Study of Legal Risk, Risk Management and Role in Work Integrated Learning Programmes' (2015) 37(3) *Journal of Higher Education Policy and Management* 344.

26 *Ibid* 351–2.

27 See generally J Rufus Beale, 'Delivery of Legal Service to Institutions of Higher Education' (1974) 2(1) *Journal of College and University Law* 5; Robert D Bickel, 'A Revisitation of the Role of College and University Legal Counsel' (1993) 85 *Education Law Reporter* 989; Sara Lipka, 'The Lawyer Is In', *The Chronicle of Higher Education* (online, 1 July 2005) <www.chronicle.com/article/The-Lawyer-Is-In/25505>, profiling Pamela J Bernard, General Counsel at the University of Florida; Jonathan Peri, 'The Wisdom of Employed General Counsel in Higher Education' (2008) 18(1) *Widener Law Journal* 191.

access to legal services by the academic administrator,²⁸ misconduct by the academic administrator when instructing the university lawyer or acting on their advice,²⁹ and the identification of the client, so as to avoid conflicts of interest in the delivery of legal services.³⁰ The identity of the client within a decentralised organisational structure, and within conflicts of interest, in particular, has also been the source of academic interest in the role of the university lawyer.³¹ One issue in the literature is particularly relevant to risk management by university lawyers: communication by the academic administrator with respect to legal services.

The literature emphasises the importance of communication by academic administrators when managing the risks of university activities. Risk management by university lawyers can be contingent upon the academic administrator involving the university lawyer before any legal crisis occurs,³² and before any decisions are made by the academic administrator.³³ The importance of timely communication by academic administrators is supported by recent empirical research. In a study by Hustoles, university lawyers recommended that academic administrators could deal more effectively with risk management by contacting university lawyers early regarding problems; recognising the university lawyer as a resource; and engaging with university lawyers through timely legal advice, education, and other relationship-building activities.³⁴ The most frequently cited issue by Australian university lawyers that may impact their role, as reported by Cameron and Klopper, was passivity or lack of communication by WIL staff.³⁵ In particular, WIL staff may fail to collaborate with university lawyers early in the agreement-making process, or not request legal advice at all, in relation to WIL programs.³⁶

28 Roderick K Daane, 'The Role of University Counsel' (1985) 12(3) *Journal of College and University Law* 399, 408–9; Fleming (n 24) 10–14; David Schimmel and Linda Nolan, 'Academic Administrators, Higher Education and the Practice of Preventive Law' (2005) 194 *Education Law Reporter* 461, 466.

29 Norman L Epstein, 'The Use and Misuse of College and University Counsel' (1974) 45(8) *Journal of Higher Education* 635, 639; Robert M O'Neil, 'The Lawyer and the Client in the Campus Setting: Who Is the Client, What Does the Client Expect and How May the Attorney Respond?' (1993) 19(4) *Journal of College and University Law* 333.

30 Daane (n 28) 408; Fleming (n 24) 3; Panel, 'The University Counsel: A Roundtable Discussion' (2001) 87(6) *Academe* 26, 26–7; Peter H Ruger, 'Effective and Efficient Use of Counsel: Preventing Issues and Controlling Costs' (Conference Paper, National Conference on Legal Issues in Higher Education, 18 February 2007) 3–4.

31 Robert H Aronson, 'Conflict of Interest' (1977) 52(4) *Washington Law Review* 807, 848–51; Robert F Drinan, 'Lawyer-Client Confidentiality in the Campus Setting' (1993) 19(4) *Journal of College and University Law* 305; William A Kaplin and Barbara A Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making* (Jossey-Bass, 5th ed, 2013) vol 1, 168–9.

32 Robert D Bickel and Peter H Ruger, 'The Ubiquitous College Lawyer', *The Chronicle of Higher Education* (online, 25 June 2004) <www.chronicle.com/article/The-Ubiquitous-College-Lawyer/33466>.

33 Epstein (n 29) 639.

34 Carol LJ Hustoles, 'Through the Eyes of Higher Education Attorneys: How Department Chairs Are Navigating the Waters of Legal Issues and Risk Management' (PhD Thesis, Western Michigan University, 2012) 156–7.

35 Cameron and Klopper (n 25) 356–7.

36 *Ibid* 357.

With the exception of Cameron and Klopper, the issues ventilated by university lawyers in the literature were not targeted at WIL programs or part of any empirical study. Nevertheless, the dynamics of the relationship between the legal office (as legal service provider), and the WIL discipline (as recipient), may impact risk management by university lawyers in the specific context of WIL programs.

C Risk Management in Higher Education

Risk management is commonly conceptualised as a process which involves identifying the risk, analysing the impact and probability of the risk, developing and implementing methods to manage the risk, and reviewing the process and methods.³⁷ There are four main approaches to managing risk identified in the higher education literature: risk avoidance, risk control (or reduction), risk transfer (or shifting) and risk acceptance (or retention).³⁸ A combination of two or more approaches is often used to address a risk.³⁹ Risk avoidance may involve eliminating the activity, conditions or programs that create the risk.⁴⁰ In the context of WIL, the most extreme form of risk avoidance would be a decision to withdraw the WIL program from the curriculum. Another practice associated with risk avoidance in WIL is removing a host organisation from a list of potential WIL placement sites.⁴¹

Risk control involves actions which reduce the frequency or impact of the risk.⁴² This could include staff training programs; a requirement for a party to obtain insurance; policies and procedures; incident reporting; and site inspection and maintenance.⁴³ Risk transfer involves shifting all or some of the responsibility for the risk to other parties such as insurers (policy of insurance), students (releases/waivers), universities and host organisations (contract).⁴⁴ Risk acceptance represents an acknowledgement that if the university wishes to pursue the activity that creates the risk, the risk cannot be avoided, controlled or transferred.⁴⁵

For the purpose of this article, risk management is defined as the practices,

37 See generally John F Adams and John W Hall, 'Section II: Legal Liabilities in Higher Education' (1976) 3(2-4) *Journal of College and University Law* 335; Barbara Bennett, *Risky Business: Risk Management, Loss Prevention and Insurance Procurement for Colleges and Universities* (National Association of College and University Attorneys, 1990); Cooper, Orrell and Bowden (n 3) 146; John Miller, 'Managing Sport Management Internship Risks: Avoidance and Retention Issues' in John Miller and Todd Seidler (eds), *A Practical Guide to Sport Management Internships* (Carolina Academic Press, 2010) 147.

38 Adams and Wall (n 37) 360.

39 See, eg, *ibid*; Bennett (n 37); Burton Sonenstein and Laura A Kumin, *Essentials of Risk Management* (Association of Governing Boards of Universities and Colleges, 1998) 7.

40 Kaplin and Lee (n 31) 170.

41 Miller (n 37) 148-9.

42 Kaplin and Lee (n 31) 171.

43 Bennett (n 37) 7-9.

44 Kaplin and Lee (n 31) 171-7.

45 Sonenstein and Kumin (n 39) 8.

methods and strategies used to address risk. The definition emerged from the case study and is purposively broad so as to capture the risk management experiences of university lawyers reported in the case study. The risk management practices of university lawyers are the services, delivered to representatives of the university, which are designed to manage legal risk, whereas risk management methods are how university lawyers approach their risk management practices. The risk management strategies of university lawyers are the overall plans for risk management that are aligned to university goals associated with WIL.

D Risk Management by University Lawyers in WIL

The literature reveals three main reasons for engaging university lawyers with respect to WIL: the risk management practices of review, drafting and advice. Authors recommend university lawyers as a source of wise counsel in risk management, and describe some of the legal risks that university lawyers manage through advice, review and drafting of documents.⁴⁶ However, risk management by university lawyers is not explored in any depth or subject to empirical study, nor explored from the perspective of the university lawyer. There are two limited exceptions. Briel and Getzel briefly discuss the guidelines developed by the University of Minnesota's General Counsel, which address the responsibility of the university and host organisation for providing accommodations to students with disabilities who wish to participate in WIL programs.⁴⁷ Karickhoff and Howley provide a case study of three education students who have special needs, and who are involved with WIL placements.⁴⁸ The university lawyer advised WIL staff about providing support to these at-risk students, the importance of identifying at-risk students early in their degree to protect the students' due process rights, and notifying students about the difficulties associated with completing their degree.⁴⁹

The few university lawyer authors in the literature study risk management through the prism of black letter law, and not personal experience or as part of a research project. Based on doctrinal analysis, they recommend institutional risk management practices, but do not study or explore risk management by university lawyers. For instance, Bernard presented a case law analysis of American academic dismissals and disciplinary dismissals from WIL programs,⁵⁰ whereas Bickel, Hoye, and Biddinger Gregg and Schrink examined potential university liability

46 Cameron and Klopper (n 25) 347–8.

47 Lori W Briel and Elizabeth Evans Getzel, 'Internships in Higher Education: Promoting Success for Students with Disabilities' (2001) 21(1) *Disability Studies Quarterly* 5:1–12, 3–4.

48 Maudie Karickhoff and Aimee Howley, 'Democracy in Teacher Education: Equality Verses Excellence' (1997) 33(2) *Teacher Educator* 61.

49 *Ibid* 64.

50 Pamela J Bernard, 'Academic Dismissals of Students Involved in Clinical, Internship or Externship Activities' (Conference Paper, Law & Higher Education Conference, 12–14 February 1995).

for student harm suffered during a WIL placement in the USA.⁵¹ Broughton and Overby, and Miller, Anderson and Ayres, analysed legal issues associated with WIL contracts.⁵² An exception is Mullowney and Santora, who provided 10 short American case studies to demonstrate the various personas associated with successful university lawyers.⁵³ One of the case studies was a legal action for disability discrimination on the basis that the university rejected the student's request to be accompanied by her mother during a teaching placement.⁵⁴ After 18 months of 'legal wrangling', the university prevailed.⁵⁵ This case was intended to demonstrate that one persona associated with successful university lawyers is being a 'patient risk manager'.⁵⁶ However, this study does not provide (nor was it intended to provide) any description about what the university lawyers did to manage risk.

Overall, no known systematic research exists which explores the experiences of university lawyers with risk management in the specific context of WIL programs. This empirical gap in the literature led to the following research question as part of a case study: *how do university lawyers manage legal risk with respect to WIL programs?*

III CASE STUDY DESIGN

A Scope

This research is an instrumental case study⁵⁷ of university lawyers' risk management practices⁵⁸ with respect to WIL programs. The scope of WIL programs in the case study is limited to WIL placements in Australia, as there may be distinct risks

- 51 Sherry L Biddinger Gregg and Jeffrey L Schrink, 'The Legal Ramifications of Student Internships' (1997) 10(1) *Justice Professional* 61; Robert D Bickel, 'Explaining the Legal Duty of the College or University to Make Reasonable Provision for the Safety of Student Interns and Externs' (Conference Paper, Law & Higher Education Conference, 18–20 February 2001); William P Hoye, 'The Law Off-Campus' (Conference Paper, National Conference on Law and Higher Education, 16 February 2004).
- 52 James C Broughton and James O Overby, 'Contracts: Clinical Training in Therapeutic Recreation' (1993) 27(3) *Therapeutic Recreation Journal* 212; Lori K Miller, Paul M Anderson and Ted D Ayres, 'The Internship Agreement: Recommendations and Realities' (2002) 12(1) *Journal of Legal Aspects of Sport* 37.
- 53 William J Mullowney and Kathleen Curry Santora, 'The Happy Practice of College and University Law' (2014) 46(3) *Change* 14.
- 54 *Ibid* 17.
- 55 *Ibid*.
- 56 *Ibid* 16.
- 57 Robert E Stake, *The Art of Case Study Research* (SAGE Publications, 1995) 3–4.
- 58 Whilst 'risk management is more than the "end product" delivered by university lawyers and discernible to recipients of legal services', it is argued that the risk management practices of university lawyers are of particular interest to a wider readership of university stakeholders: Cameron, 'Work Integrated Learning' (n 10) 193. As such, the risk management methods and strategies of university lawyers are outside the scope of this article, and are reported separately: Cameron, 'Work Integrated Learning' (n 10).

with international WIL programs,⁵⁹ and to placement-based WIL,⁶⁰ being student exposure to real as opposed to simulated or virtual settings.⁶¹ Further, the university lawyers selected for the case study were in-house counsel only. The other type of university lawyer is external counsel, namely, a qualified lawyer representing a law firm engaged by the university to deliver legal services. It was assumed that in-house counsel would be more involved with risk management in relation to WIL programs and thus could provide a richer description of their experiences.⁶²

B Case Selection

Maximum variation sampling techniques were employed to select 13 university lawyers from 12 university sites in Australia. University lawyers were stratified according to state and territory of the primary university site; university type;⁶³ university lawyer length of experience and position; and size of legal office (total number). A case typology was maintained during the selection process to ensure diversity in case selection, with additional demographic information (university lawyer background, recognised WIL lawyer⁶⁴ and office structure)⁶⁵ added to the case typology. A finalised case typology is at Table 1.

59 See, eg, L Diane Banks, 'Legal Issues in International Cooperative Education' (1985) 21(3) *Journal of Cooperative Education* 34; William P Hoye and Gary M Rhodes, 'An Ounce of Prevention Is Worth ... the Life of a Student: Reducing Risk in International Programs' (2000) 27(1) *Journal of College and University Law* 151; Kathleen M Burch, 'Going Global: Managing Liability in International Externship Programs' (2010) 36(2) *Journal of College and University Law* 455.

60 See generally Calvin Smith and Kate Worsfold, 'WIL Curriculum Design and Student Learning: A Structural Model of Their Effects on Student Satisfaction' (2014) 39(6) *Studies in Higher Education* 1070.

61 The reason for limiting the scope of the study to placement-based WIL relates to the research problem. The major source of legal risk to the university in WIL programs is the participation of the host organisation and placement of students in a real workplace environment. This is demonstrated by the fact that all 12 reported decisions involving student action against Australian universities relate to placement-based WIL: Cameron, 'The Strategic and Legal Risks of Work-Integrated Learning' (n 13) 246, 256.

62 To support this research purpose, case study participants also had to possess a minimum of two years' experience as a university lawyer.

63 The five types, including the relevant universities that apply to each type, are adapted from Gavin Moodie, 'Types of Australian Universities' (Paper, 30 January 2012) <www.academia.edu/310547/Types_of_Australian_universities>.

64 A recognised WIL lawyer is a dedicated person in the legal office for handling legal work concerning WIL programs or recognised in the legal office as handling most of the legal work concerning WIL programs.

65 A flat office structure involves a maximum of two lines of authority. A university lawyer is supervised by and reports to a General Counsel or Director (labelled 'Manager' in the case typology). A hierarchical structure involves a Manager, as well as a second-in-command ('2IC') such as a deputy counsel, associate director or senior lawyer. The 2IC reports to the Manager and supervises the university lawyers.

Table 1: Case typology of university lawyers

State or territory of main campus	<i>N</i>	University type	<i>N</i>	Legal office size (number)	<i>N</i>	University lawyer experience	<i>N</i>
New South Wales	3	GO8	5	2 to 5	6	2 to 4 years	4
Victoria	3	Technical	2	6 to 9	6	5 to 9 years	5
Australian Capital Territory or South Australia	3	New Generation	2	Greater than 9	1	Greater than 9 years	4
Western Australia	2	Regional	2				
Queensland	2	Gumtree	2				

Position	<i>N</i>	Recognised WIL lawyer	<i>N</i>	Office structure	<i>N</i>	University lawyer background	<i>N</i>
University lawyer	9	No	10	Flat	8	Mix	8
Manager	4	Yes	3	Hierarchical	5	Private sector	3
						Public sector	2

C Interview Design

The interview design, which received ethics approval,⁶⁶ was a mix of structured interview questions, predominantly aimed at collecting demographic information, followed by more open-ended questions about university lawyers' experiences with legal risk and risk management. Program risk and contract risk emerged as two specific categories of legal risk during the interview process. Program risks are associated with the operation of the WIL program. More specifically, they relate to the conduct of universities, host organisations and students before, during and after a WIL placement, as well as personal characteristics of students that can expose the university to legal risk. Contract risks are associated with contracts involving the host organisation, student and/or university ('WIL agreements'). A WIL agreement may be prepared by the university ('university WIL agreement') or the host organisation ('host WIL agreement'). There were two types of contract risk — contract terms and contract practices. The contract risks and program risks identified by university lawyers have been reported separately by

66 Griffith University Ethics Approval AFE/19/13/HREC.

the author.⁶⁷ An understanding of *what* legal risks university lawyers manage is essential to understanding *how* university lawyers manage these legal risks. As such, the contract and program risks are referred to in the case study findings.

D Data Collection and Analysis

The data collected for the case study included in-person interviews with each university lawyer of approximately 60–120 minutes in duration; email communications to expand and clarify responses during the in-person interview; and documents referred to by university lawyers. The primary documents collected and analysed were university WIL agreements, university policies, WIL program documents, university strategic plans and resources for WIL staff about WIL agreements and risk management (‘WIL resources’). The data from each case (university lawyer) was analysed using eclectic and pattern coding techniques,⁶⁸ and the codes were compared across cases to identify categories of risk management. Overall, the case study is presented as a cross-case analysis⁶⁹ of risk management by university lawyers in WIL programs.

IV RESULTS

University lawyers provide legal and strategic advice about program and contract risks, communicate directly with the host organisation, refer legal matters to a higher level of university management in exceptional circumstances, draft and review WIL agreements, educate WIL staff, consult during the development of WIL policy, review WIL program documents and prepare WIL resources about risk management and WIL agreements. Each risk management practice is presented separately in the case study.

A Legal and Strategic Advice

University lawyers provide advice to WIL staff in relation to legal risk. However, the context and nature of that advice differs between contract and program risk. With contract risk, WIL staff generally approach the university lawyer for advice pertaining to a WIL agreement not formalised by the parties. University lawyers who encounter a program risk are generally responding to an incident during the WIL placement. In a risk management context, the advice about a

67 Cameron, ‘The Contract Risks to Universities of Work-Integrated Learning Programs’ (n 1); Cameron et al (n 1).

68 See generally Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (SAGE Publications, 2nd ed, 1994) 69–72; Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (SAGE Publications, 2nd ed, 2013) 188–93, 209–13.

69 John W Creswell, *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research* (Pearson Education, 4th ed, 2012) 479, citing Stake (n 57).

WIL agreement is proactive, that is, identifying and assessing the contract risk before it materialises, whereas the advice on program risk is reactive — what can be done to manage the materialisation of the risk? The legal and strategic advice pertaining to program and contract risks will now be examined.

1 Program Risk

When a program risk materialises, the advice of university lawyers is focused on ensuring WIL staff comply with university policy when responding to an incident and on protecting the welfare of the affected student as well as future students. These policies are designed to manage the risk associated with university activities such as WIL. In the case of incidents such as bullying, sexual harassment and assault, it is ‘making sure that they stick to the steps in the policies in terms of how we deal with these issues’ (Steve).⁷⁰ The university lawyer does not directly participate in the process by communicating with the student or host organisation. Rather, the university lawyer may act as a coach for WIL staff during the process ‘as to the appropriate conversations that you can have within the limits of the law’ (Sue). This coaching role is akin to strategic as opposed to legal advice. Sue alluded to this distinction when explaining the coaching role: ‘It could ultimately be a legal issue, but it’s about a coaching role as to how far you can go in questions ... what you do in terms of sort of getting involved if at all in any of the allegations’.

One of the first questions considered by the university lawyer in response to an incident is whether and when the university should intervene. The nature of the alleged incident may dictate that student safety overrides any procedural steps in university policy. The advice may be that the student is immediately removed from the workplace, irrespective of the veracity of the allegation, and that future WIL placements with the host organisation be suspended pending the outcome of an investigation. Some university lawyers may also coach WIL staff as to the sensitive conversation required with the student as well as with the host supervisor⁷¹ about the incident, and the reasons for the university’s actions, without breaching student confidentiality. Kate recalled a case involving students allegedly subject to bullying in a media organisation. The advice was not focused on the legal ramifications of the behaviour but rather on the welfare of the student and the conversations to be had with the student by WIL staff:

My advice was more about how are we going to help our students, because some of them were in a world of hurt over it, and weren’t showing up to university and were falling apart. ... We needed to get the students in and have conversations

70 University lawyers have been given a pseudonym in this case study for the purposes of anonymity and readability.

71 ‘Host supervisor’: a person, engaged by the host organisation, who is responsible for supervising the student during the WIL placement.

with them, tell them that we're here to support them and we'll find them another placement, and that they're not going to be disadvantaged in any way because of this and it's not their fault ...

If there is a pattern of workplace incidents at a host organisation, or a serious allegation is verified, the university lawyer's advice may be that the university no longer places students at the host organisation. This message is not trumpeted to the offending host organisation — instead the students are quietly directed to other host organisations. As Kate explained in the case of the media organisation, 'we didn't write to her saying, "we're not sending our students to you ever again", we just don't engage with her, and if she asks, "can I have a few students?", "no, none available sorry"'. This cessation of the host organisation relationship highlights how risk avoidance may be the most appropriate method to manage program risk in the circumstances described by Kate and Sue.

2 Contract Risk

The university lawyer's advice on contract risk is the end product of reviewing the host WIL agreement or the amendments proposed by the host organisation to the university WIL agreement. The university lawyer not only raises the contract risks following a review, but may also assess risk in terms of probability and consequences, as well as recommend risk management methods for the WIL discipline, including risk control, transfer, acceptance and avoidance. This part of the advice often incorporates a coaching role for the university lawyer.

Advice by the university lawyer, following their assessment of contract risk, that the university should not enter a host WIL agreement in its current form constitutes risk avoidance. Tom explained the process in these terms:

Every time we review those [host WIL agreements] we provide a risk analysis to the university and say, 'if we enter into this arrangement, this is the risk to the student, this is the risk to the university ... so our recommendation is that we don't actually sign this agreement ... that we sign one of ours'.

Risk avoidance was the advice of university lawyers in response to such matters as:

- Indemnities granted in favour of the host organisation relating to student conduct that the university had no control over;
- Assignment of student IP to the host organisation which was contrary to university IP policy, was not related to the WIL placement or prohibited the student from publishing their academic work;
- An agreement provision requiring the university to take disciplinary action against a student, which bypassed university policy; and

- Scholarship and stipend payments to students in WIL programs.

Advice to WIL staff that the risk be avoided is usually accompanied by a recommendation that the offending provision(s) in the WIL agreement be negotiated, as well as the changes to the agreement that should be negotiated. The university lawyer may also coach WIL staff about how to negotiate with the host organisation because WIL staff may not have sufficient experience with contract negotiation. Note that risk avoidance is not the university lawyer simply saying ‘no’ to the WIL agreement. University lawyers advise WIL staff to go back to the host organisation and renegotiate, often using strategies and contract terms suggested by the university lawyer.

If the contract risk is unavoidable, the university lawyer’s focus turns to advising the WIL discipline on how the risk can be transferred or controlled (if at all) by the university. A common example of risk control raised by university lawyers was the assignment of student IP rights to the host organisation. University lawyers identified a lack of student understanding and compulsion associated with assigning their IP as contract risks to the university. However, the legal office cannot technically advise the student because the client is the university. A tension exists between supporting student welfare and providing legal advice to the student as the university and the student are interconnected. The university lawyer needs to find a way to support student welfare, an interest shared by the student and the university, without providing legal advice to the student. To resolve this impasse, WIL staff act as a circuit breaker or intermediary by filtering advice they receive from the university lawyer as information to the student. In this way student interests can be protected and risk is managed without the university lawyer providing direct advice to the student.

University lawyers may advise WIL staff to have a conversation with the student to ensure that they make an informed decision about assigning their rights. The conversation entails WIL staff educating students about what the host organisation is requesting the student to do, what their IP rights are under university policy and the law, and the availability and importance of accessing the free student legal service on campus. The student legal service is operated by the student union at some universities and engages practising lawyers. According to Jack, the student legal service can protect student interests when the university lawyer may have a conflict of interest in doing so:

I have to advise the university, and that’s not always going to be the best thing for the student. So in those circumstances, where I can’t really be on the student’s side, it’s really useful to be able to tell the students that they have this option to go to the lawyer.

The legal office of Sue also provides the student legal service with the WIL agreement template used for the assignment of student IP that may be the

subject of legal advice to students. This practice is designed to promote greater understanding and knowledge of the documents so that appropriate advice to students is given. Whilst the university lawyer cannot advise students directly, their advice to WIL staff can direct students to lawyers on campus who can advise.

B *Communicate Directly with the Host Organisation*

A second risk management practice of university lawyers is direct communication with representatives of the host organisation. The general rule is that university lawyers advise WIL staff during negotiations with the host organisation pertaining to the WIL agreement but are not directly involved in the negotiations. Direct communication, particularly with smaller host organisations, may actually jeopardise the WIL placement. Sam noted, ‘we try to leave that [communication] at the relationship level, because if smaller organisations are getting heaved by lawyers, that might put an end to the program’. According to Tom, detachment from the negotiation process has an added benefit in terms of risk management — WIL staff can cast the university lawyer as a ‘bad cop’ when insisting that the host organisation sign the university WIL agreement: ‘They can say, “oh, the university lawyer’s not going to change it, because it’s used for everybody ... and for fairness to everybody we have to stick with it”, so we’re happy to be bad cop in the back room’.

Occasionally, the university lawyer will be called upon to participate in the negotiations. University lawyers identified two circumstances in which they will directly communicate with the host organisation — when the host organisation has legal representation, and when a stalemate in negotiations has occurred. University lawyers’ experiences with host organisation legal representatives were mixed. Jane argued that direct communication with legal representatives sometimes enables the WIL agreement to be finalised more quickly. The parties agree on what they want to achieve from the arrangement and have a draft document. At that point, the university lawyer can step in and negotiate with the legal representative of the host organisation to finalise the agreement. Sam’s experience was also positive because the solicitor on the other side could understand the university’s position on particular contract matters during the negotiation. Conversely, Jack recalled a failed negotiation with legal representatives who did not appreciate the impact of agreement provisions requiring the university to assure the conduct and character of students during the WIL placement.

The host organisation’s lack of understanding about the purpose of the WIL program and the legal consequences of proposed provisions on the university appear to be primarily responsible for a stalemate in contract negotiations. Peter intervened during the negotiations in a politics WIL program when WIL staff

could not resolve the impasse:

I ended up going to meet with them as they were very insistent that their terms were not negotiable (and they were unreasonable and onerous) and they only wanted an agreement with the University — not with the students themselves. ... [S]o I (along with our contract manager and academic) went to discuss with their overzealous contract manager who had completed a multi page risk tool and matrix but who seemed to miss the point of the internship and focused on pedantic points in the agreement. The face to face meeting sorted all of that and we were able to reach a suitable agreement that appropriately managed the risk for both parties.

Tom has intervened in negotiations to clarify the purpose of the WIL program. Host organisations were requesting guarantees from the university that they would not be subject to a claim that the student was an employee under the *Fair Work Act 2009* (Cth), agreement provisions which were akin to an employee-employer relationship, as well as indemnities which absolved the host organisation of risk. For Tom, it was about managing the host organisation's expectations of the WIL program and explaining that the agreement provisions were designed to minimise legal risk to the host organisation:

There have been only one or two occasions where I've had to talk to lawyers on the other side to explain that, 'no, the purpose of the program is actually for the benefit of the student ... it's not to give you cheap labour, and the purpose ... the reason the document is set up that way is to make sure that you're not seen as being exploitative, so it's for your benefit too', and when they realise that, they realise there's no way they're getting an indemnity, they're normally okay.

By clarifying the purpose of WIL and WIL agreements, university lawyers can minimise its attendant legal risks.

C Refer the Legal Matter to a Higher Level

Another risk management practice is the referral of legal matters by university lawyers to a higher level of university management. University lawyers are advisors and not decision-makers about risk management in WIL programs. The final decision to accept or reject all or part of the advice rests with the academic discipline, specifically the WIL staff member with appropriate authority. The university lawyer is generally detached from the subject matter of the advice, that is, their involvement in the matter generally ends with the advice to the recipient. However, the university lawyer may refer the legal matter, including their advice and any associated documentation, to a higher level of university management for consideration in circumstances assessed by the university lawyer as 'high risk'. 'Higher level' means an operational level higher than the WIL staff member who

received the initial advice. Chris referred university participation in a scholarship arrangement to a higher level with a recommendation that the university cease engaging in the practice because it may be viewed as an attempt to circumvent the host organisation's legal obligations as an employer of the student. WIL staff conduct associated with the WIL program may also be escalated to senior management. Whilst Chris acknowledged that the university lawyer's role is not to monitor whether the WIL discipline has acted on their advice, a referral may be necessary because of the high risk associated with the activity proposed.

Sue will refer a WIL agreement to a higher level for approval if the contract risk identified in the agreement has a broad impact in terms of student numbers and/or WIL disciplines. For instance, the WIL agreement may apply to more than one academic discipline. Alternatively, the WIL agreement may apply to a single discipline but set a precedent for other disciplines that retain the same host organisation for WIL placements. The high risk here lies in the precedent setting — the host organisation may expect the terms of the WIL agreement to be similar with respect to future students and other disciplines. Sue's approach is that the broader the implications, the higher up in terms of authority the proposed WIL agreement and associated legal advice will go. A head of the discipline may sign a WIL agreement that applies to an individual student involved in a 'one-off' WIL placement or a small cohort of students within the same discipline because it will impact only current and future students from that discipline. A higher authority such as a Provost may sign an agreement that does or may apply to multiple disciplines and a larger cross-section of students. Overall, university lawyers appreciate that effectively managing high-risk WIL activities may require the involvement of a higher authority.

D Drafting University WIL Agreements

Drafting contracts can be seen as a traditional risk management practice of university lawyers. The WIL agreement is a mechanism by which the university can control as well as transfer risk in WIL programs. University lawyers draft, update and amend university WIL agreements, which are primarily contract templates for use in WIL placements. There appear to be two main types of WIL agreements drafted by university lawyers — templates for clinical placements in the health discipline and for non-clinical placements. With non-clinical placements, university lawyers generally draft multiple WIL agreement templates which vary according to discipline and/or distinguishing features. Alternatively, one WIL agreement template may incorporate a series of distinguishing features that can be included or excluded from the agreement. The distinguishing features have previously been classified under four headings:

- *Parties to the agreement:* individual (a Student Deed); bipartite (university–

host organisation or host organisation–student); bipartite (university–host organisation plus a Student Deed as a condition of the bipartite agreement); or tripartite (university–host organisation–student).

- *Students covered by the agreement:* a single student or multiple students.
- *Paid and unpaid WIL placements:* for paid placements, the type of payment (remuneration, stipend/scholarship) and, if it is a scholarship or stipend arrangement, the payment method to the student (directly by the host organisation or indirectly through the university).
- *Ownership of IP created by the student related to the WIL placement:* the student owns all IP; the student owns all IP and grants the host organisation a licence to use the IP for business purposes; or the host organisation owns all IP other than the copyright in assessment materials.⁷²

The sections which follow focus on the provisions in university WIL agreements that are designed to manage each of the six legal risks pertaining to contract terms. The Appendix also provides a snapshot of the common terms in university WIL agreements, derived from a review of non-clinical agreements produced by 10 university lawyers and clinical agreements provided by three university lawyers. The summary in the Appendix has two purposes. First, it promotes understanding of the composition of a typical university WIL agreement. Second, it contextualises the specific agreement provisions discussed below.

1 Assignment of IP to the Host Organisation

Two contract risks emerged from students assigning their IP rights to the host organisation. First, the student may not understand the legal consequences of assigning their IP rights or may feel compelled to do so.⁷³ University lawyers can manage this legal risk by including a recommendation in a student deed that the student seek legal advice, an acknowledgment in the deed which requires the student to indicate that they have sought legal advice or decided not to seek legal advice, or instructions issued to WIL staff that they recommend students obtain legal advice. University lawyers also include a ‘plain English’ summary of what assignment and/or licensing of IP to the host organisation under the deed means. This information is incorporated in the deed itself or attached to the deed as an information sheet. The second legal risk concerned the breadth of IP assigned to the host organisation in that the student may be prevented from submitting and/or publishing assessment material such as reports, presentations or theses.⁷⁴ University lawyers manage this legal risk in the university WIL

72 Cameron, ‘The Contract Risks to Universities of Work-Integrated Learning Programs’ (n 1) 408.

73 Ibid 409–11.

74 Ibid 411.

agreement by ensuring that students retain ownership of IP they create during the WIL placement. Alternatively, if IP is assigned to the host organisation, the student retains copyright or in other words their right to publication of assessment materials.

2 Host Organisation as an Inadvertent Employer

An employment relationship ‘between the student and the host organisation may be an unintended consequence of the WIL placement’.⁷⁵ University lawyers manage this legal risk by including a mutual acknowledgment in the WIL agreement that the student is not, or is not intended to be, an employee of the host organisation, and in the case of scholarship and stipend arrangements, a provision that any payment under such an arrangement is not payment for services rendered to the host organisation. The WIL agreement may also include warranties by the host organisation that the student will not receive remuneration or payment of any kind; if the student is remunerated, the host organisation will enter a separate employment contract; the WIL placement will not exceed the period of time specified in the WIL agreement; and the student is surplus to staffing requirements of the host organisation. These warranties are examples of the university lawyer attempting to transfer labour-related risks from the university to the host organisation.

3 Disciplinary Action on the Host Organisation's Terms

The contract risks associated with the host organisation terminating the WIL placement occurs where the WIL agreement does not require the host organisation to consult with the university prior to removal of the student; does not require the host organisation to provide a valid reason to the student or university for removal; or enables the host organisation to compel the university to take disciplinary action.⁷⁶ These provisions may also be contrary to university policy designed to afford the student procedural fairness. Host organisations generally have the prerogative in university WIL agreements to remove the student from the WIL placement. Nevertheless, university lawyers manage the contract risks in the WIL agreement by making clear that the responsibility for disciplinary action is with the university. This means that the university retains the power to discipline the student with respect to the WIL program, albeit they may be removed from the WIL placement. By retaining disciplinary power over the WIL program, the WIL discipline has scope to keep the student in the WIL program by providing, for example, an alternative placement. The WIL agreement may also place conditions on the host organisation's power of removal. For instance, the agreement may require the host organisation to refer any student discipline

⁷⁵ Ibid.

⁷⁶ Ibid 412–13.

matters to the university, to consult with the university and agree on a course of disciplinary action, and to have specific grounds for terminating the placement, such as breach of university or host organisation policy, incompetence, misconduct, or if the student is no longer suitable to continue the placement. The student may also have the right to appeal the decision made by the host organisation to terminate the placement.

4 *Uninsured or Underinsured Risks*

The contract risk associated with insurance is that the university and/or host organisation does not have insurance or sufficient insurance coverage such that the university remains responsible for the legal risk solely or jointly with the host organisation.⁷⁷ The university lawyer manages the contract risk in the WIL agreement by specifying the insurance policies both parties must maintain, specifying a minimum amount that the university and/or host organisation must maintain for public liability and professional indemnity insurance, and requiring the host organisation to provide evidence that the insurance is current.

5 *The University Indemnifies the Host Organisation*

The contract risk arises from the breadth of the indemnity. A host organisation may insist on an indemnity which covers all student and WIL staff conduct on WIL placement.⁷⁸ University WIL agreements generally limit the scope of the indemnity in favour of the host organisation to negligent acts or omissions of university staff and students. Further liability is reduced proportionately to the extent of negligent acts or omissions by the host organisation and/or the WIL agreement includes a reciprocal indemnity in which the host organisation indemnifies the university for its negligence. The WIL agreement may also limit the types of damages where the university is required to indemnify the host organisation. Liability may not include consequential damages (eg loss of profits and anticipated savings), special or incidental damages.

6 *The University Assures the Competency and Conduct of Students*

The contract risk is an assurance by the university to the host organisation about the competence and conduct of the student on WIL placement, which has the effect of transferring risk from the host organisation to the university.⁷⁹ University lawyers attempt to shift responsibility for student competence back to the host organisation in the agreement, by requiring the host organisation to satisfy itself

⁷⁷ Ibid 413.

⁷⁸ Ibid 413–14.

⁷⁹ Ibid 414.

that the student is suitable for the WIL placement and ensuring that student activities are appropriate, having regard to the student's skills, ability and level of experience. If the host organisation insists on the university providing such assurances in a bipartite agreement between the university and host organisation, the university may require students to sign a separate deed in which they agree to a list of responsibilities reflected in the WIL agreement related to their conduct and competence. Examples of student responsibilities are in the Appendix. The university could take legal action against the student for breach of the deed to recover any losses suffered from breaching its corresponding obligations to the host organisation in the bipartite agreement. However, legal action is unlikely because, as Jack acknowledged, there would be reputational consequences for the university if the university sued one of its students. The primary purpose of the deed as a risk management tool is to alert students to their obligations during the WIL placement.

E Review Host WIL Agreements

Some host organisations will not accept a WIL agreement drafted by the university lawyer and propose their own agreements for consideration by the university. Host WIL agreements are also referred to by university lawyers as 'non-standard agreements' or 'agreements on the host's terms' (Jane). The advisory role of the university lawyer is to identify any legal risks from a review of these non-standard agreements, assess legal risk and suggest risk management methods to the WIL staff. All the legal risks concerning contract terms discussed in the preceding section have been identified by university lawyers, following a review of the host WIL agreement. As such, host WIL agreements need to be carefully considered by university lawyers because of the associated contract risks.

F Educate WIL Staff

Another risk management practice of university lawyers is the education of WIL staff about the role of university lawyers, WIL agreements and risk management. One of the purposes of educating staff is to raise awareness of the university lawyer's role in WIL programs. Jess has conducted informal sessions with the health discipline during which the role of the university lawyer, risks associated with WIL programs (most notably supervision) and key terms of the WIL agreement were discussed. According to Jess, this education may lead to better instructions if legal services are required by WIL staff in the future because they know in advance what Jess will be looking for in the WIL agreement. The legal office of Sue conducted training sessions for WIL disciplines when university WIL agreement templates were first introduced and continues to provide training at the request of WIL staff on specific scenarios or issues related to WIL programs.

However, training by university lawyers in agreements and risk management tends to be generic, that is, not specifically focused on WIL programs. John has conducted risk management training, which educates all academic staff about what legal risk is, the legal risks that staff should be looking for, as well as risk management as a process of identification, assessment, evaluation and response. The legal office of Peter conducts generic training sessions on contracts, consumer protection law, indemnities and IP. ‘War stories’ are an important part of staff education about the importance of having detailed agreements to address legal risk. Peter translates the war stories into lessons so that academics can appreciate the practical consequences for their activity or program. Peter has provided this WIL-specific lesson during the training — academic staff who delete provisions concerning student IP rights for the purpose of simplifying a WIL agreement may prevent a student from submitting their PhD! Overall, education by university lawyers is a way of increasing the legal literacy of WIL staff so that they can effectively carry out their risk management responsibilities.

G Consult as to WIL Policy

A further risk management practice occurs when university management turns to the university lawyer for guidance during the development of WIL policies. The WIL policies referred to by university lawyers regulate WIL programs across the university, particularly the design of WIL programs including learning objectives and outcomes, student induction/preparation, assessment, program evaluation, disciplinary action, insurance coverage, reasonable adjustments for students with a disability and the rights and responsibilities of the host organisation, student and university. These responsibilities are reflected in university WIL agreements. For one university lawyer, consultation involved meeting with the person responsible for drafting the WIL policy on a regular basis. The university lawyer provided information on the types of WIL-related matters encountered, opinion about the challenges the university was facing in WIL programs and advice about WIL agreement templates, including the circumstances in which the agreements should and should not be used. Such consultation with university lawyers in the development of WIL policies is a way by which university lawyers can influence risk management pertaining to the design and operation of WIL programs across the university.

H Review WIL Program Documents

A risk management practice of all 13 university lawyers in this study was the review of host WIL agreements. Some university lawyers also review documentation distributed to host organisations and students about the WIL program, commonly described as handbooks or guides (‘WIL program documents’). Many of the

provisions in the handbook reflect the terms in the university WIL agreement, such as university, student and host organisation responsibilities, disciplinary procedures and insurance. The review is not a ‘standalone’ responsibility of the university lawyer, but is conducted in conjunction with other risk management practices such as the provision of legal advice and the review of WIL agreements. University lawyers have identified legal risks when reviewing these documents. Emma reviewed one guide which suggested that students could work for free. Emma removed the statements and amended the guide to better inform the host organisation about the responsibilities of the university and the university expectations of the host organisation with respect to the WIL program. The guide is now clear that the WIL program is not ‘an opportunity for them to get free labour’ (Emma). Tom identified the legal risk of a WIL discipline referring to the wrong insurance policy when reviewing a handbook. The experiences of Tom and Emma suggest that WIL program documents require careful consideration by the university lawyer as they may contain binding rights and obligations of stakeholders akin to a WIL agreement.

I *Prepare WIL Resources*

The final risk management practice of university lawyers is the preparation of WIL resources. WIL resources can be divided into two categories. The category that university lawyers were most involved with is WIL agreement information and instructions. WIL staff receive information about a variety of legal and procedural matters specific to the WIL agreement, including a description of the main provisions of the university WIL agreement, the availability of and access to WIL agreement templates, and the process for making changes to the agreement. Many of the contract risks are specifically covered in these WIL resources. Guidance is provided to WIL staff on the various insurance policies maintained by the university and when they apply to particular types of WIL programs, procedures for disciplinary action, types of legal entities associated with the host organisation, IP rights of students, and payment and eligibility requirements for scholarships/stipends in WIL programs.

WIL staff also receive instructions about how to complete university WIL agreements. Topics include selecting the correct WIL agreement to use amongst the various templates drafted by the university lawyer, determining when it is appropriate to use a template, and the steps required to determine the correct legal entity of the host organisation for inclusion in the university WIL agreement. The steps include conducting online entity name and number searches and selecting the correct signature panel (dependent on the type of legal entity) for the WIL agreement. These WIL resources are designed to manage the contract risk of

inserting the incorrect host organisation entity in the WIL agreement.⁸⁰ WIL staff are also directed to complete schedules at the back of the university WIL agreement and are guided by a process for finalising and executing the WIL agreement. The latter process manages the contract risk of a person not possessing the authority to sign the WIL agreement in breach of university policy.⁸¹

The second category of WIL resources is risk management. These resources are designed to assist WIL staff in identifying, assessing and addressing risk in WIL programs and include a table of risks organised according to type and likelihood of risk (high, medium, low), examples of risks in WIL programs and actions that WIL staff may take to address the risk, guidelines on how to manage risk and a process for documenting the risk and the risk management practice. Only one university lawyer provided input with respect to these WIL resources, but interestingly, many more suggested that having such resources would improve risk management.

V DISCUSSION

A Risk Management Practices

This case study advances the literature through a rich description of university lawyers' risk management practices and an analysis of the WIL agreements and resources prepared by university lawyers in the context of WIL programs. University lawyers described the nature and context of their advice pertaining to program and contract risks. A significant part of their advisory function involves strategic advice or coaching WIL staff about how to deal with students and host organisations in relation to incidents during the WIL placement (program risk) and WIL agreements (contract risk). University lawyers identified which contract risks they advise WIL staff to avoid, and in particular, the advice they provide when addressing the assignment of student IP to the host organisation.

The WIL agreement templates drafted by university lawyers provided a rich source of knowledge regarding the distinguishing features of university WIL agreements and how university lawyers address six legal risks associated with contract terms in the WIL agreement. Authors in the literature have listed and described common terms in a WIL agreement based on their personal experience⁸² or as part of an empirical study of WIL agreements.⁸³ What makes

80 Ibid 414–15.

81 Ibid 415.

82 Michael B Goldstein, *Legal Issues in Experiential Education* (Panel Resource Paper No 3, Peer Assistance Network in Experiential Learning, National Society for Internships and Experiential Education, 1981); Broughton and Overby (n 52); Miller, Anderson and Ayres (n 52).

83 See, eg, Sheldon R Gelman, 'The Crafting of Fieldwork Training Agreements' (1990) 26(1) *Journal of Social Work Education* 65.

the cross-case analysis of agreement templates in this case study unique is the connection made between the risk management practice and the contract risks identified by university lawyers. The cross-case analysis collates and describes the WIL agreement template provisions drafted by university lawyers,⁸⁴ as well as the strategic and legal advice of university lawyers which manage each of the six legal risks pertaining to contract terms.

The experiences of university lawyers also revealed three additional risk management practices not previously identified in the literature. First, university lawyers prepare resources for WIL staff related to WIL agreements and risk management. WIL staff receive instructions on how to complete a WIL agreement, as well as information on legal topics which are addressed in the WIL agreement, such as insurance, IP and disciplinary procedures. Although only one university lawyer prepared resources designed to assist WIL staff in identifying, assessing and addressing risk, it is a risk management practice recommended by a number of university lawyers during the interview process. Second, university lawyers may communicate directly with the host organisation in circumstances where the host organisation is legally represented or where there is a stalemate in negotiations over a WIL agreement. This risk management practice is an exception to the general rule stressed by university lawyers that they are advisors and not decision-makers; in other words, university lawyers do not act on the subject matter of their advice. A third risk management practice, and another exception to the general rule, is when university lawyers refer a legal risk to a higher level of university management in circumstances assessed by the university lawyer as high risk.

During the interview process, university lawyers also discussed matters which represented a challenge to, or assisted with, managing risk in WIL programs. The subsequent cross-case analysis identified three key issues (or themes) associated with the host organisation and the WIL discipline that may impact the risk management practices of university lawyers: the sophistication of the host organisation, the legal awareness of WIL staff and communication by WIL staff. These stakeholder issues are discussed in the sections which follow and provide context to, and the impetus for, subsequent recommendations made by university lawyers for improving institutional risk management.

B Risk Management Issues

1 Sophistication of the Host Organisation

University lawyers discussed a series of characteristics of the host organisation, including its understanding of the WIL agreement and the purpose of the WIL

84 See below Appendix.

program, the presence or absence of risk management systems, and the provision of WIL agreements. Collectively these characteristics are described as the sophistication of the host organisation. A host organisation is sophisticated in this sense if it prepares the WIL agreement, has a comprehensive risk management system in place during the WIL placement, understands that the purpose of the WIL program is student-centred, and understands the provisions of the WIL agreement as they apply to the university, host organisation and student.

Sophistication, with respect to risk management and the preparation of WIL agreements, tends to be associated with the size of the host organisation, whether that be in terms of financial position, number of employees and/or workplaces. A large host organisation is more likely to prepare a WIL agreement for the university to sign (Kate, Jane and Tom), whereas smaller host organisations are not particularly interested in preparing or receiving complex legal agreements. As a consequence, the university lawyer prepares simple university WIL agreement templates to facilitate the WIL placement for small organisations (Kate and John) and spends more time reviewing host WIL agreements in relation to large organisations.

The host organisation may have a sophisticated understanding of the purpose of the WIL program and the provisions of the WIL agreement as they apply to the university, student and host organisation. University lawyers spend additional time and resources engaging in risk management practices when the host organisation lacks that understanding. Sam's experience is that small organisations may not understand the liability and insurance provisions in a WIL agreement. Insurance and liability provisions are an important method of transferring risk from the university to the host organisation. The university has a list of insurances that the host organisation is required to hold under the WIL agreement, which may include public liability, professional indemnity and workers' compensation insurance. Sam is regularly called upon to provide advice to WIL disciplines, which is then relayed as information to the host organisation, about what risks are covered by the university and why, and what insurance the university expects the host organisation to hold as part of its normal business operations. Sam lamented that 'they've just got no idea when you talk about liability or insurance or even the basics sometimes of what insurance they carry or why they need it'.

If the host organisation fails to understand that particular agreement provisions they propose are unreasonable for the university or student, the university lawyer's advice is likely to incorporate risk avoidance. Such was David's experience concerning a definition of 'IP' in a host WIL agreement. The definition extended the IP rights of a government agency to any works of the student generated during the time of the WIL placement, even if unrelated to the placement. The breadth of the definition was a contract risk to the university because it meant that the agency would have retained the IP in the thesis the student was writing outside the

WIL placement.⁸⁵ David advised the WIL discipline that the agreement provision was unacceptable. It was apparent to David that the government agency did not consider or understand the nuances of the proposed definition of ‘IP’, specifically the consequences of using the proposed definition for a student on an unpaid WIL placement.

The representatives of the host organisation are a telling indicator of sophistication. University lawyers may communicate directly with host organisation representatives when those representatives do not understand the purpose of the WIL program or the legal risks of particular agreement provisions they propose. Peter negotiated a previously ‘not negotiable’ WIL agreement with an overzealous contract manager ‘who seemed to miss the point of the internship’. Tom explained to legal representatives the purpose of the WIL program (‘it’s not to give you cheap labour’), as well as agreement provisions prepared by Tom designed to minimise the legal risk to the host organisation of being an inadvertent employer of the student. Jack recalled a time that legal representatives of a host organisation did not have a sophisticated legal understanding of the difference between a student on WIL placement and an employee in the workplace. The legal representatives were insisting on agreement provisions by which the university was to assure the host organisation that students would engage in particular conduct and behaviour in the workplace. Whilst an employer can control the actions of an employee by requiring the employee to comply with reasonable directions,⁸⁶ the university does not possess the same control of students in the workplace. Jack’s repeated explanation of this fundamental difference to legal representatives was to no avail — the WIL discipline accepted the contract risk because of the university demand for WIL placements. Jack’s legal work then turned to minimising the contract risk by preparing a separate deed for students to sign which mirrored the student’s responsibilities concerning conduct and competence in the WIL agreement.

2 Legal Awareness of WIL Staff

Legal awareness of WIL staff means the degree to which WIL staff are aware of the legal rights and obligations relating to the WIL program under university policy, in the WIL agreement and when designing the WIL program. This could also be referred to as their ‘legal literacy’. Such legal literacy of WIL staff is critical, given that the WIL discipline has responsibility for risk management in its WIL programs.

WIL staff may not be aware of legal considerations when designing WIL programs. In the absence of university policy, Emma explained that WIL staff,

85 This scenario was previously identified as a contract risk in Cameron, ‘The Contract Risks to Universities of Work-Integrated Learning Programs’ (n 1) 411.

86 *R v The Darling Island Stevedoring and Lighterage Co Ltd* (1938) 60 CLR 601, 621–2 (Dixon J).

particularly in non-traditional WIL disciplines such as business and the arts, rely on the legal office for advice on how to set up the WIL program, as well as issues to be mindful of such as compliance with labour laws, IP and confidentiality. Sam's experience is that WIL staff may not be aware of how to structure the WIL program, despite the existence of a university policy which prescribes the approval, structural and agreement requirements of a WIL program. WIL staff may not understand what they need to do to establish a WIL program because they are unaware of the university policy.

WIL staff may be oblivious to university policy or, as in the experience of Steve, the emotional reaction by WIL staff to an alleged incident during the WIL placement may cloud their awareness of university policy designed to minimise legal risk and to afford procedural fairness to all parties concerned. Emotive WIL staff can make decisions quickly without proper thought to due process. An emotional impulse by WIL staff to resolve a legal risk such as bullying or sexual assault, without consulting university policy, may generate another legal risk — a breach of university policy. A focus of Steve's advice when treating legal risks that materialise is to trigger WIL staff consciousness of university policy and to coach WIL staff as to the steps required to ensure compliance with university policy.

WIL staff may not either understand the legal rights and obligations of the student, host organisation and the university that are attached to common provisions of a WIL agreement, or appreciate the attendant legal risks. For Sam, two typical requests for legal advice sought by WIL staff relate to insurance and indemnities. The questions, which would appear to be born from the resistance of host organisations, demonstrate a lack of understanding about why the host organisation needs to be insured and needs to indemnify the university. WIL staff have asked Sam 'why do these people have to be insured? Doesn't the university insure everybody?' and 'why are you asking them to indemnify us for things like that? They don't want to do that ... what's the university doing about it?'

WIL staff may also be unaware of the legal issues associated with IP. For instance, Jane explained that WIL staff can be keen to have the WIL placements 'locked away', as everything has been pre-organised before the university lawyer's involvement. For example, a student has already been selected, the host organisation is willing to take the student and an arrangement has already been reached between the university and host organisation which, amongst other things, includes an assignment of IP generated by the student to the host organisation. However, the WIL staff member is not aware of the legal consequences of assignment until the arrangement is referred to the legal office to be documented. Peter diagnosed the enthusiasm of WIL staff to secure the WIL placement, and their accompanying lack of awareness about IP, as 'tunnel vision'. The lack of

awareness by WIL staff about the WIL agreement may be isolated to particular legal considerations such as IP, indemnities and insurance, or more endemic in the sense that WIL staff fail to discuss the ‘nuts and bolts’ of the WIL placement with the host organisation, or to appreciate that the WIL agreement, if not properly drafted and reviewed, can be a source of legal risk.

3 Communication by WIL Staff

Communication by WIL staff, in particular the timing of the request for legal services, influences the type, substance and impact of university lawyers’ risk management practices. WIL staff who communicate effectively with the university lawyer assist the university lawyer when dealing with agreements and providing advice. Jess and Jane agreed that one communication method which assisted them with managing legal risk was having a central WIL contact point within a faculty of one or more disciplines (‘WIL conduit’), being a WIL staff member responsible for receiving all requests for legal services and instructing the legal office. The WIL conduit is aware of all matters received by the legal office, which prevents duplication and minimises the legal risks of two WIL agreements applying to one WIL discipline or one WIL agreement extending to multiple disciplines in a faculty, without each of those disciplines being consulted.⁸⁷ The importance of good communication is demonstrated in the sections which follow, by illustrations of the consequences that can unfold when it is lacking.

Poor communication within the WIL discipline or faculty is evidenced by two WIL staff members dealing with the same matter, or lack of awareness by WIL staff of WIL agreements and other documents already in use by the WIL discipline. In both circumstances, the university lawyer plays the part of matchmaker, referring WIL staff to colleagues who can provide information and guidance about setting up WIL placements. Tom described communication issues of WIL staff and the matchmaking role of the university lawyer in these terms:

They come to legal but they haven’t discussed it with other placement providers who already have similar schemes in the same faculty (for example), so often there’s not that cross-pollination happening within the faculty. We’ll be the source of truth for them rather than their own faculty. So sometimes our role is actually putting them in touch with the people that they need to be talking to before they come to us.

In particular, the cross-pollination within the WIL discipline or faculty promotes legal awareness by WIL staff. According to Tom, collaboration with others ‘helps them formulate what they want and need before they walk in the door’, so that the legal advice they seek is targeted at particular issues attached to the WIL agreement.

87 These practices represent contract risks: see, eg, Cameron, ‘The Contract Risks to Universities of Work-Integrated Learning Programs’ (n 1) 415.

The timing of WIL staff requests for legal services was one specific communication factor, identified by university lawyers, which influenced their risk management practices. University lawyers referred to three points in time at which legal services are requested by WIL staff:

1. Before the terms of an arrangement are finalised;
2. After the arrangement is finalised but before the documentation is completed (eg signed or published); and
3. After the documentation is completed.

Risk management by university lawyers is most effective if WIL staff request legal services before the terms of an arrangement are finalised. For example, WIL staff who communicate instructions to the university lawyer before finalising the WIL agreement with the host organisation give the university lawyer more scope to negotiate and guide the agreement-making process. The university lawyer can provide advice about the terms of a WIL agreement to negotiate with the host organisation. Further, the university lawyer has the time to rectify any issues concerning the legal awareness of WIL staff before they become legal risks, which may involve referring WIL staff to colleagues within the WIL discipline who can provide advice and produce relevant documents to assist WIL staff with finalising the arrangement.

A challenge to Sue's risk management practice is some WIL staff who, having finalised the arrangement, want the review of a WIL agreement to be conducted on an urgent basis, and pay little attention to Sue's process of identifying, assessing and suggesting strategies to manage the legal risks. As Sue explained:

But the challenges are in sometimes dealing with the staff who are organising them, and they want them done yesterday or tomorrow and really don't want to work through the process, because our process if it is a non-standard is to review it, give information to the WIL staff member and say, 'look here are the risks that are created by the terms of this contract, we recommend that you negotiate ... that either you or we together negotiate some changes'. You'll get some staff saying, 'nope', either because they don't want to, or because they know the host organisation is just going to say no.

The changes to the WIL agreement recommended by the university lawyer are less likely to be accepted and the ability of the university lawyer or WIL staff to negotiate changes are stymied if the terms of the arrangement are finalised by the time the draft WIL agreement reaches the university lawyer.

Jane identified the misuse of WIL agreement templates by the WIL discipline as a legal risk, but also as an example of how failing to approach the university lawyer prior to finalising the arrangement with the host organisation can erode the

university's negotiating position. For instance, WIL staff may have given away more than the university needed to, in particular the provision of indemnities in favour of the host organisation, by utilising WIL agreement templates that are not tailored to the circumstances of the WIL discipline. If legal advice had been requested earlier, Jane would have drafted an appropriate WIL agreement in collaboration with the WIL discipline and provided strategic advice to WIL staff about negotiating with the host organisation, as well as legal advice on agreement provisions proposed by the host organisation, which may have achieved an outcome on more favourable terms for the university. Jess acknowledged that it was 'pretty standard' for WIL staff to approach Jess for legal advice on a WIL agreement after the deal between the university and host organisation had been done. As with Jane, Jess acknowledged that 'there are deals that I probably would've looked at differently'.

Emma described the 'reality' of receiving instructions after the documents have been completed as a challenge to risk management. Emma may only find out about the WIL program after the publication and use of WIL documents. For example, promotional documents in a WIL program that had words to the effect of 'let our students work for you for free' were already published by the WIL discipline. Emma amended the promotional documents by removing the connotations of free labour which posed a legal risk and inserted provisions in a WIL agreement template which clarified the responsibilities of the university and host organisation.

Overall, the risk management issues ventilated by university lawyers substantiate and advance the existing literature. In particular, the legal awareness (or literacy) of WIL staff has not previously been explored as an issue associated with the role of the university lawyer. WIL staff have referred to the university lawyer's perceived lack of knowledge about WIL programs,⁸⁸ but not the actual lack of knowledge by WIL staff about legal rights and obligations relating to the WIL program. It is likely that issues relating to legal literacy are not unique to WIL programs. As such, the risk management practices of university lawyers may also be applied in other higher education activities to improve legal literacy.

The characteristics of the host organisation and WIL staff may influence the type of risk management practice, the resources devoted to risk management by the legal office, and the likely impact of university lawyers' risk management practices. University lawyers are more likely to review host WIL agreements and provide advice on amendments designed to minimise contract risk when dealing with a sophisticated host organisation, rather than draft university WIL

88 Robert G Madden and Norman H Cobb, 'Legal Issues Facing Social Work Academia' in Patty Gibbs and Eleanor H Blakely (eds), *Gatekeeping in BSW Programs* (Columbia University Press, 2000) 171, 190, citing Norman H Cobb, 'Court-Recommended Guidelines for Managing Unethical Students and Working with University Lawyers' (1994) 30(1) *Journal of Social Work Education* 18.

agreements and review amendments proposed by the host organisation (if any). A sophisticated host organisation that proposes its own WIL agreement, when combined with poor communication by WIL staff, is a serious risk management issue for university lawyers. For instance, WIL staff who request legal services after an arrangement is finalised or after the documentation is completed may have already exposed the university to legal risk through the existing use and publication of WIL agreements, or have reduced the chances of the university successfully negotiating amendments to the WIL agreement suggested by the university lawyer which are designed to manage contract risk. The university lawyer can advise WIL staff to negotiate changes to WIL agreements that pose contract risks the university should avoid, but the likelihood of the advice being applied by the WIL discipline or accepted by the host organisation diminishes if the parties have already agreed to the terms.

The next section outlines a series of considerations for improving risk management, based on the research findings and the recommendations of university lawyers during the interviews.

VI CONSIDERATIONS FOR IMPROVING RISK MANAGEMENT

A WIL Resources and Program Documents

WIL resources and program documentation which address risk management issues in the design and delivery of WIL programs can promote legal literacy of WIL staff and improve host organisation understanding of WIL agreements and WIL programs. The legal office, WIL disciplines and other university divisions such as student equity and disability services, could collaborate within a formal WIL group to produce WIL resources and program documentation for WIL disciplines, students and host organisations. WIL program documents could include handbooks or guides for host organisations and students about the WIL program, its purposes, the responsibilities of the parties and other information which is reflected in the terms of the WIL agreement. WIL resources may include information about and instructions for completing the WIL agreement, as well as processes to assist WIL staff with identifying, assessing and addressing risk in WIL programs. WIL resources may also include an induction program for students, delivered in person and/or online which, save for the incorporation of any discipline-specific matters, can be delivered across a variety of WIL disciplines. According to Steve, these centralised WIL resources would assure the university that all WIL disciplines are applying a consistent standard of risk management that takes place prior to the WIL placement.

Risk management resources for WIL programs were recommended by a number

of university lawyers. Steve recommended a ‘risk checklist’ for WIL staff to complete before seeking legal services, which may include questions concerning use of medical instruments, access to patient and student information, inspection of the host site, and generation of IP by the student, and which requires WIL staff to specify the worst-case scenarios during the WIL placement. The checklist would provide information about potential program and contract risks to the university lawyer, as a starting point for conducting a risk assessment. John suggested online WIL resources that would provide information about legal risks in WIL programs and suggested risk management practices. Emma and Peter suggested a guide for establishing a WIL program, which would include WIL agreement templates and a description of the legal risks in a WIL program.

B Risk Management Education

University lawyers can educate WIL staff about their role, WIL agreements and risk management. Many university lawyers expressed their desire to spend more time educating WIL staff about legal risks in WIL programs. For instance, Jane wanted to educate WIL staff about things to consider when setting up WIL programs and placements, documents to have in place for the WIL placement, and the appropriate use of WIL agreement templates. Jane argued that education, even if conducted informally over a coffee catch-up with WIL staff, would increase WIL staff legal awareness, lead to more comprehensive instructions and thereby improve the speed and efficiency of the legal services delivered. David suggested that education of WIL staff would involve a discussion about issues to be aware of when running a WIL program, with topics including use of personal information, workplace health and safety, IP, liability and insurance. Incidentally, these represent legal risks that have arisen in David’s experience when reviewing WIL agreements.

The research findings also revealed negotiation skills as an additional topic for risk management education of WIL staff. University lawyers can provide strategic advice or ‘coach’ WIL staff about negotiating with the host organisation. The coaching by university lawyers could be translated into an education of WIL staff in negotiation skills. Educating WIL staff about the nuances of negotiation may include lessons about the consequences of agreeing to the demands of the host organisation without proper consideration of the contract risks.

C WIL Policy

A WIL policy provides clarity around how WIL placements will operate at the university, and provides institutional support for advice by university lawyers that a particular WIL placement poses an unacceptable risk to the university.

For instance, Tom, Sam and Sue recommended a WIL policy that articulated the governance of WIL placements, being the structures and frameworks for the establishment and operation of WIL placements at the university. Sue argued that the policy gives WIL staff and the university lawyer boundaries to assess which WIL placements are and are not acceptable to the university:

[The policy] provides the framework ... so it's the principles (and essentially the rules) around how the university wants to engage in this particular space ... and so it helps the lawyers because that's their guidance as to what's an appropriate ... what's a risk we can agree to? What's one where we need to say 'no', or push back, or get higher level approval? It also sets the context for the WIL staff to say, 'OK, this gives me a picture of what sorts of things I'm allowed to organise'.

Sue also suggested that the requisite steps of the WIL agreement-making process, which is a WIL resource of some universities, be embedded in WIL policy. According to Sue, this would reduce the number of inquiries to the legal office about the preparation and execution of WIL agreements. Finally, Sam recommended that WIL policy requires WIL disciplines to conduct due diligence before accepting a host organisation, which includes ensuring the host organisation understands its responsibilities to the student and to the university. The WIL policy could also be presented as a timeline of events indicating the activities to be conducted by a WIL discipline before, during and after the WIL placement.

D *Timely and Effective Communication with University Lawyers*

The timing of the request for legal services by WIL staff has a significant influence on the risk management practices of university lawyers. As previously recommended by the author,⁸⁹ university management should consider education activities and policies that require WIL staff to involve university lawyers in a timely manner, particularly with respect to host WIL agreements and amendments proposed by the host organisation to university WIL agreements. Timely communication with university lawyers can improve the prospects of a university lawyer, directly or indirectly, negotiating changes to agreement provisions that pose an unacceptable risk to the university.⁹⁰

The appointment of a WIL conduit in each faculty of the university is one communication method worthy of consideration by university management. A WIL conduit is a WIL staff member responsible for receiving all requests for legal services and instructing the legal office. Jess and Jane claimed that the

89 Cameron, 'The Contract Risks to Universities of Work-Integrated Learning Programs' (n 1) 418.

90 Ibid.

WIL conduit assisted them with risk management and Steve recommended its implementation. Such initiatives that encourage communication between university lawyers and WIL staff are critical in effectively managing the risks associated with WIL.

VII FUTURE RESEARCH

There is fertile ground for future research related to risk management in higher education. All or part of the research methodology could be applied as a template for exploring risk management by university lawyers in their general day-to-day legal practice, in other higher education activities, or in WIL programs in other countries. The research findings reported in this article could then be used for comparative analysis. For instance, what are the similarities and differences between the risk management framework of Australian university lawyers in WIL programs compared to their USA counterparts? What are the common and unique characteristics of risk management by university lawyers in other higher education activities?

Further research could also build on the research findings by evaluating the risk management practices of university lawyers. The case study identified stakeholder issues that may influence the effectiveness of risk management by university lawyers and recommendations of university lawyers which validate particular risk management practices. However, it was outside the scope of the study to question university lawyers about whether their risk management practices were effective or not. For example, an analysis of WIL agreement templates drafted by university lawyers revealed common terms of a WIL agreement designed to manage contract risks.⁹¹ Future research could evaluate the actual wording of the WIL agreement terms, and other risk management practices of university lawyers, through legal (black letter law) and/or empirical (university lawyers, university management, WIL staff) lenses. For instance, IP was the subject of considerable attention by university lawyers in WIL agreements. A study of IP law would provide greater understanding about the efficacy of existing risk management frameworks, as well as the potential liability of the university, student and the host organisation with respect to WIL programs.

VIII CONCLUSION

The case study reported in this article demonstrates that university lawyers, a relatively unknown category of in-house counsel, have a framework of practices that support the university with minimising the legal risks of WIL. Their experiences provide a basis for university management, WIL disciplines and

91 See below Appendix.

university lawyers to evaluate and improve risk management at a legal office, discipline and institutional level.

University lawyers provide not only legal advice about contract and program risk, but also strategic advice about how to approach the student or host organisation in relation to an incident during the WIL placement or a WIL agreement. In exceptional circumstances, the university lawyer will become directly involved with the subject matter of their advice by referring the legal risk to a higher level of university management or by communicating directly with the host organisation on behalf of the WIL discipline. In addition to drafting WIL agreements, university lawyers review WIL agreements and WIL program documents, consult as to WIL policy and educate WIL staff about the WIL agreements they develop, as well as risk management and their role in the university setting. The preparation of WIL resources pertaining to the WIL agreement and risk management was a practice not widely undertaken, but nevertheless strongly recommended, by university lawyers.

The case study also identified issues associated with the WIL discipline and the host organisation that can undermine the risk management practices of university lawyers and expose universities to legal risk. Some WIL staff may be unaware of legal rights and obligations related to the WIL program, may fail to collaborate with colleagues in the development of WIL programs and documents, and are not requesting legal services in a timely manner or at all. WIL resources and policy, timely communication with university lawyers, education by university lawyers and collaboration amongst WIL disciplines are some of the practices which universities can employ to address these stakeholder issues and thereby effectively manage the legal risks of WIL programs.

APPENDIX — COMMON TERMS OF UNIVERSITY WIL AGREEMENTS

Subject heading	Description
Confidentiality	<ul style="list-style-type: none"> • Restrictions on the disclosure and use of confidential information by the student, host organisation and/or WIL staff. • The return of confidential information in the student's possession on request and/or at end of the WIL placement.
Disciplinary procedures	<ul style="list-style-type: none"> • Responsibility for taking disciplinary action. • Procedures for notifying the university of student conduct/performance issues and/or termination of the placement. • Grounds for termination of the placement.
Duration and review of agreement	<ul style="list-style-type: none"> • The start date and end date of the agreement, with additional provisions concerning review and extension of the agreement.
Duration of WIL placement	<ul style="list-style-type: none"> • The start and end date of the WIL placement.
Hours per week	<ul style="list-style-type: none"> • The number of hours per week the student will be at the WIL placement location.
Indemnity	<ul style="list-style-type: none"> • The university indemnifies the host organisation with respect to negligent student and WIL staff conduct; and/or • The host organisation indemnifies the university with respect to negligent host organisation conduct.
Insurance	<ul style="list-style-type: none"> • The university to maintain personal accident; public liability; professional indemnity; medical malpractice (if applicable); and workers' compensation insurance. • The host organisation to maintain public liability; professional indemnity; and/or workers' compensation insurance (in the case of paid placements). • Minimum amount of insurance cover. • The host organisation to produce evidence of insurance currency on request by the university.

IP	<ul style="list-style-type: none"> • Ownership of IP created by the student during the WIL placement (developed IP). • Ownership of IP of the university and host organisation (background or pre-existing IP).
Issues during WIL placement	<ul style="list-style-type: none"> • The host organisation is to notify the university and vice versa of WIL placement issues including student misconduct.
Legal relationships	<ul style="list-style-type: none"> • The student is not, or is not intended to be, an employee. • The student is surplus to staffing requirements of the host organisation and will not receive or is not entitled to receive any remuneration or payment of any kind from the host organisation. • The university and host organisation do not have a partnership, joint venture or agency relationship. • If the student is an employee, the host organisation is to enter a separate employment contract with the student.
Payment to students	<ul style="list-style-type: none"> • Scholarship/stipend monies are not remuneration, namely payment for services rendered to the host organisation. • Details of the scholarship monies received by the university from the host organisation and paid to the student (indirect) or paid by the host organisation to the student (direct) including provisions pertaining to amount, timing and termination of the payment.
Privacy of student information	<ul style="list-style-type: none"> • The handling of student information by the university and the host organisation according to privacy legislation.
Purpose of WIL placement	<ul style="list-style-type: none"> • The primary purpose is to undertake activities which are consistent with WIL program objectives.
Responsibilities (host organisation)	<ul style="list-style-type: none"> • Appropriate supervision and a host supervisor with appropriate qualifications and experience. • Appropriate learning experiences and resources (eg facilities, equipment) for the student. • Participate in student evaluation. • Comply with workplace health and safety and anti-discrimination laws.

- Conduct student induction/orientation.
 - Notify the university of incidents, absences and issues.
 - Provide student activities that are appropriate given the student's skills, ability and experience, and/or are consistent with WIL program learning objectives.
 - Produce host organisation policies.
 - Provide a facility in the workplace for university supervisor-student meetings.
- Responsibilities (student)
- Comply with reasonable directions of the host organisation.
 - Dress in suitable attire.
 - Obtain necessary licences, approvals, police checks and registrations.
 - Complete the orientation/induction process of the host organisation.
 - Act according to the WIL resources and any directions provided by the university prior to placement.
 - Punctual attendance at WIL placement location.
 - Comply with host organisation and university policy.
 - Notify host organisation of absences, circumstances that materially affect placement and workplace incidents.
 - Maintain regular contact with the host and university supervisors.
 - Comply with confidentiality, privacy and workplace health and safety obligations.
 - Return property to the host organisation at the end of the WIL placement.
 - Not perform clinical procedures without client consent (clinical agreements only).
- Responsibilities (university)
- Administration of the WIL program.
 - Select students for the WIL placement.
 - Provide a university supervisor.
 - Provide uniforms and ID cards for staff and students (clinical agreements only).

- The student and university supervisors have relevant checks, licences, vaccinations/immunisation, insurances, registrations and qualifications for placement.
 - The student and university supervisors agree to comply with host organisation policies.
 - Notify host organisation of placement requirements, students and changes to student enrolment and/or university supervisor.
 - Conduct student induction/orientation.
 - Control and discipline of student.
 - Students and staff are bound by host organisation and university policy.
 - Taking steps to ensure the student and WIL staff comply with confidentiality and privacy obligations relating to the host organisation and its clients.
- Student access to workplace and clients
- Student access to the workplace and clients is subject to client consent and the WIL agreement between the university and the host organisation.
- Student activities
- The activities the student will undertake during the WIL placement. The activities are typically listed in a schedule to the WIL agreement.
- Student numbers
- The number of students on WIL placement with the host organisation.
- Termination of agreement
- The circumstances in which the WIL agreement will terminate: expiration; by notice; student performance or misconduct; host organisation conduct; or breach of the agreement by the host organisation or the university.
- WIL placement location
- The workplace address of the WIL placement.