Work integrated learning: A study of risk management by university lawyers

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Abstract

This thesis explores risk management by Australian university lawyers within the specific context of work integrated learning (WIL) programs. In particular this thesis examines what legal risks university lawyers manage, how university lawyers manage these risks and the factors which may influence their risk management in relation to WIL programs.

WIL is a strategic risk pursued by universities in the prevailing higher education environment, which is characterised by competition, changes in funding arrangements and stakeholder demand for WIL. However the strategic opportunities that WIL presents cannot be achieved without the university taking on unavoidable and distinct legal risks that may have serious financial and reputational consequences for the university. The challenge for universities is to maximise the strategic opportunity that WIL presents but to minimise the risks it entails. University lawyers are involved with meeting that challenge as part of their internal delivery of legal services to the university. Despite this important role, the work of university lawyers remains largely unexplored in the literature – risk management in relation to WIL programs is predominantly addressed from the perspective of WIL staff, not university lawyers.

The mixed methods study of university lawyers used in this thesis is the first known systematic research designed to describe and analyse risk management by university lawyers within the specific context of WIL programs. The first phase of the mixed methods study, a survey of 41 Australian university lawyers, provides an initial understanding about role, legal risk and risk management by university lawyers. The second phase is a case study of 13 university lawyers from 12 universities in Australia.

The findings from this study are that risk management by university lawyers represents a framework of practices, methods and strategies supporting the university goals of maximising the strategic value and minimising the legal risks of WIL. The risk management strategy of university lawyers is to facilitate the delivery of WIL placements for students and to facilitate risk management by WIL disciplines. To execute the strategy, university lawyers use both methods and practices. In terms of methods they are pragmatic and accessible, ask staff questions, garner external support for risk management practices, and communicate and collaborate with WIL staff,

insurance-risk and lawyers from other universities. In terms of practices, university lawyers advise, educate, draft and review various WIL instruments in relation to WIL programs.

The risk management framework of university lawyers addresses two categories of legal risk in relation to WIL programs: program and contract risk. University lawyers manage program risks associated with student disability and medical conditions, workplace hazards and student misuse of social media. Nevertheless university lawyers are predominantly engaged in managing contract risks with respect to WIL programs, these being the contractual terms involving the host organisation, university and/or student as well as the contract practices of the WIL discipline.

Strategic, organisational and stakeholder factors may influence the risk management framework of university lawyers. Strategic factors relate to the goals and objectives of the university, organisational factors are associated with the day-to-day operation of the legal office, and stakeholder factors are attributable to the host organisation (external) and the WIL discipline on behalf of the university (internal). The factors are subsequently conceptualised as risks to demonstrate the strategic, operational and reputational risks that university lawyers may encounter and manage which, in addition to the legal risks, may affect the ability of the university to achieve its goals in relation to WIL.

The findings of this research can be applied by university lawyers, WIL disciplines and university management to evaluate and improve risk management at their own institutions and to educate themselves and their colleagues about risk and risk management in WIL programs. The research also reveals a number of issues that may undermine risk management, not only in WIL programs, but in relation to all higher education activities. These issues should be of particular concern to university management, who are ultimately responsible for risk management at an institutional, faculty and discipline level, and who can make decisions which impact the activities of the legal office and the WIL discipline.

Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Craig John Cameron

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Glossary of Terms

2IC: A second-in-command within the legal office who has the formal responsibility for supervising university lawyers and reporting to the manager.

Academic administrator: A person who is a member of university management.

Contract risk: Legal risks which are associated with contracts involving the host organisation, student and/or university.

Enterprise risk management (ERM): A comprehensive process of managing risks across the university that may affect the achievement of university objectives related to its core activities in learning and teaching, research, and service (refer further section 1.8.5).

Financial risk: An event or circumstance that affects the assets of the university.

Group of Eight universities: The oldest Australian universities in their mainland capital cities: Australian National University, Monash University, University of Adelaide, University of Melbourne, University of New South Wales, University of Queensland, University of Sydney and University of Western Australia.

Gumtree universities: Australian universities, established from the mid-1960s to the mid-1970s, that were distinctively different from the older capital city universities: Deakin University, Flinders University, Griffith University, La Trobe University, Macquarie University, Murdoch University, University of Newcastle and University of Wollongong.

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

Host organisation WIL agreement: A WIL agreement prepared by the host organisation.

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

Institutional risk management: Risk management by the university as a whole, as distinguished from risk management by WIL disciplines and university lawyers.

Insurance-risk: A collective description for the delivery of risk management and insurance services, as part of a combined operating division (with other functions) or in separate divisions. The persons who deliver the services are individually described as risk personnel or insurance personnel.

Legal risk: An event or circumstance that exposes the university to the possibility of liability or non-compliance with external or internal rules and regulations (refer further section 1.8.4).

Manager: The head of the legal office or multiple university divisions (which includes the legal office); also known as a General Counsel or Director.

New generation universities: Australian universities based on former colleges of advanced education, designated as universities around 1987 or as private universities, with most of their student load in cities of more than 250,000 people: Australian Catholic University, Bond University, Edith Cowan University, Torrens University, University of Canberra, University of Notre Dame, Victoria University and Western Sydney University.

Operational risk: An event or circumstance that affects the day-to-day operation of the legal office.

Organisational factor: A factor which is associated with the day-to-day operation of the legal office.

Program risk: Legal risks which 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 the personal characteristics of students that can expose the university to legal risk.

Recognised WIL lawyer: 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.

Regional universities: Australian universities with most of their student load in centres with a population of fewer than 250,000 people: Central Queensland University, Charles Darwin University, Charles Sturt University, Federation University Australia, James Cook University, Southern Cross University, University of New England, University of Southern Queensland, University of the Sunshine Coast and University of Tasmania.

Reputational risk: An event or circumstance that affects the university's prestige, standing, or brand.

Risk: An event or circumstance that influences (positively or negatively) the university's ability to meet its objectives. Sub-categories of risk include strategic, operational, financial, legal and reputational (refer further section 1.8.3).

Risk management: The practices, methods and strategies used to address risk. The practices, methods and strategies are collectively referred to as a risk management framework (refer further section 1.8.6).

Risk management methods: How university lawyers approach the risk management practices.

Risk management practices: The services, delivered by university lawyers to representatives of the university, that are designed to manage legal risk.

Risk management strategies: The overall plans for risk management which are aligned to university goals associated with WIL.

Stakeholder factor: A factor which is associated with the participation of the two main stakeholders in the WIL program – the host organisation (external) and the WIL discipline on behalf of the university (internal).

Strategic factor: A factor which relates to the goals and objectives of the university in research, teaching and learning and service, as specified in university strategy.

Strategic risk: An event or circumstance that affects the university's ability to achieve its goals with respect to WIL programs.

Technical universities: Australian universities established early as technical institutes in a capital city and formally designated a university after 1987: Curtin University, Queensland University of Technology, RMIT University, Swinburne University of Technology, University of South Australia, and University of Technology Sydney.

University lawyer: A qualified lawyer, employed by the university, who delivers legal services to the university (refer further section 1.8.2).

University management: A collective term to describe senior management responsible for the operating activities of the university; may consist of the Vice-Chancellor, Deputy or Pro-Vice Chancellors, Faculty Deans and Associate Deans and Heads of academic disciplines (or equivalent titles such as President, Director or Chief Operating Officer).

University supervisor: A WIL staff member appointed to supervise the student during the WIL program. Supervision may occur in the workplace, on campus or in both locations.

University WIL agreement: A WIL agreement prepared by the university, which is often a template for use by one or more academic disciplines.

Work Integrated Learning (WIL): a curriculum design which combines formal learning with student exposure to real professional, work or other practice settings (refer further section 1.8.1).

WIL agreement: A written agreement involving the university, host organisation and/or student with respect to the WIL placement.

WIL convenor: The person responsible for managing the WIL program. The WIL convenor is generally an academic staff member and is commonly known in traditional study programs as a course or subject convenor.

WIL discipline: The academic discipline responsible for delivering the WIL program.

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

WIL program: An education program, delivered by a university, which incorporates WIL as part of the curriculum.

WIL program documents: documentation about the WIL program distributed to host organisations and students; these are commonly described as handbooks or guides.

WIL staff: University employees involved with the management and/or delivery of WIL programs. 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. Collectively these persons are referred to as WIL staff and are members of a WIL discipline.

WIL resources: resources for WIL staff about WIL agreements and risk management.

Workplace: The professional, practice or work environment in which the student completes their WIL placement.

Chapter One: The risky business of WIL programs

1.1 Introduction

This thesis explores risk management by Australian university lawyers within the specific context of work integrated learning (WIL) programs. WIL is a curriculum design which combines formal learning with student exposure to real professional, work or other practice settings. In Chapter One it is argued that WIL is a strategic risk worth taking by universities, but that WIL also presents distinct and unavoidable legal risks. The challenge for universities is to maximise the strategic value of WIL (strategic risk) but to minimise the legal hazards (legal risk) that WIL entails. University lawyers are involved with meeting that challenge as part of their delivery of “in-house” legal services to the university. Despite this important responsibility, the role of university lawyers remains largely unexplored in the literature – risk management in relation to WIL programs is predominantly addressed from the perspective of WIL staff, not university lawyers.

The mixed methods study in this thesis focuses on the university lawyer in order to deepen understanding about legal risk and risk management, as well as the factors which may influence risk management by university lawyers in the context of WIL programs. It is argued that university lawyers support the university goals of maximising strategic value and minimising legal risk by employing a risk management framework of practices, methods and strategies, which may be influenced by strategic, stakeholder (WIL discipline and host organisation) and organisational factors. These factors are subsequently conceptualised as risks to demonstrate that university lawyers may encounter and manage strategic, reputational and operational risks which, in addition to the legal risks, affect the ability of the university to achieve its goals in relation to WIL. Overall, this thesis provides a basis for university management, WIL disciplines and university lawyers to evaluate and improve risk management.

This chapter firstly discusses how WIL is a strategic risk and then identifies the possible legal risks. It will then highlight the importance of risk management with regard to WIL, followed by the role of university lawyers. The next part will outline the research purpose, research design and questions, and then scope of the thesis. The chapter concludes with the central argument and the outline of the thesis.

1.2 WIL as a strategic risk

WIL involves a strategic risk taken by higher education to support the goals of a university. Competition on a national and global scale and a shift in funding arrangements have necessitated a more “business-orientated” approach to higher education by Australian universities (Freudenberg & Samarkovski, 2014; Smith & Worsfold, 2015). WIL has strategic value because it satisfies the demands of two key stakeholders – students and employers. Delivering WIL programs can enhance a university’s reputation, which can be critical in attracting future students, and can positively influence student satisfaction with their degree (Blackwell, Bowes, Harvey, Hesketh, & Knight, 2001; Cameron, Freudenberg, & Brimble, 2013; Freudenberg, Brimble, & Cameron, 2010; Patrick et al., 2008). If the consumer (student) is satisfied with the delivery of their educational product, this can have a positive impact on student enrolment and retention, thus providing a continuing income stream for the university through to graduation, and potentially after graduation if the student pursues further studies (Zegwaard & McCurdy, 2014). Employer satisfaction with WIL programs can strengthen university–employer relationships and employment outcomes for students. This enhanced relationship may lead to research partnerships, consultancy work and other shared initiatives (Cooper, Orrell, & Bowden, 2010; Patrick et al., 2008). It is therefore not surprising that many universities have formally recognised WIL as a strategic risk by incorporating WIL as part of their objectives (Cooper et al., 2010).

Employer and student demand for this learning paradigm stems from the fact that WIL offers a “rich, active and contextualised learning experience for students” (McLennan & Keating, 2008, p. 4). WIL can have a positive influence on student generic skills such as interpersonal, written and oral communication, team work, self-management and professionalism (Blackwell et al., 2001; Jackson, 2013; Little & Harvey, 2006; Lock, Bullock, Gould, & Hejmadi, 2009; Smith, Ferns, & Russell, 2014), as well as on student self-efficacy (Cameron et al., 2013; Freudenberg et al., 2010) and academic performance (Gomez, Lush, & Clements, 2004; Mandilaras, 2004; Reddy & Moores, 2006). In career terms, WIL can enhance student understanding of the work environment and employer expectations (Patrick et al., 2008; Wilton, 2012), can facilitate career awareness, progression and direction (Coll et al., 2009; Crebert, Bates, Bell, Patrick, & Cragolini, 2004; MacDonald, Cameron, Brimble, Freudenberg, &

English, 2014; Patrick et al., 2008; Reddy & Moores, 2006; Zegwaard & McCurdy, 2014) and can improve graduate employment outcomes (Blackwell et al., 2001; Jonck, 2014; Mason, Williams, & Cranmer, 2009). Employment can be a key motivator for students enrolling in university. Consequently, students may demand educational programs such as WIL that can have a positive impact on their future employment.

From an employer perspective, WIL can equip students with the skills and self-efficacy to be productive graduates in the workplace, a response to a longstanding concern expressed by government, industry associations and employers about the work-readiness of graduates (ACNielsen Research Services, 2000; Australian Chamber of Commerce and Industry [ACCI] & Business Council of Australia [BCA], 2002; Precision Consultancy, 2007). The demand for WIL is made explicit in industry and institutional agendas to expand WIL programs (Australian Workforce and Productivity Agency [AWPA], 2013; Office of the Chief Scientist, 2012; Universities Australia, ACCI, Australian Industry Group, BCA, & Australian Collaborative Education Network [ACEN], 2014, 2015) as well as by professional bodies that impose WIL as a compulsory requirement in a number of disciplines such as education, nursing, medicine, allied health and engineering.

The stakeholder demand for WIL, plus a competitive higher education environment, suggests that WIL will be increasingly incorporated into the curriculum across a wide range of disciplines. Although WIL is a strategic opportunity, it presents a number of distinct legal hazards that can have serious financial, operational and reputational consequences for universities.

1.3 The legal risks of WIL

WIL programs create different legal risks for universities, compared to traditional study programs, because the learning environment is situated in a workplace controlled by a third party (the host organisation). In traditional study programs, the classroom is the university's locus of control. Learning in the classroom (whether on-campus or virtual) is relatively predictable because of the teacher's ability to control the learning environment through the curriculum (Cooper et al., 2010). The university relinquishes some of that control in WIL programs because the student is situated in a separate environment (Swift & Kent, 1999). The opportunity for students to interact

with representatives and clients in the workplace makes learning authentic, but also unpredictable and risky. Furthermore, undergraduate students, many of whom are in their teenage years and early twenties, may lack life experience and maturity (Newhook, 2016) and may have little or no previous experience in that workplace environment, which arguably makes them more vulnerable to risk.

A table of legal risks in WIL programs, gleaned from a literature review of personal author accounts, empirical studies and case law in Australia, is detailed in Appendix A. The table was inspired by and extends the work of Cooper et al. (2010), who collated a reference table of general concerns and specific issues (or risks) to students associated with WIL. The legal risks are categorised according to the three parties in WIL programs (student, university and host organisation) and to the timing of the conduct (before, during and after the WIL placement). The table also includes a record of the program risks identified by university lawyers in Chapter Five of the case study. The table is not intended to be an exhaustive list of legal risks or to establish that all of the legal risks are unique to WIL programs. For instance, students who receive a failing grade in a traditional study program may be denied procedural fairness or the university may not provide reasonable adjustments for students with a disability on campus. Nevertheless the table (as indicated by “WIL only” in the third column in Appendix A) details the university’s exposure to a broad spectrum of distinctive legal risks in WIL programs and will be used as the basis for comparing university lawyers’ experiences with legal risk reported in Chapter Five. The circumstance which distinguishes legal risks in WIL from those in traditional study programs is the participation of a host organisation that accepts the student into the workplace environment.

Appendix A also includes the results of a study using popular legal search engines (CaseBase, Austlii and Thomson Reuters Laws of Australia) that sought to identify any legal cases taken by students, host organisations or their clients against the university in relation to a WIL program. Although an analysis of the law underpinning the risks identified in the literature and cases is outside the scope of this thesis (refer Varnham, Kamvounias, & Squelch, 2015), the cases are instructive, as they provide examples of when the legal risks have resulted in litigation for the university involved. The study revealed 12 reported Australian cases, all involving student action against the university. Table 1.1 provides the case citation and legal grounds of the student action.

Table 1.1: Legal cases in Australia relating to WIL programs

Case citation	Legal grounds of action
<i>W v Flinders University of South Australia</i> [1998] HREOCA 19	A claim of disability discrimination on the basis that reasonable adjustments were not made by the university to facilitate the WIL placement.
<i>Fennell v Australian National University</i> [1999] FCA 989	A claim of misleading or deceptive conduct concerning the promotion of a WIL program.
<i>BKR and Queensland University of Technology</i> [1999] 5 QAR 7	A challenge under freedom of information legislation to the university's decision to release information concerning the student's participation in a WIL program.
<i>Sluggett v Flinders University of South Australia</i> [2003] FCAFC 27	A claim of disability discrimination based on the lack of access to the host organisation site and a failing grade for the WIL program.
<i>Williams v Monash University (Anti-Discrimination)</i> [2005] VCAT 958	A claim of discrimination on religious grounds arising from a failing grade for the WIL program.
<i>Simundic v University of Newcastle</i> [2007] FCAFC 144	A claim that the university supervisor criticised, verbally abused and discriminated against the student on the basis of race during a WIL program.
<i>Jenkins v Charles Sturt University</i> [2008] NSWSC 50	An application for judicial review of a university's decision to exclude the student from the degree arising from the award of repeated failing grades for a WIL program.
<i>Tadros v Charles Sturt University and 2 Ors</i> [2008] NSWSC 1140	An application for judicial review of the university's decisions to award a failing grade for the WIL program and to exclude the student from the university arising from the student's misconduct during a WIL program.
<i>Shvetsova v University of New England</i> [2014] NSWSC 918	An application for judicial review of a university's decision to award a RU (Result Unknown) grade for the WIL program and to require the student to complete an additional WIL placement of 10 days arising from the student's unsatisfactory performance during a WIL placement.
<i>Shvetsova v University of New England</i> [2015] NSWCATAD 49	A separate claim under freedom of information legislation that the university did not provide access to particular records relating to an internal review of university decisions about the student's enrolment in the WIL program.
<i>Ellis v Southern Cross University</i> [2015] NSWCATAD 25	Claims of victimisation and race discrimination based on the words of a university supervisor during an interim performance evaluation; subsequent termination of the WIL placement and the award of a failing grade; and the failure to reinstate the placement following a successful internal appeal.
<i>Coomaraswamy v University of New South Wales</i> [2016] NSWCATAD 41	Claims of race, age and disability discrimination based on the failure of teaching staff to provide adequate assistance and support to undertake WIL placements; and the termination of enrolment at the university arising from the student's unsatisfactory performance during a WIL placement.

Note that *Simundic* and *Sluggett* involved a series of appeals and are counted only once for recording purposes. The universities involved successfully defended all but one of the cases (*Tadros*). Although the number of Australian cases appears inconsequential, this may represent only a fraction of the complaints against universities that are instead resolved internally by the university or externally by agencies such as the State Ombudsman. It is clear that universities are operating WIL programs in an increasingly litigious environment (Astor, 2010; Kaplin & Lee, 2013). All 12 reported cases occurred between 1998 and 2016, with the more recent cases having a similar theme – a disgruntled consumer of educational services claiming discrimination or seeking judicial review concerning an academic decision to award a failing grade for the WIL program and/or to exclude them from the course or university. A strategic expansion of WIL programs may result in more student complaints to internal and external bodies.

The costs to universities of resolving legal risks can be substantial. First are the explicit legal costs and potential payment of damages to an injured party. The costs of staff time and the emotional costs of staff involvement, although difficult to quantify, also impact on the university's bottom line and divert universities from their primary objectives of teaching, research and service (Santora & Kaplin, 2003). Astor (2008) notes that "in some cases, the talents and experience of staff and students are lost to the university: people involved in disputes frequently choose to leave, retire early, suffer health consequences, become demoralised and less productive" (p. 157). A case in point is *Sluggett v Flinders University*. Flinders University was the respondent to one action alleging disability discrimination during a WIL placement at the Human Rights and Equal Opportunity Commission and then to two appeals in the Federal Court. The three actions resulted in 18 days of court hearings and the calling of numerous witnesses from the university and host organisation from the date of the first application (22 June 1994) to the decision of the Full Court of the Federal Court dismissing the student's second appeal (5 March 2003). The negative publicity surrounding a legal issue can also damage the reputation of the university, thereby deterring potential students and staff (Astor, 2008; Cooper et al., 2010). Given these substantial costs, risk management by universities in WIL programs is a business necessity as well as a legal obligation.

1.4 The importance of risk management in WIL programs

Risk management in WIL programs is an important research topic, given the strategic opportunity of WIL, the distinctive legal risks of WIL and the financial, operational and reputational costs associated with the materialisation of a legal risk. Risk management not only makes good business sense but is also mandatory in the prevailing regulatory environment. The Australian Commonwealth Government has recently implemented a risk-based approach to higher education regulation and quality assurance (Edwards, 2012). To maintain registration as a higher education provider with the Tertiary Education Quality and Standards Agency (TEQSA), the national regulator of the higher education sector in Australia, the higher education provider must demonstrate that “risks to higher education operations have been identified and material risks are being managed and mitigated effectively” (*Higher Education Standards Framework (Threshold Standards) 2015* (Cth), section 6.2.1(e)). Government funding to public universities is also contingent on complying with this requirement (*Higher Education Support Act 2003* (Cth), section 19.65).

The task of managing legal risks is a complex one. WIL is a strategic opportunity for universities but it does expose the university to different legal risks. The catalyst for that distinctive legal risk – a host organisation that accepts students into the workplace environment – is also the characteristic that defines WIL. The tension between strategic opportunity and legal risk in WIL programs is clear. It is not possible to remove all legal risks without removing the “work integrated” component from work integrated learning. Universities must either accept and manage the legal hazards associated with WIL or forego the strategic opportunity of WIL. The formal recognition by universities of WIL as a strategic risk, the stakeholder demand for WIL and a competitive higher education environment suggest that universities could be risk takers when it comes to WIL. The challenge for universities is to maximise the strategic value of WIL (WIL as a strategic risk) but to minimise the legal hazards it entails (WIL as a legal risk). University lawyers, being qualified lawyers employed by the university, are involved with meeting that challenge as part of their delivery of in-house legal services. The next section of this chapter explains why a study of university lawyers makes an original and significant contribution to knowledge and understanding about risk management in the specific context of WIL programs.

1.5 University lawyers – contributing to the scholarship of risk management in WIL

In this research, university lawyers are the unit of analysis for studying the phenomenon of risk management in WIL programs (Stake, 1995). University lawyers, along with WIL staff and university management, are involved with risk management in WIL programs. The research focus on university lawyers is designed to address a gap in the literature – the absence of any studies of risk management in WIL programs from the perspective of university lawyers. Two categories of existing literature are relevant to this phenomenon. The first category describes and analyses the role of university lawyers, along with empirical studies of university lawyers (“university lawyer literature”). The second category addresses risk management in relation to WIL that identifies the university lawyer or is authored by a university lawyer (“WIL literature”).

The university lawyer literature is United States of America (USA) centric; many of the empirical studies are dated and, with the exception of Turcotte, Nichols and Philipps (2016), the literature does not focus on explicit higher education programs such as WIL (Association of Governing Boards of Universities and Colleges [AGB] & United Educators [UE], 2009, 2014; Block, 2014; Campo, 2009; Elleven, Kern, & Lumsden, 1997; Elleven, Lumsden, & Kern, 1997; Hustoles, 2012; Rupe, 2005; Schimmel & Nolan, 2005). Although university lawyers describe their roles and issues as these relate to risk management, there is no systematic research of the risk management practices, methods and strategies of university lawyers, or of the issues which may impact their risk management, in the specific context of WIL programs.

Risk management by university lawyers is referred to in the WIL literature, but neither explored in any depth or subject to empirical study, nor explored from the perspective of the university lawyer. The WIL literature is predominantly written from the perspectives of academics and WIL staff. With very few exceptions (Briel & Getzel, 2001; Karickhoff & Howley, 1997), authors do not describe the role of university lawyers, but rather identify the areas of risk management in which WIL staff should engage university lawyers. Recommendations to consult university lawyers can represent prudent guidance, but do not explain how university lawyers experience and manage legal risk in WIL programs. The few university lawyer authors in the WIL literature study legal risk through the prism of “black letter law” and not from personal

experience or as part of a research project. They also identify and describe various risk management practices but do not explore the role of the university lawyer as a risk manager (Bernard, 1995; Bickel, 2001; Biddinger Gregg & Schrink, 1997; Broughton & Overby, 1993; Goldstein, 1981, 1990; Goldstein & Wolk, 1987; Hoye, 2001; Kaplan, 1994).

The WIL literature is substantial, but is nevertheless incomplete without considering the perspective of university lawyers. It is argued that the perspective of the university lawyer is essential for understanding how the risk of WIL is managed, given their central role in risk management. University lawyers can provide valuable insights about legal risk and risk management that can assist university management, WIL disciplines, and university lawyers all respond to the challenge of maximising the strategic value but minimising the legal risk of WIL programs.

Overall, this thesis makes an original and significant contribution to knowledge and understanding of risk management in WIL. In particular, this thesis:

1. Represents the first study of risk management in WIL from the perspective of university lawyers;
2. Describes and analyses two types of legal risk in WIL: program risk and contract risk. Contract risks have not previously been addressed as part of a systematic study of risk management in WIL programs. The research substantiates the existing literature pertaining to student disability and medical conditions, expands the range of workplace hazards considered to be program risks, and reveals student misuse of social media as a category of program risk;
3. Examines risk management in WIL through a lens of enterprise risk management (ERM). ERM is a contemporary risk management model being adopted in USA and Australian universities that has not been applied to the study of risk management in WIL;
4. Represents the first comprehensive explanation of risk management by university lawyers with respect to WIL programs. Risk management is not limited to the services that university lawyers deliver to manage legal risk, but represents a framework of practices, methods and strategies that support the university goals of maximising the strategic value and minimising the legal risks associated with WIL;

5. Describes and analyses strategic, organisational and stakeholder factors that may influence risk management by university lawyers in relation to WIL programs, and conceptualises these factors as a series of strategic, operational and reputational risks (“non-legal risks”) that university lawyers may encounter and manage as part of their risk management framework.

This thesis is also significant by virtue of its practical application for an intended audience of university management, WIL staff and university lawyers who share responsibility for managing the legal and non-legal risks in WIL programs. This intended audience can utilise the research to evaluate and improve risk management at their institutions. The key findings of the research which demonstrate the significant contribution of this thesis to risk management in WIL programs, as well as the implications and applications of the research, are outlined in Chapter Ten.

1.6 Research purpose

The primary purpose of this research is to explore risk management by university lawyers in the particular context of WIL programs. This exploration is designed to provide new insight for university management, WIL disciplines and university lawyers about the factors which may influence, as well as the strategies, methods and practices associated with, risk management by university lawyers. This insight could be applied to evaluate and improve risk management at a legal office, discipline and institutional level. The research findings may support the existing risk management framework, or may stimulate action to address organisational, strategic and stakeholder factors influencing risk management in relation to WIL programs.

A subsidiary purpose is to identify and describe university lawyers’ experiences of legal risk in relation to WIL programs. Although numerous empirical studies and cases have identified legal risks (Appendix A), there is no detailed account of university lawyers’ experiences in the literature. Such experience may reinforce the existing literature or may identify legal risks that demand further consideration as part of a university’s risk management framework, a framework which is a legal requirement in the prevailing higher education environment. A further aim is to provide greater awareness amongst WIL staff about the role of university lawyers in higher education. In fact the author’s lack of awareness of university lawyers was part of the catalyst for this thesis (section

1.9). A better appreciation of university lawyers may promote collaboration between WIL staff and university lawyers, both instrumental as risk managers with respect to WIL programs. The next section provides a brief description of the research design employed and the research questions posed to achieve the purpose of this research.

1.7 Research design and questions

This research utilises a mixed methods design to study risk management by university lawyers with respect to WIL programs. The first phase of the mixed methods design, a survey of 41 Australian university lawyers, aims to provide an initial understanding about the role of university lawyers, legal risk and risk management by university lawyers in the context of WIL programs, and to inform the qualitative design. The survey research questions formulated to gain this initial understanding are outlined in Table 1.2.

Table 1.2: Survey research questions

No.	Question
SQ1	What is the nature of legal work undertaken by university lawyers with respect to WIL programs according to academic discipline and legal area?
SQ2	What are the future legal risks to the university with respect to WIL programs?
SQ3	To what extent do university lawyers engage in risk management associated with WIL?
SQ4	What is the role of the university lawyer with respect to WIL programs?

The second and dominant phase of the mixed methods design is a case study of 13 university lawyers from 12 Australian universities. The case study emerged as the preferred qualitative design because it can garner a rich description of the legal risks experienced by university lawyers, the practices, methods and strategies they employ to manage legal risk, and the factors which may influence their risk management framework with respect to WIL programs. The qualitative and quantitative phases are mixed at two separate points of the research design: during the design stage when the survey results are applied to inform the case study (Chapters Three and Four), and during the case study (Chapters Five to Nine).

The research questions that apply to the overall thesis are outlined in Table 1.3. The empirical gaps in the university lawyer literature and the WIL literature, as well as in

the studies of legal risk (Appendix A), provided the basis for exploring university lawyers' experiences with legal risk and risk management as reflected in RQ1 and RQ2. The survey findings contributed to the design of RQ3. Issues ventilated by university lawyers about their role in relation to WIL programs (SQ4) triggered connections with the literature, inspiring RQ3.

Table 1.3: Thesis research questions

No.	Question
RQ1	What legal risks do university lawyers manage with respect to work integrated learning programs?
RQ2	How do university lawyers manage legal risk with respect to work integrated learning programs?
RQ3	What factors may influence risk management by university lawyers with respect to work integrated learning programs?

1.8 Key terms and scope of thesis

The key terms in this thesis are WIL, university lawyer, risk, legal risk, ERM and risk management. Each key term under the headings below is defined with reference to relevant literature in higher education; and the scope of the research being undertaken is clarified as it applies to the key terms. These key terms are important for appreciating the scope of this thesis.

1.8.1 Work integrated learning

The meaning of the term WIL can be a source of semantic confusion. It is a term used by different disciplines to describe similar processes of combining practical work and learning within a curriculum (Gardner & Bartkus, 2014; Orrell, 2011; Patrick et al., 2008). Other terms used to describe WIL include internship, cadetships, cooperative education, placement, practicum, clinical rotations/program/internship/clerkship, sandwich course/year, professional practice, service learning and experiential learning and fieldwork (AWPA, 2014; Cooper et al., 2010). WIL, unlike the other terms, makes explicit the purpose of the curriculum, distinguishing WIL from other forms of work-based learning that do not entail the integration of university study and practice (Smith, 2012). Volunteer work and work experience, both forms of work-based learning that

pose specific legal risks (Cameron, 2013) as demonstrated by recent USA case law (Jones & Seltzer, 2014), are not addressed in this thesis.

The following definition of WIL, as adapted from Jackson (2014) and Smith (2012), is proposed for this thesis: *A curriculum design which combines formal learning with student exposure to real professional, work or other practice settings.* The WIL programs studied in this thesis are what Smith and Worsfold (2014) describe as “placement-based WIL”: student exposure to real as opposed to simulated settings. Simulated settings include law students completing mock trials in a specifically designed moot court, medical and nursing students with simulated patients or aviation students using a flight simulator. The reason for limiting the scope of this thesis to placement-based WIL relates to the research problem. As previously discussed, WIL programs impose different legal risks for the university, with the major sources of that different risk being the participation of the host organisation and placement of students in a workplace environment. The unique risk profile of placement-based WIL is evident from the 12 reported Australian decisions and the studies identifying legal risk, which all involved placement-based WIL (Appendix A).

WIL programs in real workplace settings are diverse. They may be available to all students or to a select few. Students may be paid or unpaid. Universities may pay or not pay the host organisations for their participation. The WIL placement may be local, interstate, international or in a remote location. The WIL program may be a mandatory or elective component of a degree. Differences also exist in terms of the assessment, length and timing of placement, the method and level of integration of work and learning, and the supervision and university support for the student and host organisation (AWPA, 2014; Cooper et al., 2010; Forrester, Heel, & Henderson, 2005). Real workplace settings may be on-campus, such as physiotherapy and other health services clinics, or off-campus. This thesis seeks to describe university lawyers’ experiences of risk management across this diverse range of WIL programs. However it is necessary to reduce the scope of WIL programs addressed in this thesis to WIL placements in Australia as there are distinct legal risks associated with international WIL programs (refer Banks, 1985; Burch, 2010; Hoyer & Rhodes, 2000; Imperato, Bruno, & Sweeney, 2016).

1.8.2 University lawyer

A university lawyer is defined in this thesis as: *a qualified lawyer, employed by the university, who delivers legal services to the university*. The university lawyers studied in this thesis are in-house counsel only. This decision was dictated by the purpose of the research, that is, to provide a rich description of university lawyers' experiences of risk management that can be analysed for the benefit of university management, WIL disciplines and university lawyers. 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. The key difference between the two types of lawyers is that in-house counsel is employed by one client whereas external counsel delivers legal services to a variety of clients. Compared to their external counterparts, in-house counsel is more accessible to university staff (Peri, 2008); specialises in higher education law; is immersed in and familiar with the cultural and strategic nuances of the institution; is focused on the one client (the university) and develops experience in addressing recurring legal problems (Bealle, 1974; McCarty & Thompson, 1977, Sensenbrenner, 1974). Familiarity, accessibility, focus and expertise have the potential to promote "preventive lawyering", whereby in-house counsel can take action to prevent the manifestation of legal problems (Bealle, 1974). As a consequence, it was thought that in-house counsel is likely to be more involved with overall risk management in relation to WIL programs and thus could provide a richer understanding of their experiences.

1.8.3 Risk

Risk in higher education is generally defined by one or more of the following factors: probability of occurrence; consequences of event; and the event itself. For instance, Adams and Wall (1976) defined risk in terms of the likelihood of a financial loss from an event. This traditional perspective of risk in higher education is negative – events are viewed solely as a hazard to the university, which must be minimised (Ackley et al., 2007; Cassidy, Goldstein, Johnson, Mattie, & Morley, 2001; Edwards, 2012).

More recently, ERM has entered the lexicon of university management. ERM evolved from the private sector, a consequence of lessons learned from the high risk financing

strategies responsible for several business failures during the Wall Street crash of the late 1980's (Clyde-Smith, 2014). Empirical studies demonstrate that a number of universities in the USA are implementing ERM because of its perceived benefits, compared to the traditional "silo" approach to risk management in which university elements act in isolation from one another, detached from the goals of the university (Ackley et al., 2007; AGB & UE, 2014). There is also evidence that ERM is being adopted by Australian universities (Clyde-Smith, 2014) and it is suggested that the risk-based approach to higher education regulation in Australia represents a model of ERM (Padro, 2014). This thesis proposes the following definition of risk, as adapted from Mattie (2007): *Any issue that influences, positively or negatively, the university's ability to meet its objectives*. The definition is consistent with the dual and holistic perspectives of risk articulated by ERM.

1.8.4 Legal risk

The broad definition of risk drawn from the ERM literature in higher education encompasses a range of operational, reputational, strategic, financial and compliance issues (or risks) that may impact on the university's ability to meet its objectives. Strategic risk is an issue that affects the university's ability to achieve the goals specified in university strategy, whereas operational risk is an issue that affects those day-to-day operations of the university that are necessary to achieve the goals (Ackley et al., 2007; Cassidy et al., 2001). Financial risk is about the potential loss of assets and reputational risk is associated with the university's prestige, standing, or brand (Blustain et al., 2016). Compliance risk, which is a form of legal risk, refers to compliance with external as well as internal legal and regulatory requirements (Ackley et al., 2007; Cassidy et al., 2001).

The following definition of legal risk, based on the existing literature, is proposed for this thesis: *An event or circumstance that exposes the university to the possibility of liability or non-compliance with external or internal rules and regulations*. External rules and regulations include case law and statute, whereas internal rules and regulations such as contracts, policies, procedures and codes are created by and/or adopted by universities themselves. Legal risk here is defined in terms of the event or circumstance and not the probability or the consequences of the event. The probability of the event is assessed as part of the risk management process. The negative consequences of a legal

risk are implicit. A university that does not comply with rules or regulations may encounter financial loss, loss of reputation, lost time and other costs, as well as related staff and student attraction and retention issues.

The definition of legal risk reduces the scope of this thesis in two respects. First, legal risk in the definition refers to the university and not to the student, the WIL staff, the host organisation or its related parties (clients or employees). The same event or circumstance may be a legal risk to multiple parties, but the university lawyer is engaged to provide legal services to one party, their employer and “client”, being the university. The second limitation relates to the categorisation of legal risk as distinguished from other risks to the university, such as ethical risks (refer Anderson, Kanter, & Slane, 2004; Mark, 2001) and the strategic, financial, operational and reputational risks referred to in the ERM literature (Ackley et al., 2007; Cassidy et al., 2001, Mattie, 2007). Legal risk is the primary risk category addressed in this thesis because the unit for analysing risk management in relation to WIL programs constitutes university lawyers. University lawyers provide legal services to the university. As will be demonstrated in Chapter Two, preventive lawyering or the management of legal risk is an important part of that legal service delivery. This is not to suggest that university lawyers do not manage other risks or that legal risk is not related to the other risk categories. Although risk management by university lawyers is studied through the lens of legal risk, the case study will reveal in Chapters Eight and Nine that university lawyers may also encounter and manage operational, strategic and reputational risks when delivering legal services related to WIL programs. These categories of risk may also be interrelated, in that the same event or circumstance may generate legal, operational, strategic, financial and/or reputational risk. For example, the WIL program represents a strategic risk (an opportunity) as well as a legal risk (hazard) to the achievement of the university’s objectives. The task of the university in risk management is to maximise the return from WIL as a strategic activity but to minimise the legal hazard that WIL entails. The university lawyer is centrally involved with minimising the legal hazards.

1.8.5 Enterprise risk management

The following definition of ERM, as adapted from Abraham, Baird, & Neugebauer (2013), Ackley et al. (2007), AGB & UE (2014), Kaplin & Lee (2013) and

Mattie (2007), is proposed for this thesis: *A comprehensive process of managing risks across the university that may affect the achievement of university objectives related to its core activities in learning and teaching, research, and service.* There are five features which distinguish ERM, as it applies to universities, from the traditional perspectives of risk and risk management:

1. *Dual perspective on risk:* Risks are conceptualised as opportunities (positive) as well as hazards or threats (negative) to the university (Abraham et al., 2013; Cassidy et al., 2001; Clyde-Smith, 2014). ERM involves universities managing the opportunities and minimising the hazards (Mattie, 2007);
2. *Holistic perspective on risk:* Risks represent issues across the university that can affect the university's ability to meet its objectives (Blustain et al., 2016; Mattie, 2007; Tufano, 2011);
3. *Strategic focus of risk management:* Risk management is "mission centred" (Tufano, 2011), linked to institutional governance and aligned with the goals and objectives of the university (Mattie, 2007);
4. *Shared responsibility for risk management:* All parts of the university are involved with and share responsibility for risk management (Ackley et al., 2007; Blustain et al., 2016); and
5. *Integration with traditional risk management:* The distinguishing features of ERM are integrated with traditional risk management (Ackley et al., 2007).

This thesis examines risk management in WIL through a lens of ERM. A description and analysis of whether the universities allied to the university lawyers studied have implemented ERM is beyond the scope of this thesis. Nevertheless, it is argued that ERM offers a contemporary and insightful perspective on the research topic for an intended audience of university lawyers, university management and WIL staff. ERM is being adopted in many USA and Australian universities because of its perceived benefits, and university lawyers in the USA are presently involved in the process of developing and implementing ERM frameworks (AGB & UE, 2014). WIL is also an appropriate activity for viewing through an ERM lens. WIL is a risk that involves academic disciplines across the university (holistic perspective on risk) and offers strategic opportunities as well as legal hazards (dual perspective on risk). The distinguishing features of ERM will be identified and analysed at various points of the

case study, as they relate to risk management by university lawyers. In particular, the cross-case analysis in Chapters Six to Nine will discuss the findings from an ERM perspective.

1.8.6 Risk management

ERM expands traditional concepts of risk and risk management, but it does not replace the underlying process. Traditional risk management is subsumed within ERM (Ackley et al., 2007; Cassidy et al., 2001) 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 (Adams & Wall, 1976; Bennett, 1990; Cooper et al., 2010; Miller, 2010). There are four main approaches to managing risk identified in the literature: risk avoidance, risk control (or reduction), risk transfer (or shifting) and risk acceptance (or retention). A combination of two or more approaches is often used to address a risk (Adams & Wall, 1976, Bennett, 1990; Sonenstein & Kumin, 1998). Risk avoidance may involve eliminating the activity, conditions or programs that create the risk (Abraham et al., 2013; Janosik & Andrew, 1985; Kaplin & Lee, 2013; Manock, 2002). In the context of WIL, the most extreme form of risk avoidance would be a decision to withdraw the WIL program from the curriculum. However such action could undermine university objectives of delivering WIL placements (a strategic risk). Another practice associated with risk avoidance in WIL is removing a host organisation from a list of potential WIL placement sites (Miller, 2010).

Risk control involves actions which reduce the frequency or impact of the risk (Kaplin & Lee, 2013). In a higher education context this could include staff training programs; a requirement for a party to obtain insurance; policies and procedures; incident reporting and site inspection and maintenance (Abraham, 1999; Bennett, 1990). 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) (Abraham et al., 2013; Kaplin & Lee, 2013). 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 (Sonenstein & Kumin, 1998).

Based on this discussion and on the findings from the case study, the following definition of risk management is proposed: *the practices, methods and strategies used to address risk*. The definition of risk management emerged from the case study and is purposively broad so as to capture the risk management experiences of university lawyers in the case study (Chapters Five to Nine). 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. This definition is also consistent with the strategic focus of risk management articulated by ERM.

A study of risk management by WIL staff is outside the scope of this thesis for two reasons. Firstly, there is a substantial body of literature, including texts, empirical studies and guides, which articulate actual risk management by WIL staff as well as risk management recommended for WIL staff (Baird, 2011; Cooper, Orrell, & Bowden, 2003, 2010; Emslie, 2009a, 2009b; Gaberson & Oermann, 2007; Gordon, McBride, & Hage, 2004; Jones, Glynn, & Francis, 2012; Maidment, 2003; Miller & Seidler, 2010; Moore & Urwin, 1991; Reeser & Wertkin, 2000; Storrie, Ahern, & Tuckett, 2011; Valentine, Gandy, Burry, & Ginsberg, 1994). Conversely, and as previously discussed in this chapter (section 1.5), there is a lack of research addressing risk management by university lawyers in the specific context of WIL programs. The literature that does exist is predominantly written from the perspectives of academics and WIL staff and includes no known empirical studies of university lawyers.

1.9 Researcher position

The research topic has its origins in 2009. At that time the author was a WIL convenor of two WIL programs: a professional development program (refer Freudenberg et al., 2010) and an economics internship course (refer Cameron et al., 2013). During the economics internship, a host organisation insisted that the student and an authorised representative of the university sign a contract prepared by its in-house counsel as a condition of the WIL placement. Further investigation of university policy to identify an authorised representative revealed the university lawyer, a type of in-house counsel previously unknown to the author. As a practising lawyer, the author was

interested in exploring the university lawyer's role with specific reference to WIL programs, being a particular area of academic interest. The influence of the author's experiences as a lawyer and as a WIL convenor, on the decisions made during the research, will be reflected upon at various points in the thesis. For instance in this chapter the author's experiences influenced the selection of the research topic, university lawyers as a unit of analysis, and the study of reported decisions involving action against the university in relation to WIL programs.

1.10 Central argument and outline of thesis

The central argument of this thesis is that risk management by university lawyers represents a framework of practices, methods and strategies which address program and contract risks in WIL programs and which support the university goals of maximising the strategic value and minimising the legal risks of WIL. The risk management practices and methods of university lawyers are intended to facilitate the delivery of WIL placements for students and to facilitate risk management by WIL disciplines. Strategic, organisational and stakeholder factors which may influence the risk management framework of university lawyers also generate strategic, operational and reputational risks that university lawyers may encounter and manage. These risks, in addition to the legal risks, affect the ability of the university to achieve its goals in relation to WIL. The central argument of this thesis is illustrated in Figure 1.1.

Figure 1.1: Risk management by university lawyers in relation to WIL programs

The structure of the thesis is as follows. Chapter Two begins with an overview of university lawyers in Australia, followed by a detailed analysis of the university lawyer literature and the WIL literature. This analysis reveals a gap in the literature, labelled the “empirical gap”, which is addressed by this mixed methods study of university lawyers. Chapter Three describes the evolution and characteristics of the mixed methods design. The characteristics of the quantitative (survey) and qualitative (case study) phases of the design include a discussion of the research questions, ethical considerations, sample selection, data collection, data analysis and the limitations of the research. Chapter Four presents the results of a survey of 41 university lawyers concerning their role, legal risk and risk management with respect to WIL programs. A series of observations are made which inform the case study design.

Chapters Five to Nine represent the case study, with the chapters organised according to the thesis research questions. Chapter Five identifies and describes the two types of legal risks that university lawyers manage with respect to WIL programs: contract risk and program risk. Chapters Six and Seven examine the practices, methods and strategies university lawyers employ to address legal risk. The risk management strategy of university lawyers is to facilitate the delivery of WIL placements for students and to facilitate risk management by WIL disciplines. To execute this strategy, university lawyers are pragmatic and accessible, ask staff questions, garner external support for risk management practices, and communicate and collaborate with WIL staff, insurance-risk and lawyers from other universities when advising, educating, drafting and reviewing various WIL instruments in relation to WIL programs.

Chapters Eight and Nine address the organisational, strategic and stakeholder factors that may influence risk management by university lawyers in relation to WIL programs. Strategic factors relating to the goals and objectives of the university and organisational factors associated with the day-to-day operation of the legal office may influence the risk management framework of university lawyers (Chapter Eight). Chapter Nine examines the potential influence on risk management by university lawyers of the two main stakeholders in the WIL program: the host organisation (external); and the WIL discipline on behalf of the university (internal).

The final chapter, Chapter Ten, draws together the cross-case analysis and findings of the case study to support the central argument of the thesis. This chapter describes the

key insights from the case study and discusses the broader applications and implications of the research. It then outlines a series of considerations for improving risk management that can be utilised by university lawyers, WIL disciplines and university management to evaluate and improve risk management at their own institutions. These considerations not only apply to WIL programs; they may extend to other university activities requiring the services of a university lawyer. The thesis concludes with opportunities for future research.

1.11 Conclusion

WIL programs are indeed a risky business for universities. WIL is a strategic risk worthy of pursuing by universities in the prevailing higher education environment, which is characterised by competition, changes in funding arrangements and stakeholder demand for WIL. Nevertheless the strategic opportunities that WIL presents cannot be achieved without the university taking on unavoidable and distinct legal risks that may have serious financial and reputational consequences for the university. The challenge for universities is to maximise the strategic opportunity that WIL presents but to minimise the legal hazards it entails. University lawyers are involved with meeting that challenge as part of their delivery of legal services to the university. However, the literature review in the next chapter reveals that, to date, risk management by university lawyers has not previously been the subject of empirical study in the specific context of WIL programs. The mixed methods study of university lawyers which follows the literature review seeks to deepen understanding about risk management in WIL for the benefit of university lawyers, WIL disciplines and university management. With this deeper understanding, the fertile ground of learning that WIL provides to students can continue.

Chapter Two: Risk management by university lawyers

2.1 Introduction

This chapter examines the field of risk management by university lawyers. Chapter One discussed the strategic value of WIL but also the legal threats associated with WIL that could have significant operational, financial and reputational consequences for the university, should they materialise. The studies of legal risk tabulated at Appendix A and the summary of case law addressing legal risks in WIL programs provided context to this research problem. The purpose of Chapter Two is to discuss and analyse the role of the university lawyer as it applies to risk management.

Chapter Two begins with a review of the “university lawyer literature”, a category of literature that describes and analyses the university lawyer’s role in higher education, along with empirical studies of university lawyers. This is followed by a review of the “WIL literature”, a second category of literature addressing risk management in relation to WIL, which identifies the university lawyer or is authored by a university lawyer. The literature review confirms that there is no empirical study of university lawyers with respect to risk management in WIL programs. The concluding sections of this chapter explain how the literature guided the development of the thesis research questions and articulates four aspects of this thesis which make an original and significant contribution to the literature about risk management in WIL.

2.2 University lawyer literature

In this thesis, risk management in WIL is studied from the perspective of the university lawyer. University lawyers, along with WIL staff and university management, are responsible for risk management in WIL programs. The following section first discusses university lawyers in Australia and then reviews the literature that describes and analyses the role of the university lawyer in higher education and the issues associated with that role. Empirical studies of university lawyers are then considered.

2.2.1 University lawyers in Australia

University lawyers are an integral part of educational management in Australian universities, but their prevalence and role is largely absent from the literature. Unlike

the United States of America (USA), there is a scarcity of research and consideration of Australian university lawyers. A 1999 conference paper and a 2008 conference presentation 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 (C. Hammond, personal communication, January 13, 2014). Fleming (1999) 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.

An analysis of Australian university websites 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; are engaged in dispute resolution and litigation; train and educate university staff; deal with subpoenas and other court documents; and co-ordinate 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.

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 USA literature also provides a basis for comparison with the mixed methods study of Australian university lawyers, as it applies to WIL programs. The next section describes the various duties or "roles" of the university lawyer when delivering legal services to the university, with a focus on any roles which can provide insight about risk management by university lawyers.

2.2.2 Roles of the university lawyer

Broadly, the university lawyer in the USA is engaged to support the institutional goals and objectives of the university that are related to teaching, research and service (Daane, 1985; Orentlicher, 1975). University lawyers have categorised their duties into a variety of roles, including those of spokesperson/liaison, manager, insulator and dispatcher, litigator, mediator, educator, draftsperson and reviewer, advisor and regulator (Bickel, 1974; Daane, 1985; Dunham, 2010; Orentlicher, 1975). The role of the university lawyer can also be defined by the type of legal service delivered. University lawyers fulfil their role by engaging in “treatment law” and in “preventive [or preventative] law” (Bickel, 1974; Corbally, 1974; Daane, 1985; Kaplin & Lee, 2013; Sensenbrenner, 1974). Treatment law requires the university lawyer to resolve an actual legal process such as litigation by or against the university, or non-compliance with internal regulations. In contrast, a university lawyer practising preventive law takes action before legal problems arise (Kaplin & Lee, 2013). Studies by Campo (2009) and Hustoles (2012) establish that university lawyers do spend considerable time with preventive law situations and that university management does use university lawyers to assist with risk prevention. Risk management by university lawyers, an evident component of preventive law, is made explicit in the four roles of advisor, educator, draftsperson and reviewer. Two additional roles of the university lawyer that may apply to risk management emerge from the literature – the university lawyer as collaborator and the university lawyer as facilitator. These six roles are next addressed.

Advisor

The traditional and visible role of the university lawyer is as *advisor*. The university lawyer is advisor to the university as both their employer and client (Daane, 1985; Lathi, 1976). When presented with a proposed course of action, the university lawyer may be required to articulate and assure compliance with the relevant State and university regulations, outline the risks and benefits to the university associated with the action and make recommendations. In this way, university management can better understand the issues involved and thereby make informed decisions (Bickel, 1993; Epstein, 1974; Kauffman, O’Neil, Post, & White, 2001). Bickel (1974) argues that the delivery of this preventive advice is the “primary thrust of the attorney’s responsibility to the university”, which may save the institution from challenges to its decisions (p.

77). As an advisor, and one who is educated about new legal developments, the university lawyer also needs to anticipate future legal risks and to guide the academic administrator on how to address them (O'Neil, 1993; Ruger, 1997).

Authors emphasise the distinction between advice and decision-making and the independence of the university lawyer in their advisory role. As Kaplin and Lee (2013) note, "the purpose of preventive law is not to make the administrator into a lawyer or the lawyer into an administrator" (p. 164). The university lawyer assesses and articulates the risks of an activity, in terms of both hazards and opportunities, to the academic administrator. It is then the academic administrator who makes a decision about whether to pursue the activity (Bickel, 1993; Kauffman et al., 2001). The university lawyer is also positioned within a decentralised organisational structure in which legal services can be requested by a wide range of parties (Fleming, 1999). As such, the university lawyer's independence is frequently cited in the literature. The university lawyer needs to deliver fearless and frank advice to the university (as client) so as to avoid conflicts of interest between the university and its representatives (Daane, 1985; Fleming, 1999; Kaplin & Lee, 2013).

Educator

In guiding university management, the university lawyer can also function as an *educator*. Education may require the university lawyer to communicate their role to the academic administrator, to address frequently asked questions, to provide resources to identify potential legal issues (Ward & Tribbensee, 2003), to educate the administrator as to high risk areas which require review of documents by university lawyers (Sensenbrenner, 1974), as well as to monitor and communicate legal developments to university management (Ruger, 1997; Samels & Martin, 2015). As a matter of preventive lawyering, Kaplin and Lee (2013) recommend that university lawyers arrange training for university management and staff that addresses "the legal aspects of their professional responsibilities and the legal implications of their actions" (p. 165). Teaching is not a lawyer's traditional function, but it can be an integral risk management practice in the university setting (Daane, 1985), as it increases the legal literacy of those involved.

Drafter and reviewer

A request for legal services may require the university lawyer to perform the multiple roles of advisor, drafter and reviewer of documents (Daane, 1985; Sensenbrenner, 1974). In particular, the literature has focused on the role of university lawyers with policy in the context of risk management. University lawyers identify the problems that create legal risks, review the relevant law, generate policy options for resolving the problem, examine the legal risks associated with each policy option tendered by university lawyers and university management, and then participate in drafting the new policy (Kaplin & Lee, 2013). Good risk management practice also dictates that university lawyers review existing policies and practices to ensure compliance and procedural fairness, and advise university management accordingly (Bickel, 1993; Kaplin & Lee, 2013; Thomas, 1998). This is particularly important in light of any new legal developments (Ruger, 1997). For example, an amendment to discrimination legislation may require the university lawyer to review and draft variations to the university's equal opportunity policy. However, in drafting, reviewing and providing advice, the university lawyer facilitates the making of policy only – the policy is not made until it is approved by the relevant academic administrator (Kauffman et al., 2001). Collaboration and facilitation are two additional roles that appear to support risk management by university lawyers.

Collaborator

The university lawyer may perform the role of collaborator when providing advice, educating university management, and drafting and reviewing documents. The literature emphasises the importance of communication and collaboration in three relationships: university lawyers and university management; university lawyers and the operational division responsible for insurance and risk related matters at the university (insurance-risk); and among university lawyers. University lawyers collaborate with their colleagues from other universities (Fleming, 1999; Glick, 2014; Ruger, 1997). Fleming acknowledges that, in the Australian context, networks with lawyers at other universities are a valuable resource in a legal office with limited resources, and describes the nature of the collaboration:

Apart from meeting on a quarterly basis, we often e-mail each other to “bounce” ideas, or alert each other to problems. For example, university lawyers across Australia recently co-operated to insist (successfully) on changes to some rather unacceptable terms of a contract to which all Australian universities were a party. (Fleming, 1999, p. 11)

In the USA, Ruger (1997) argues that legal practice in higher education is collaborative, that the National Association of College and University Attorneys (NACUA), the peak professional body for university lawyers in the USA, has contributed to fostering a sense of community among university lawyers and that this spirit is evident in most university legal offices. Glick (2014) provides some empirical evidence of collaboration between USA university lawyers, having interviewed 20 university lawyers about how institutions learn from each other when responding to the law, as part of a broader research project. Findings included that universities collaborated to solve legal problems, with one university lawyer acknowledging that “there is a lot of sharing and we probably end up with a lot of policies that look very similar” (p. 362).

University lawyers should also collaborate with insurance-risk about insurance coverage to alleviate university staff concerns about personal liability (Kaplin & Lee, 2013), and to ensure that the university receives the maximum benefit from its insurance policies (Ende, Anderson, & Crego, 1997). Insurance personnel deal with insurance-related matters, including the adoption and variation of policies and the handling of claims made by or against the university, whereas university lawyers educate, advise and prepare and review documents designed to prevent the manifestation of legal risk. Nevertheless, university lawyers and insurance personnel have been described as “natural allies”: they are both in the business of risk management and both wanting to protect the university from a litigious environment (Ende et al., 1997, p. 716). University lawyers collaborate with insurance-risk when reviewing and finalising insurance policies, particularly coverage of risks, by combining their expertise in insurance, risks to the university, legal interpretation, and knowledge of settlements and judgements concerning the manifestation of legal risks (Adams & Wall, 1976; Ende et al., 1997). The legal knowledge of university lawyers and knowledge of the insurance market and customs retained by insurance-risk can be complementary. A university lawyer working closely with insurance-risk can understand the fundamentals of

insurance coverage and can apply their legal and insurance knowledge to improve university insurance programs (Ende et al., 1997).

Risk management by university lawyers can be contingent upon the academic administrator involving the university lawyer before any legal crisis occurs (Bickel & Ruger, 2004), and before any decisions are made by the academic administrator (Epstein, 1974). Equally, collaboration with university management requires the university lawyer to understand the administrator's purpose of the activity within the broader context of achieving institutional objectives, to apply their legal knowledge and to work with the administrator to manage the legal risks (Bickel & Ruger, 2004). Collaboration equips university lawyers with an intimate understanding of university operations, thereby assisting them in anticipating legal risks and identifying university areas which require greater allocation of legal resources because of their higher risk (Bickel, 1974). The importance of understanding and timing in collaboration is supported by recent empirical research. A study by Hustoles (2012) in the USA included open ended questions which invited university lawyers to recommend ways in which department chairs could deal more effectively with legal risk and risk management. The prominent themes in the responses of university lawyers included the importance of department chairs contacting university lawyers early regarding problems, and the recognition by department chairs of the university lawyer as a resource, as well as greater university lawyer involvement with department chairs through timely legal advice, education, and other relationship building activities.

Facilitator

The university lawyer may also execute the role of facilitator when providing advice. The primary objective of providing advice is to facilitate activities which achieve university objectives. Scaduto succinctly describes the facilitative approach in this way: "A counsel's role is not to tell people what they cannot do, but to help them accomplish what they want to do" (in Lipka, 2005). Corbally (1974), drawing on his experiences with university lawyers as an academic administrator, initially alluded to the facilitative approach of university lawyers to risk management. The university lawyer tends to be a "conservative voice in the management team", raising questions of university management about processes and procedures (p. 4). Whilst others perceive the university lawyer to be obstructive, Corbally's experience was that university

lawyers worked with university management to achieve a common objective. Daane (1985) refers to Corbally (1974) and expands this initial conception by analogising the university lawyer as a facilitator:

There will be times, for example, when the lawyer's advisory role will be to flash a red stop signal and thus to prevent a statutory violation or some other problem. Much more often, however, the lawyer's role is to facilitate the accomplishment of an institutional objective in a way consistent with the law. The red light function is important, but the green light should shine more often. (Daane, 1985, p. 409)

More recently Ward and Tribbensee (2003) relied on the "facilitator university" model originally devised by Bickel and Lake (1999) and further developed by Lake (2013) to argue that the goals and mission of the university, as well as legal issues should be considered by university lawyers when advising the client. According to Lake (2013), the facilitator university is a social and legal model which can strike an appropriate balance between university control and student freedom to provide a fair allocation of legal rights and responsibilities between university and student that maximises student safety and promotes the mission of the university. Students and the university share the responsibility for student safety. The facilitator university accepts reasonable risk as part of its mission because students can learn from risky activities. Students have the freedom to participate in the activity which creates risk, but the university is responsible for ensuring the risk is reasonable through appropriate planning as well as providing guidance, warning and instruction to the student so that they can make an informed decision about the activity and its attendant risks. Legal rules can formalise this shared responsibility by requiring universities to take reasonable care to prevent foreseeable risks and for students to accept the responsibility of obvious risks.

Ward and Tribbensee (2003) appear to focus solely on the university mission component of the facilitator university model to make the same point as Corbally (1974) and Daane (1985) – the significance of university objectives when university lawyers work with university management. For instance a university lawyer taking a facilitative approach does not simply advise an academic administrator that a proposed activity is illegal or possesses obvious risk, but asks questions to understand the goal of the activity or its relationship to the mission of the university (Ward & Tribbensee, 2003).

The lawyer may suggest alternatives that minimise risk or that achieve the goal, thereby giving an activity the “green light”. A recent dissertation study of three university lawyers in the USA by Block (2014) suggests that some university lawyers perceive their role as someone who facilitates, but does not make a decision, on a course of action. As one university lawyer put it: ““you just realize that this deal’s not going to get done unless ... you, as the attorney, put together the building blocks to make a deal happen”” (p. 89).

The preceding discussion on the role of university lawyers in higher education is instructive to this thesis because it offers some insight into the possible risk management practices, methods and strategies of university lawyers in the context of WIL programs (Chapters Six and Seven). The literature intimates that risk management by university lawyers is not confined to their practices but may involve a broader framework of practices, methods and strategies. The roles of the university lawyer as advisor, educator, drafter and reviewer of documents represent their risk management practices: the services that are designed to manage legal risk, delivered by university lawyers to representatives of the university. However, collaboration with outside university lawyers, university management and insurance-risk and the facilitation of activities that achieve university objectives are not risk management practices of university lawyers. Collaboration may be a risk management method, that is, how university lawyers approach their risk management practices; facilitation may be characterised as a strategy, employed by university lawyers, which is aligned with the university goals of maximising the strategic risk and minimising the legal risks associated with WIL. University lawyers may not only facilitate the delivery of WIL activities that can meet university objectives in the sense described by Daane (1985); they may also facilitate risk management by WIL disciplines.

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. Whilst the issues are not explicitly made in the context of WIL programs, they may represent factors in the case study which may influence the risk management framework of university lawyers (Chapters Eight and Nine).

2.2.3 Issues with university lawyer role

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 (Bealle, 1974; Bickel, 1993; Lipka, 2005; Peri, 2008) and the identification of the client, so as to avoid conflicts of interest in the delivery of legal services (Daane, 1985; Fleming, 1999; Kauffman et al., 2001; Ruger, 2007; Sensenbrenner, 1974). 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 (Aronson, 1977; Drinan, 1993; Kaplin & Lee, 2013; O'Neil, 1993). Two additional issues in the literature are particularly relevant to risk management by university lawyers: access to legal services by the academic administrator and the conduct of the academic administrator with respect to legal services.

Budgetary issues and university policies limiting access by university management to legal services may impede risk management by university lawyers. Fleming (1999) argues that university policy which requires charging university departments for legal services prevents access: "In my experience, financially-stretched departments will delay seeking advice if they have to pay for it – and then the bomb will then go off, and the legal department will have to pick up the pieces" (p. 13). University policy and processes may also limit access, for example, by requiring the academic administrator to "go through a chain of command" before obtaining legal advice (Schimmel & Nolan, 2005, p. 472). Whilst Daane (1985) acknowledges that some restrictions are necessary to prevent frivolous concerns, a bureaucratic approval process may prevent the university from addressing legal problems at an early stage (Ruger, 2007).

Public funding cuts to universities, with resulting budget cuts to legal services departments, have placed additional workload pressures on university lawyers, further compounded by the growth of demand for legal services (Bickel & Ruger, 2004). This creates a conflict between the duty of a university lawyer to provide competent and timely advice, and meeting the demands of a large workload (Ruger, 2007). The study by Hustoles (2012) suggests that access to legal services remains a live issue in the American higher education system. University lawyers recommended that department chairpersons could deal more effectively with legal risk and risk management by

increasing the number of university lawyers and by removing limitations on who can access legal services.

University lawyers have identified the university's own representatives as a potential impediment to their role. Whilst the academic administrator is not prevented from disregarding legal advice, they may deliberately and repeatedly disregard, circumvent or misuse legal advice (O'Neil, 1993). A repeated disregard may not only expose the university to greater legal risk but may also erode the relationship between academic administrator and university lawyer (Ruger, 2007). An example of misuse is the administrator who claims that “we checked it carefully with our lawyers” when this did not in fact occur (O'Neil, 1993, p. 339), or if they acted on legal advice, the administrator provided the lawyer with an incomplete or different fact scenario to that which actually exists (Epstein, 1974). Inadvertent conduct may involve the academic administrator who fails to disclose material facts because they are unaware of its legal importance (C. Hammond, personal communication, January 13, 2014) or who approaches the university lawyer for advice after the action which creates the legal risk has been taken (Epstein, 1974; Schimmel & Nolan, 2005).

The issues ventilated by university lawyers are not targeted at WIL programs or part of any empirical study. Nevertheless from this literature, factors which may influence risk management by university lawyers in the specific context of WIL can be postulated (Chapters Eight and Nine). This may include access to legal services, and the conduct of the recipient of legal services, as well as the resources of the legal office. The next section completes a review of the university lawyer literature by examining three categories of research into university lawyers: the work of university lawyers, the perceptions of current and future legal issues and risk management by university lawyers. The empirical gap in the literature, with respect to risk management by university lawyers in the context of WIL programs, will be summarised in the concluding section.

2.2.4 Empirical studies of university lawyers

The preceding discussion of university lawyers' role and issues reveals the primary gap in the literature – there appear to be no empirical studies in the world that address risk management relating to WIL programs from the perspective of university

lawyers. To provide further assurance of this, the NACUA was contacted, as it provides member-only access to surveys of American university lawyers. The NACUA confirmed that the surveys to date do not include information relevant to legal risk, risk management or WIL programs (A. Wilder, personal communication, July 20, 2014).

Empirical studies of university lawyers can be divided into three general categories. The first category is the demographical representation and work of university lawyers (Bealle, 1974; Block, 2014; Frank B Manley & Co, 1992; Glick, 2014; Geary, 1975; Gregory, 1987; Rupe, 2005; Thompson, 1977; Weber & Oswald, 1968; Wheeler, 1972). The second category is their perceptions of current and future legal issues (Elleven et al., 1997, 1997; “Pressing legal issues”, 2004; Schimmel and Nolan, 2005; Turcotte et al., 2016). The third category is risk management (AGB & UE, 2009, 2014; Campo, 2009; Hustoles, 2012). All three categories are USA-centric and, with the exception of Turcotte et al. (2016), the studies do not focus on explicit higher education programs such as WIL. These three categories, with particular focus on studies that may provide insight for this thesis, are discussed below.

Work of university lawyers

Existing studies involving the work of university lawyers tend to pre-date the rise of WIL and are quantitative in nature, such that they offer little in the way of insight in relation to WIL program risk management. At best the quantitative studies provide support for the various roles of university lawyers described in the literature (section 2.2.2). For instance, Geary (1975) confirmed that American university lawyers spent most of their time in providing legal advice and counsel to academic administrators, drafting and reviewing documents and internal rules, dealing with equal opportunity and affirmative action and handling faculty and staff problems. Gregory (1987) found that the majority of university lawyers’ time was spent on operational duties as opposed to policy-making duties. The last of the quantitative studies was by the NACUA in 1992 (Frank B Manly & Co, 1992). According to the study, the most time-consuming activity, and the activity which increased most during the past five years for the 166 university lawyers surveyed, was “preparing/reviewing documents”. More recent studies are qualitative but focused on particular aspects of American university lawyer experiences: perceptions of academic freedom (Rupe, 2005), the influence of legal office structure and the campus environment on their role (Block, 2014), and policy

making through mimicking or modifying existing policies of other institutions (Glick, 2014). WIL is not an aspect pertaining to the work of university lawyers that is examined in any detail.

A recent study by Block (2014) does have potential relevance to the organisational factors which may influence risk management by university lawyers addressed in the case study (Chapter Eight). One part of Block's study involved interviews with three American university lawyers to explore their perceptions of their roles. The findings suggest that the campus environment, campus leadership and size and structure of the legal office may be factors which influence university lawyers' perceptions of their role. For example one participant, who was employed in a legal office with just two university lawyers, lamented that the legal office did not have sufficient time to facilitate campus discussions about potential legal issues or to personally focus on university policy – both risk management practices. Conversely, the other two participants, who were part of a legal office with over 10 university lawyers, could spend more time with clients and issues. The larger legal offices also had a hierarchical structure comprising of general counsel, associate general counsels, and assistant general counsels, in which the general counsel would deal with high profile matters, with lower level problems the responsibility of associate and assistant general counsels. The size and structure of the legal office are descriptive statistics that can be collected and addressed in the case study to determine whether they have any influence on risk management by university lawyers.

Perceptions of current and future legal issues

Studies on present and future legal issues provide signposts towards issues that may be relevant to WIL programs. These signpost issues include disability discrimination, technology, sexual harassment and negligence. With one recent exception (Turcotte et al., 2016), the results are not in response to specific questions about WIL and may not simply be extrapolated to WIL, due to its distinct risk profile compared to traditional study programs. Furthermore, the studies by Schimmel and Nolan (2005) and Elleven et al. (1997, 1997) were quantitative, meaning that university lawyers did not have the opportunity to explain why particular legal areas were present and future issues for universities, nor to describe their own experiences. A qualitative study may have revealed that some of these legal issues originated in WIL programs.

The Chronicle of Higher Education reported on a panel discussion of 10 American legal experts (including eight university lawyers) who were asked: “what will be the most pressing issues that higher education institutions will confront in the next five years?” University lawyers identified privacy law and access and accommodations for students with disabilities as pressing legal issues but did not relate their experiences to specific higher education programs such as WIL (“Pressing legal issues”, 2004).

The study by Turcotte et al. (2016) did relate the experiences of university lawyers, WIL staff and representatives from host organisations to WIL programs. Drawing in part on the synthesis of the WIL literature (Table 2.1) as well as the findings of the survey (Chapter Four) published by Cameron and Klopper (2015), the authors examined the impact of current legal issues impacting WIL programs in Ontario, Canada and recommended steps to improve existing legal frameworks and university processes. However the findings are limited, as they apply to perceptions of legal issues by university lawyers. Legal issues were predominantly addressed from the perspective of WIL staff and host organisation representatives, with only two of the 19 interview participants being university lawyers. The study did not present or analyse the responses of university lawyers in isolation. As a consequence, no conclusions can be drawn about legal risk from a university lawyer perspective alone. Further, the interview participants identified the legal issues associated with WIL programs, but the subsequent description and analysis involved case law and legislation that applied to the legal issues.

The discussion of legal risk by Turcotte et al. (2016) through the prism of black letter law is not to detract from the significance of the research findings. In fact, following the survey research in this thesis (Chapter Four), it was recommended that a study of the law underpinning the legal risks would provide greater understanding of the university’s potential liability to various parties associated with WIL (Cameron & Klopper, 2015). It is argued that the experiences of university lawyers described and analysed in this thesis may provide new insight about legal risk that can then be applied by stakeholders to evaluate and improve risk management with respect to WIL programs.

Risk management by university lawyers

Studies in risk management are primarily addressed from the perspective of university management. The Association of Governing Boards of Universities and

United Educators (AGB & UE, 2009, 2014) examined the use of, acceptance of and attitudes towards enterprise risk management (ERM) in American colleges and universities. University lawyers represented 9.8% of the 921 respondents in the 2014 survey and 6.5% of the 489 respondents who stated their position in the 2009 survey. The studies do not present or analyse the survey responses of university lawyers in isolation. As a consequence, no conclusions can be drawn about risk management from a university lawyer perspective alone.

Campo (2009) interviewed 29 education leaders (Presidents, Vice Presidents and university lawyers) in universities and colleges from New York State, USA on a range of legal issues for the purpose of identifying risk management mechanisms. While two respondents interviewed were university lawyers, the results were not stratified according to type of education leader; meaning no results pertaining to risk management can be gleaned from the study as they relate to university lawyers. Nevertheless three prominent risk management themes identified from the interviews supported the employment of university lawyers: “hire attorney on staff”, “send more issues to attorneys for review” and “have specialized attorneys”.

Hustoles (2012) conducted a quantitative study of American university lawyers’ perceptions of department chair dealings with legal risk and risk management. One part of the study addressed the time and frequency of legal services delivered to department chairs for various types of student- and faculty-related legal issues. University lawyers provided the most legal assistance for chairs pertaining to the faculty issue of contracts and grants, whereas privacy and access to student information was the leading student issue. Similar to Campo (2009) and AGB and UE (2009, 2014), this study did not explore the risk management practices, methods or strategies of university lawyers.

2.2.5 The empirical gap in the university lawyer literature

Overall, the university lawyer literature demonstrates that university lawyers engage in risk management practices when advising, educating and drafting and reviewing documents. Collaboration and facilitation also appear as roles which support the risk management practices of the university lawyer in higher education. University lawyers have also articulated concerns relevant to their risk management practices, including access to legal services, legal office resources and the conduct of university

management. While the university lawyers describe some of their risk management roles and issues relevant to risk management, there is no systematic research of the risk management practices, *methods* and *strategies* of university lawyers, or the issues which may impact their risk management, in the specific context of WIL programs.

University lawyers are also situated within the WIL literature addressing risk management. The next section reviews the WIL literature, which includes the risk management practices of university lawyers in the context of WIL and the relationship between WIL staff and university lawyers, both instrumental as risk managers with respect to WIL programs.

2.3 WIL literature

2.3.1 Risk management practices of university lawyers

The WIL literature reveals three main reasons for engaging university lawyers: the practices of review, drafting and advice. The university lawyer's involvement forms part of recommendations designed to improve risk management in WIL programs. It has been suggested that WIL disciplines should ensure that university lawyers review a number of items including:

- University insurance policies (Bailit, 1999; Cobb, 1994);
- WIL agreements involving the university, student and host organisation (Broughton & Overby, 1993; Gelman, 1990; Goldstein, 1990; Jaquith, 1995);
- Student disciplinary policies, in particular due process (Enz, Kimerer, & Freeman, 1998; Koerin & Miller, 1995; Vache-Haase, 2004);
- Disability policies (Brent, 2004; Neely-Barnes, McCabe, & Barnes, 2014; Rothstein, 2007); and
- Proposed accommodations for students with disabilities (Francis, Salzman, Polomsky, & Huffman, 2007).

University lawyers should also be involved in both the review and the drafting of WIL agreements and policies (Miller, Anderson, & Ayres, 2002; Miller & Wendt, 2010). In a national survey of 303 Program Deans and Directors of undergraduate and postgraduate social work programs, Gelman, Pollack and Auerbach (1996) found that 59% of WIL agreements were developed in collaboration with legal counsel, and 26% of programs

had involved legal counsel in negotiations over the agreement with host organisations. This appears to be an increase, as a previous study by Gelman and Wardell (1988) found that legal counsel had been involved in less than half of the WIL agreements. These studies highlight the involvement of university lawyers with WIL staff in risk management.

The subject of advice provided by the university lawyer reveals the breadth and complexity of legal risks that face universities. Table 2.1 provides a list of matters in which authors have sought advice from or have recommended that WIL staff seek advice from a university lawyer. The legal risks covered by the advice include disciplinary action, insurance, indemnities, confidentiality, student misconduct, student payments, discrimination, workplace health and safety, policy and sexual harassment.

Table 2.1: Subject of legal advice requested or recommended by WIL staff in the WIL literature

Subject	Reference
Termination of students from WIL programs	Cole and Lewis (1993); Forrest, Elman, Gizara, and Vacha-Haase (1999)
Insurance coverage and indemnification of university	Goldstein (1981)
Disclosure of sensitive student information to host supervisors and the limits of confidentiality	Reeser and Wertkin (1997)
Liability for student misconduct on placement	Gordon et al. (2004)
Affirmative action programs	Goldstein (1990)
Admission and continuation policies for students with criminal records	Farnsworth and Springer (2006)
Scholarship, stipend and other payments to students	Goldstein (1981, 1990)
Handling of problematic students	Rothstein (2009); Vacha-Haase, Davenport and Kerewsky (2004)
Pre-screening of students as part of a discipline's gatekeeping function, including policies	Gibbs (1994); Jones et al. (2012); Moore and Urwin (1991)
Before or when a situation arises that relates to the university's duty of care to students on WIL placement	Dye and Bender (2006)
The legal implications of policies and procedures	Gaberson and Oermann (2007)
Responsibility of the university, WIL staff and host organisation for harm suffered during a placement	Munger (2006)
Responding to students who make misrepresentations to the public during litigation against the university	Dugger and Francis (2014)
Student evaluation documentation	Wayda and Lund (2014)
Development of sexual harassment policies	Valentine et al. (1994)
A potential or actual claim against the university related to harm suffered by a student during a WIL placement	Biddinger Gregg and Schrink (1997)

The provision of legal advice, as well as the drafting and review of WIL agreements, policies and procedures by university lawyers, reveals an important relationship between university lawyers and WIL staff, both risk managers in WIL programs. The dynamics of that relationship are discussed in the next section.

2.3.2 Relationship with university lawyers

The importance of collaboration and communication are common themes pertaining to the relationship between university lawyers and WIL staff. Risk management in the context of student safety during WIL programs requires WIL staff and university lawyers “to engage in collaborative efforts to design and implement ‘experience-specific’ protocols that include responses to safety issues” (Bickel, 2001, p. 2). As a matter of good risk management practice, WIL staff should maintain and be proactive in their communication with university lawyers (Brent, 2004). Potential problems in WIL programs should be disclosed whilst the university lawyer is preparing the WIL agreement (Broughton & Overby, 1993), with briefings arranged by WIL staff to seek advice on situations that may entail legal complications (Cobb, 1994).

The relationship between university lawyers and WIL staff also raises the possibility of conflict. WIL staff in the social work discipline have criticised university lawyers’ perceived lack of knowledge about WIL programs when drafting WIL agreements (Gelman, 1990), and when advising on student confidentiality issues (Reeser & Wertkin, 1997). Cobb (1994), in the context of student dismissal from WIL programs, posits that American university lawyers are not knowledgeable about the status of professional education (which entails WIL) because their perspective is dominated by traditional study programs and other legal work. Madden and Cobb (2000) attribute university lawyers’ lack of knowledge to “their training and their field of interest”, that is, university lawyers are trained and hired to keep the university away from time consuming and expensive court proceedings (p. 191). Accordingly, the university lawyer may be reluctant to defend the gatekeeping practices of the social work discipline involving the termination of students, grade appeals or other student – faculty legal issues, due to the risk of litigation. Madden and Cobb suggest that the university lawyers’ focus on litigation risk, and their lack of understanding about social work education programs, may have the unintended consequence of exposing the university to litigation risk associated with poor gatekeeping. In particular, university lawyers may

fail to appreciate: the relatively low litigation risk of academic dismissal arising from the gatekeeping practices of the social work discipline compared to disciplinary dismissal for student misconduct; and the litigation risk of allowing “inappropriate or unethical students” to continue with their social work program (pp. 190-191). In these circumstances, the authors call on WIL staff to educate university lawyers about the mission, purpose and clients involved with social work programs in order to strengthen collaboration. Education by WIL staff becomes a relationship-building activity that can also improve university lawyers’ understanding about WIL programs.

2.3.3 The empirical gap in the WIL literature

Risk management by university lawyers is clearly referred to in the WIL literature, but is not explored in any depth or subject to empirical study, nor explored from the perspective of the university lawyer. Authors do not describe the role of university lawyers in managing the legal risks of WIL, but rather identify legal risk and risk management situations in which WIL staff should engage university lawyers. There are two limited exceptions. Briel and Getzel (2001) 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. Karickhoff and Howley (1997) provide a case study of a blind education student about to commence a WIL placement. In this circumstance, the university lawyer advised WIL staff about providing support to students with disabilities, the importance of identifying at-risk students early in their degree to protect the student’s due process rights, and notifying students about the difficulties associated with completing their degree. Nevertheless, the case study will reveal that any discussion of risk management practices is one component of a university lawyer’s risk management framework, which comprises practices, methods and strategies. No systematic research exists of the methods and strategies employed by university lawyers when advising and educating WIL staff, drafting agreements and reviewing policies.

It is perhaps not surprising that risk management by university lawyers with respect to WIL programs is unexplored in the WIL literature. Risk management is predominantly addressed from the perspective of WIL staff and academics, not university lawyers. WIL staff experience with university lawyers is at a risk management practice or

“surface” level. In other words, WIL staff experience only *what* university lawyers do in managing legal risk (practice), not *how* they manage legal risk (method) or *why* they engage in risk management methods and practices (strategy). University lawyer experiences with method and strategy can foster a deeper understanding, awareness and appreciation amongst WIL staff about the risk management framework of university lawyers, and can provide a rich source of information that university lawyers, WIL disciplines and university management can utilise to evaluate and improve risk management at their own institution.

The few university lawyer authors in the WIL literature study legal risk and risk management through the prism of black letter law, and not personal experience. Based on an analysis of case law, legislation and legal principles, they recommend institutional risk management practices, but do not study or explore risk management by university lawyers. Bernard (1995) presented a case law analysis of American academic dismissals and disciplinary dismissals from WIL programs, whereas Bickel (2001), Hoye (2001) and Biddinger Gregg and Schrink (1997) examined potential university liability for student harm suffered during a WIL placement in the USA. Broughton and Overby (1993) and Miller, Anderson and Ayres (2002) analysed legal issues associated with a WIL agreement. An exception is Mullooney and Santora (2014), who provided 10 short American case studies to demonstrate the various personas associated with successful university lawyers. 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. After eighteen months of “legal wrangling”, the university prevailed. This case was intended to demonstrate that one persona associated with successful university lawyers is being a “patient risk manager” (Mullooney & Santora, 2014, p. 17). However, this study does not provide (nor was it intended to provide) any description about what the university lawyers did to manage risk.

A review of the literature reveals that there are no empirical studies of university lawyers with respect to risk management in WIL programs. It is these gaps in the scholarly literature that were the initial impetus for the research questions in this thesis. The contribution of the literature to the research questions is summarised in the next

section, followed by the ways in which the thesis makes a significant and original contribution to knowledge about risk management in relation to WIL programs.

2.4 Contribution of the literature to the research questions

The empirical gaps in the university lawyer literature and the WIL literature, as well as the studies of legal risk in Chapter One, guided the first two research questions in this thesis (Table 1.3). There appears to be no systematic research of university lawyers' experiences with legal risk in relation to WIL programs. It is argued that to explore risk management by university lawyers requires a more comprehensive understanding of the legal risks that they manage. This argument then led to the first research question: *what legal risks do university lawyers manage with respect to WIL programs?*

University lawyers describe a variety of roles associated with their risk management in higher education generally, whereas WIL staff and academics 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. Two roles which emerged from the university lawyer literature – the university lawyer as collaborator and facilitator – suggest that risk management is not confined to the practices of university lawyers but may involve a broader framework of practices, methods and strategies. Nevertheless, no known systematic research exists which explores the experiences of university lawyers with risk management in the specific context of WIL programs. The empirical gaps in the university lawyer literature and the WIL literature led to the second research question: *how do university lawyers manage legal risk with respect to WIL programs?*

The university lawyers' responses to the survey in Chapter Four inspired the third research question: *what factors may influence risk management by university lawyers with respect to WIL programs?* The survey findings raised a number of issues associated with risk management by university lawyers, including the responsibility for managing legal risk between university lawyers and WIL staff, the passivity or lack of communication by WIL staff, and legal office resources. Nevertheless, the literature was a catalyst for the third research question. The survey findings triggered connections with the literature about access to legal services, and the resources of the legal office, as well

as collaboration between WIL staff, university management and university lawyers. These issues were then conceptualised as potential factors which may influence how university lawyers manage legal risk in relation to WIL programs.

2.5 Contribution of this thesis to the literature

The mixed methods study in this thesis is the first known systematic research of risk management in WIL from the perspective of university lawyers. Four specific aspects of this thesis demonstrate a significant contribution to addressing the research problem and advancing the empirical study of legal risk in WIL programs (Chapter One), as well as the university lawyer and WIL literature (Chapter Two). These four aspects are also significant by virtue of their practical application for an intended audience of university management, WIL staff and university lawyers, who share responsibility for managing risk in WIL programs. Each aspect will be discussed in turn.

Legal risks in WIL programs

The research demonstrates that university lawyers manage two types of legal risk in WIL programs: program risk and contract risk. Many of the program risks described by university lawyers substantiate the findings of empirical studies as illustrated in the table of legal risks in WIL programs in Appendix A. The table, collated from a review of the literature, case law and the case study in this thesis, categorises the legal risks; incorporates the programs risks identified by university lawyers; and identifies the legal risks that are specific to WIL programs, compared to traditional study programs. The case study confirms an empirical theme of conflicting risks associated with student disability and medical conditions, expands the range of hazards in the workplace considered to be program risks, and reveals student misuse of social media as a category of program risk.

The contract risks, being risks as to contract terms as well as to the contract practices of the WIL discipline, have not previously been addressed as part of a systematic study of risk management in WIL programs (Table 5.1). The practices of university lawyers designed to manage these contract risks, such as strategic and legal advice and the drafting of university WIL agreements, further advance the WIL literature and the university lawyer literature.

Enterprise Risk Management (ERM)

This thesis is the first study that applies ERM principles to the field of risk management in WIL. ERM is a contemporary risk management model being adopted in USA and Australian universities because of its perceived benefits, compared to the traditional silo approach to risk management in which university elements act in isolation from one another, detached from the goals of the university (Ackley et al., 2007; AGB and UE, 2014). From an ERM perspective, WIL is a risk that involves academic disciplines across the university and that offers strategic opportunities as well as legal hazards. University lawyers have a strategic focus on risk management and share responsibility with WIL disciplines, university management and other university elements for risk management with respect to WIL. The risk management framework of university lawyers is an example of how the distinguishing features of ERM, reflected in the risk management methods and strategy of university lawyers, can be integrated with traditional risk management practices to support university goals of maximising the strategic value and minimising the legal risks of WIL.

Risk management by university lawyers as a framework

This thesis contributes to a more complete picture of risk management in WIL programs by identifying, describing and examining the risk management framework of university lawyers. The WIL literature identifies the risk management practices of university lawyers but does not explore the methods or strategies employed by them to manage legal risk. University lawyers describe risk management practices in higher education and make observations about communication, collaboration and facilitation in the context of risk management, but no systematic study exists which examines the practices, methods and strategies of university lawyers. The characterisation of practices, methods and strategies as a framework recognises the different elements that support risk management by university lawyers and also provides a comprehensive explanation of how university lawyers support the goals of maximising the strategic value of WIL and minimising the legal risks associated with WIL. Not only can the risk management framework foster greater awareness amongst university management and WIL disciplines about the work of university lawyers; it can be utilised by university lawyers to evaluate, validate and improve their own risk management framework. In

fact, elements of the risk management framework which are not specific to WIL programs may have a broader application to other university activities.

Factors which may influence risk management by university lawyers and the conceptualisation of factors as risks

This thesis also contains the first known systematic study of the factors which may influence risk management by university lawyers. The case study of 13 university lawyers is dedicated to examining a series of organisational, strategic and stakeholder factors that may influence the risk management framework of university lawyers. These factors also generate a number of operational, reputational and strategic risks that university lawyers may encounter and manage, which, in addition to the legal risks, affect the ability of the university to achieve its goals in relation to WIL. In particular, the research describes and analyses the nature and extent of the responsibility for managing legal and non-legal risks, which is shared between university lawyers and the WIL discipline, as well as issues associated with that relationship which generate risk in WIL programs. As with the risk management framework of university lawyers, the factors and the associated risks may be of broader significance to institutions by applying to other university activities.

2.6 Conclusion

This chapter has examined the field of risk management by university lawyers from the perspective of university lawyers (university lawyer literature), and predominantly of WIL staff (WIL literature). Four key messages derived from the literature have guided the mixed methods study. First, no known empirical study exists which explores the experiences of university lawyers with risk management in the specific context of WIL programs. Second, risk management by university lawyers is not confined to their practices but may involve a broader framework of methods and strategies including collaboration with outside lawyers, university management, WIL staff and insurance personnel, as well as facilitation of activities that achieve university objectives. Third, the issues ventilated by WIL staff and university lawyers about access to legal services, communication and collaboration between university lawyers, university management and WIL staff, and legal office resources can be conceptualised as factors which may influence risk management by university lawyers. The fourth key

message is a consequence of messages two and three. University lawyers can provide valuable insights about legal risk and risk management that may assist university management, WIL disciplines and university lawyers with evaluating and improving risk management, not only with respect to WIL programs, but potentially to other university activities.

Based on the literature review, the foundation is set for a mixed methods study, beginning with a discussion of the research design (Chapter Three), followed by a survey of university lawyers in Chapter Four that is intended to deepen understanding about role, legal risk and risk management in WIL programs and to support the analysis in the case study (Chapters Five to Nine).

Chapter Three: Research design

3.1 Introduction

This chapter details the mixed methods research design employed to explore risk management by university lawyers in the specific context of WIL programs. University lawyers are involved with meeting the university challenge of maximising the strategic value and minimising the legal hazards associated with WIL programs. Nevertheless Chapter Two revealed that their voice is largely absent from the literature and not subject to empirical study. This thesis is designed to address that gap through an initial survey, followed by a comprehensive case study of university lawyers. The characteristics, evolution and selection of the mixed methods research design are first presented in this chapter. The evolution provides a road map of the research design, with the remaining parts of the chapter organised in the chronological order of the research design's execution. The quantitative and qualitative phases of the mixed methods design are then covered. The strategies employed to validate the mixed methods research and the research limitations of the survey and case study are discussed in the concluding sections.

3.2 Mixed methods research design

3.2.1 Characteristics

This thesis is a mixed methods study of risk management by university lawyers with respect to WIL programs. The major characteristics of the mixed methods design include the philosophical perspective, structure, sequencing and mixing of the survey and the case study research. Constructivism underpins the mixed methods design. The reality or “truth” of risk management by university lawyers is not objective but constructed by university lawyers. The survey is not intended to reveal an objective truth, but is designed to inform the case study. A case study, during which the author is immersed in the university lawyer's situation to garner their experiences, addresses the research purpose of exploring risk management by university lawyers in the specific context of WIL programs. Constructivism is demonstrated in the case study by case selection, in which the research purpose takes precedence over representativeness of the sample, in-person interviews situated in the university setting, and an inductive data analytic technique. The mixed methods design has fixed and emergent elements

(Creswell & Plano Clark, 2011). A plan to conduct a two-phase study was fixed in May 2013, as was the survey design, but details of the case study design only emerged following the survey data analysis at the end of 2013. There are two consequences of the fixed and emergent structure of the mixed methods design. First, the data collection process is sequential, with the collection of quantitative data first, followed by qualitative data. Second, the quantitative and qualitative analyses are separate. The qualitative and quantitative phases are mixed at two points: during the design stage when the survey results are applied to inform the case study (Chapters Three and Four) and during the case study (Chapters Five to Nine). Table 3.1 displays the qualitative and quantitative data collected and mixed in order to answer the thesis research questions.

Table 3.1: Data sources of the research questions

Research Question	Quantitative	Qualitative
RQ1: What legal risks do university lawyers manage with respect to WIL programs?	Survey instrument: Part 2	Interviews, e-mail communications
RQ2: How do university lawyers manage legal risk with respect to WIL programs?	Survey instrument: Parts 3 & 4	Interviews, e-mail communications, university WIL agreements, university policies, WIL program documents and WIL resources
RQ3: What factors may influence risk management by university lawyers with respect to WIL programs?	Survey instrument: Part 4	Interviews, e-mail communications, university strategic plans and university policies

The rationale for the mixed methods design also dictates that greater emphasis is placed on the case study, with the survey playing a supporting role. The purpose of the case study is to explore risk management by university lawyers, with the survey data in Chapter Four facilitating that exploration by triggering questions, observations and issues that informed the case study design. The case study employs an inductive analytic data technique during which individual perspectives are studied, compared for different perspectives and then broadened into categories, themes and assertions representing the multiple realities of university lawyers, reported in rich description at Chapters Five to Nine of this thesis.

The preceding discussion presents a summary of the characteristics associated with the final mixed methods design. However, the research design could be best described as an evolution of 32 months' duration, from the selection of the mixed methods design

through to the conclusion of the qualitative data analysis. This evolution is summarised in the next section.

3.2.2 Evolution

The mixed methods research design evolved between May 2013 and December 2015. Each element of the research design is described in this chapter and presented in chronological order of execution as outlined at Figure 3.1. Figure 3.1 is intended to illustrate that the mixed methods design is not linear or sequential. In fact overlap exists when executing the mixed methods design, particularly during the qualitative phase. For example, the interviews with university lawyers and data analysis were conducted simultaneously, and the interview questions were amended before, during and after the pilot study. Nevertheless there are two distinct phases associated with the mixed methods design. The first phase of the design conducted in 2013, a survey of 41 Australian university lawyers, provides preliminary insight into university lawyer perceptions of role, legal risk and risk management. The survey itself originated, in part, from the literature review. Phase two is the dominant strand of the design – a case study of 13 university lawyers from 12 university sites involving the following qualitative data: face-to-face interviews, e-mail communications and documents referred to by university lawyers during the interviews. The case study was developed in 2014, with the data collection and analysis taking place in 2015.

Figure 3.1: Mixed methods research design

The first stage in the evolution of the mixed methods design was the selection of mixed methods as the research design for the thesis, which is discussed in the next section.

3.2.3 Selection

A mixed methods design was selected in May 2013. A quantitative phase was employed to provide an initial understanding about the role of university lawyers, legal risk and risk management afforded by university lawyers in the context of WIL programs, to inform the qualitative design and, to a lesser extent, to triangulate the data with the qualitative research. As discussed in Chapter Two, there is no previous study of Australian university lawyers in relation to WIL programs from which an initial understanding of role, legal risk or risk management could be gained or to evaluate for the purpose of constructing a qualitative design.

The next section continues the evolution of the mixed methods research design illustrated in Figure 3.1 by describing the quantitative phase conducted in 2013, from the development of survey research questions through to sample selection, the survey instrument, data collection and analysis. The impact of the survey findings in refining the research purpose and fortifying the research questions are discussed in the concluding sections.

3.3 The quantitative phase: survey of university lawyers

3.3.1 Survey research questions

Chapter Two established that no systematic research exists which examines role, legal risk or risk management with respect to WIL programs from an Australian university lawyer perspective. The following interrelated research questions were formulated to gain an initial understanding of these topics:

- SQ1: What is the nature of legal work undertaken by university lawyers with respect to WIL programs according to academic discipline and legal area?
- SQ2: What are the future legal risks to the university with respect to WIL programs?
- SQ3: To what extent do university lawyers engage in risk management associated with WIL?

- SQ4: What is the role of the university lawyer with respect to WIL programs?

The literature inspired and informed the research questions and the subsequent survey design. The legal areas underpinning the legal risks identified in the reported cases and empirical studies of WIL programs (Appendix A) were the catalyst for SQ1 and SQ2, and were used to formulate Part 2 of the survey instrument. Risk management practices of university lawyers are identified in the university lawyer literature (section 2.2.2) and the WIL literature (section 2.3.1), but little is known about the extent to which university lawyers engage in risk management with respect to WIL programs (SQ3). This literature, as well as the author's experiences of lawyers sharing knowledge as part of their continuing professional development, formed the basis of Part 3 of the survey instrument, which addresses SQ3. Finally, the inspiration for SQ4 and the related open-ended survey question at Part 4 of the survey instrument is the university lawyer literature, which addresses the role of the university lawyer in higher education generally (section 2.2.2), but not in WIL programs specifically. The answers to the survey research questions were then used to compare the experiences of university lawyers with the literature pertaining to role, legal risk and risk management reviewed in Chapter Two.

The survey design addressing the research questions, which comprises sample selection, data collection and data analysis, is covered in the sections which follow.

3.3.2 Sample selection

The relevant population is university lawyers in Australia, with the sample being university lawyers who attended the 2013 SOUL (Society of University Lawyers) conference at Australian National University, Canberra on 31 October and 1 November 2013. Convenience sampling was employed to capture, in one location at one point in time, a large proportion of university lawyers in Australia.

3.3.3 Survey instrument

The survey instrument represents a cross-sectional survey of the practices and opinions of university lawyers with respect to their role in WIL programs, legal risk and risk management ("the survey"). A copy of the survey is in Appendix B. The survey, two and a half pages, takes approximately 10 minutes to complete. It was designed in

this way to increase the response rate and to decrease response error through fatigue (Creswell, 2008). A Participant Information and Consent Form (“the form”) attached to the survey is included in Appendix C. The host university gave ethical clearance for the survey and form (Ethics Approval AFE/19/13/HREC). The form explains the purpose of the research, the survey process, confidentiality and anonymity, the risks and benefits of participation, and makes provision for informed consent. The form also narrows the scope of the survey, consistent with this thesis, to in-house counsel, WIL programs in Australia and placement-based WIL (Smith & Worsfold, 2014), namely where WIL occurs in a real as opposed to a simulated workplace setting.

The survey instrument is apportioned into four parts containing nine questions and eight Likert scale statements. Part 1 seeks demographic information about university location; size of the legal office; existence of a dedicated or recognised person for handling WIL matters and length of employment. Part 1 of the survey instrument was designed to provide preliminary insight into Australian university lawyers and identify potential demographic factors which may inform and be explored during the qualitative research. From an ethical perspective, care was taken in the survey to ensure that none of the demographic information would identify the participant or university when reporting the results. For example, if in Question 1 Tasmania and the Northern Territory were separate boxes for participants to tick, the university or participant may be at greater risk of identification because there is only one university based in each of Tasmania and the Northern Territory.

Part 2 employs categorical scales to measure the areas in which the participants had undertaken legal work relating to WIL programs (Question 6), and the university discipline in which they had received the most inquiries for legal work (Question 7) in the last 12 months of the participant’s current university of employment. References to “none” and “not applicable” are included in Questions 6 and 7 respectively for participants who had not delivered legal services to WIL programs during that time. References to “12 months” and “current employment” are included to improve reliability of the data and consistency in participant voice throughout the survey instrument, as the questions in Parts 1, 3 and 4 relate to the university lawyer’s present employment. Question 8 asks participants the area which, in their opinion, posed the greatest risk to the university in regard to WIL programs. There is also space in Part 2

for the participant to indicate another area, academic discipline or risk. This option promotes flexibility in the survey instrument (Creswell, 2008) and validity in the survey research by capturing responses that were not envisaged during the literature review or whilst preparing the survey instrument. Finally, the references to “legal work” in Questions 6 and 7 are used as a proxy for legal risk. Given that a significant part of a university lawyer’s role is managing legal risk, the assumption made is that areas (Question 6) and academic disciplines (Question 7), the subject of legal work over the 12 month time frame, are a source of legal risk. Further, to list all potential legal risks would have created a lengthy (and potentially confusing) survey instrument and increased the prospect of participant fatigue, survey error and lower response rates.

Part 3 provides a definition of host organisation and WIL administration for participants, followed by eight statements measured on a five-point Likert scale (Never, Very Rarely, Sometimes, Often, Very Often) concerning the extent to which the participants engage in risk management practices. Part 4 is an open-ended question to which university lawyers could describe their role in terms of WIL programs. University lawyers’ descriptions of their role raise ethical issues concerning anonymity. Any comment in the response to Part 4 that may identify participant, university, location or persons involved with same is de-identified in the survey results and discussion in Chapter Four.

3.3.4 Survey administration

Prior to the 2013 SOUL conference, the author negotiated with the conference organisers a table in the foyer of the conference venue in order to promote the research and to provide a central location for university lawyers to place their completed surveys. A survey was also placed in each of the attendee’s conference bags; assistance was provided to the conference organisers with registering attendees and delivering their conference bags as a matter of reciprocity. Other strategies designed to increase the response rate included announcements made by the President of SOUL about the research; directing attendees to the survey during registration; and having spare copies of the survey available at the conference venue. To facilitate informed consent and to safeguard confidentiality and anonymity, the participants detached the Participant Information and Consent Form for their records and deposited the completed survey in a non-transparent box, located at the table, which was supervised at all times. The benefit

of being present was that university lawyers could approach the author to seek clarification of items on the survey. For example, some university lawyers were not familiar with the key term “Work Integrated Learning”. When associated terms were proffered, such as “internship”, “practicum” and “clinical placement”, they understood. This was a valuable lesson when designing the case study.

Forty-one responses were received from 158 conference attendees (based on information provided by the conference organisers). One hundred and fifty-eight does not however represent the entire sample, given that conference attendees included both university lawyers and a significant number of external counsel, guest speakers and other university personnel who were not eligible to complete the survey. An eligible participant is defined in the Participant Information and Consent Form as a “qualified solicitor who undertakes legal work within a legal services unit / department at an Australian university”. Unfortunately it is not possible to identify exactly how many of the 158 attendees were university lawyers. The minimum response rate was 26 per cent. That response rate is reasonable considering the population. In the absence of any published research on Australian university lawyers or a sampling frame, an audit of the contact details of university lawyers and legal offices on university websites revealed an estimated population of 220 university lawyers in Australia.

3.3.5 Survey data analysis

The survey data in Parts 1 to 3 was then analysed using the Statistical Package for Social Sciences (SPSS) software. Descriptive statistics were generated including frequency, mean, median, mode and standard deviation. Cronbach’s alpha was employed to test for internal reliability of the Likert scale statements in Part 3. Given that the qualitative responses in Part 4 were at best no more than one paragraph in length, the qualitative data in Part 4 was analysed manually, with the resultant themes reviewed by another academic in the field of education studies. Five decisions were also made during the analysis phase in terms of categorising, cleaning and accounting for missing data:

- “No response” categories were added to Questions 6, 7 and 8 in Part 2 and then excluded from the descriptive statistics for these questions;

- Two categories were added to the results of Questions 7 and 8, on the basis that they were significant (Education and Architecture) or mentioned multiple times under the category “Other” (Fair Work Act and Insurance);
- References to “Sport Science” and “Medical” under the category “Other” in Question 7 were added to the categories “Science” and “Health” respectively;
- Missing data from one participant in response to item 1 in Part 3 was replaced with an average of that participant’s score for the other seven statements and rounded to the nearest whole number (3); and
- The score from multiple responses of one participant to item 5 in Part 3 was averaged (3.5) and then another average was taken for scores of all 8 statements and rounded to the nearest whole number (3).

There were also multiple responses to Questions 7 and 8, despite the wording of the questions and instructions in the survey to select the most appropriate response. Frequency distributions were calculated as a percentage of total responses and total participants to incorporate all the data. Given the number of multiple responses in Question 8, separate frequency distributions were calculated for single and multiple responses.

The findings from the survey data analysis refined the research purpose and fortified the research questions to be addressed by the mixed methods research design, as described in the sections which follow.

3.3.6 Refining the research purpose

The survey findings refined the research purpose. When a mixed methods research design was first selected in May 2013, the purposes of the research were to identify legal risks for Australian universities in operating WIL programs; to explore risk management by university lawyers; and to construct an Australian legal framework governing tertiary liability in WIL (refer section “Introduction” in Appendix C). The survey, being the first phase of the mixed methods study, was designed to guide future interview research with university lawyers, and to assist with the construction of a legal framework governing tertiary liability in WIL (refer section “Risk and benefits” in Appendix C). The legal framework, to be constructed through doctrinal research, involved a systematic process of identifying, analysing, organising and synthesising

legislation, judicial decisions and commentary in Australia relevant to the liability of universities with respect to WIL programs (Pearce, Campbell, & Harding, 1987). In other words, the research would proceed with a discussion about the law which underpinned the legal risks identified in the literature, survey and by university lawyers during the interview research.

The survey raised a number of important issues in the context of legal risk and risk management, such that undertaking both interviews and doctrinal research as the second phase of a mixed methods study was untenable. It became apparent that doctrinal research was a separate thesis and that these issues could be addressed only by interview research. The survey refocused this thesis on the experiences of university lawyers and away from a black letter law analysis – the hallmark of university lawyer authors in the WIL literature (section 2.3.3). Whilst the identification of a legal framework may be a useful reference tool for Australian universities (and area of future research), what was considered of importance for an intended audience including WIL staff, university management and university lawyers was exploring university lawyer experiences with risk management. As a consequence, the construction of an Australian legal framework was removed as a research purpose and the exploration of risk management by university lawyers became the primary research purpose.

3.3.7 Finalising the thesis research questions

Whilst the three thesis research questions were guided by the research purpose, it was university lawyer responses to Part 4 of the survey that inspired the third research question: *what factors may influence risk management by university lawyers with respect to WIL programs?* The survey findings raised a number of issues associated with the role of the university lawyer as risk manager, including the responsibility for managing legal risk between university lawyers and WIL staff, the passivity or lack of communication by WIL staff, and legal office resources and structure (sections 4.4 and 4.5). These issues triggered connections with the literature, including the issues ventilated by university lawyers pertaining to their role in higher education (section 2.2.3) and the importance of collaboration between WIL staff and university lawyers (sections 2.2.2 and 2.3.2). These connections piqued an interest in exploring the issues further, culminating in the third research question. The issues university lawyers experienced with their role were conceptualised as factors which may influence risk

management. The rationale for the third research question was that if university management, university lawyers and WIL disciplines understand the factors which may influence risk management, then the factors can be used as a basis for evaluating and improving risk management at their own institutions.

Qualitative research facilitates an exploration of the legal risks that university lawyers manage (RQ1), how university lawyers manage legal risk (RQ2) and the factors that may influence risk management (RQ3). The qualitative or second phase of the mixed methods design is described in the next part of this chapter.

3.4 The qualitative phase: a case study of university lawyers

The second phase of the mixed methods research design is a multiple instrumental case study of risk management by university lawyers with respect to WIL programs (Stake, 1995). The cases being studied are 13 Australian university lawyers who have delivered legal services to WIL programs. Multiple cases are selected to examine, compare and support an understanding of university lawyers' experiences. The subsequent case study at Chapters Five to Nine represents a rich description of their experiences of legal risk and risk management in answer to the three research questions. The rationale for selecting the case study as the qualitative design for the mixed methods study is covered in the next section, with the remaining sections devoted to a description of the case study in chronological order of execution: the interview design, ethics approval, pilot study, case selection, data collection and data analysis.

3.4.1 Selection of case study as qualitative design

Case study was selected as the most appropriate qualitative research design, due to its compatibility with the research purpose. By examining a small targeted group of university lawyers, the case study provides an in-depth understanding of risk management by university lawyers in the context of WIL programs. Grounded theory was another qualitative research design examined but ultimately considered not appropriate. The research is designed to be descriptive and explanatory concerning risk management, and not aimed at developing a theory of risk management grounded in a significant number of university lawyers' experiences. The research also met the sole pre-requisite of a case study – the identification of specific cases within defined parameters (Creswell, 2013; Stake, 1995). The university lawyers (or cases) are

bounded by geographic location (Australia), definition (in-house counsel) and type of university activity (WIL programs).

3.4.2 Interview design

The interview design incorporates a mix of semi-structured and structured interview questions with no pre-determined order for answering the questions (Bryman, 2012; Merriam, 2009). A list of template questions for each interview, with references to the origin of the question, is outlined at Table 3.2. The initial demographic questions are structured, requesting specific data from all university lawyers. The remaining questions are more open ended, with follow-up questions not included in the list, as well as prompts and probes derived from handwritten notes. The author was particularly mindful following the pilot study not to prepare pre-determined (and leading) questions expressing potential factors which may influence risk management by university lawyers. This is reflected in Q11 and Q12. Factors did emerge during the interview which prompted questions about whether that factor assisted the university lawyer or represented a challenge when managing legal risk. The question on recommendations to improve risk management (Q13) is designed to serve a dual purpose. First, a recommendation by one university lawyer may be consistent with, and therefore supports, the actual risk management practices, methods and strategies of other university lawyers in Chapters Six and Seven. Second, the recommendations support the considerations for evaluating and improving risk management in Chapter Ten.

A separate interview guide (Appendix D) was kept for each university lawyer to ensure consistency and rigour in the interview process. The guide includes space for inserting the interview details as well as the university lawyer's unique ID for the case study, a script to introduce each interview, interview questions and a pre- and post-interview checklist. The highlighted clarification and expansion questions in the guide were not provided to participants prior to their interview.

Table 3.2: Interview questions

Q	Interview Question	Origin
<i>Role</i>		
1	What is your position at the university?	Scan of university websites (section 2.2.1)
2	How many university lawyers (total / full time equivalent) are employed at the university?	Empirical studies of university lawyers (section 2.2.4)
3	How many years have you been employed as a university lawyer (total / current university)?	Empirical studies of university lawyers (section 2.2.4)
4	Can you describe the organisational structure in which legal services are delivered?	Pilot study
5	Do you have a dedicated person in your office for handling legal work concerning WIL programs? (if yes) Is that person you?	Survey research
6	Do you have a person recognised in your office who handles most of the legal work concerning WIL programs? (if yes) Is that person you?	Survey research
7	How would you describe your current role in relation to WIL programs?	Roles of the university lawyer (section 2.2.2); survey research
<i>Legal risk</i>		
8	What are the legal risks that you manage in WIL programs?	Studies of legal risk (Appendix A); survey research
<i>Risk management by university lawyers</i>		
9	What do you do to manage the legal risks in WIL programs?	WIL literature (section 2.3); survey research
10	Does risk management with WIL programs differ from risk management with traditional study programs? If so, how?	Cooper, Orrell and Bowden (2010) (section 1.3)
11	What are the challenges with managing legal risks in WIL programs?	Pilot study; issues with university lawyer role (section 2.2.3); survey research
12	What assists you to effectively manage legal risks in WIL programs?	Pilot study and relationship with university lawyers (section 2.3.2)
<i>General</i>		
13	What recommendations would you make to the university to improve risk management in the context of WIL programs? What would be the impact (if any) of each recommendation on your role?	The “ideal position” question (Merriam, 2009)
14	Do you have any comments not covered by the interview questions that you feel would contribute to an understanding of your role, legal risk or risk management in the context of WIL programs?	Interview experience as an academic and lawyer

3.4.3 Ethics approval

The ethics approval process was integral to formalising the interview process and how the data would be represented in the case study. The case study design formed part of a variation (subsequently approved) to the original host university ethics approval for the survey (Ethics Approval AFE/19/13/HREC). An interview design was foreshadowed in the original ethics application, but the key components of the design only emerged following an interpretation of the survey findings. The primary issues associated with ethics approval were anonymity and confidentiality. A number of safeguards were employed to minimise the risk of identification, and were outlined in a Participant Information and Consent Form provided to participants when they were invited to participate in the study (Appendix E). De-identification occurred at a number of stages during data collection and analysis: in the interview when participants did their own de-identifying; on participant review of the interview transcript; in the case study write up and then by the participants in the review of their responses in the case study. Member checking to promote anonymity and confidentiality was time consuming but critical, given the sensitive nature of the research topic; the university lawyer obligations pertaining to confidentiality and legal professional privilege; and that the university lawyer community is a small and collegial one and therefore there is a greater risk of being identified. Many of the documents used in the case study are publicly available (e.g. template agreements, policies); others are closely guarded intellectual property of the university. As such the use of a university lawyer ID was considered on a case by case basis. No university lawyer ID has been attached to the publicly available documents referred to in the case study because of the increased risk of identification of university or university lawyer.

3.4.4 Pilot study

A pilot study of four university lawyers was conducted in order to validate and strengthen the interview design. These university lawyers were not available for case selection due to methodological reasons. The interview was stopped at various points to seek participant feedback on the interview definitions and questions. The author reflected on each pilot interview by reviewing the handwritten notes taken during the interview, an interview transcript and an interview tips sheet, and then recording the

reflections in an analytic memo stored by NVivo software. Interview questions were added, deleted, modified and tested throughout the pilot study.

The main lessons and/or changes with respect to the interview design were as follows:

1. An estimated interview length of 60 to 90 minutes was appropriate as the four interviews ranged from 48 to 92 minutes;
2. Participants were de-identifying locations, academic disciplines and persons when responding to interview questions. As a consequence, a discussion on de-identification and member checking was included in the script as part of the interview guide (Appendix D);
3. A change to Q11 in the interview design (Table 3.2). One participant did not understand the reference to “factors” in the original pilot question “What factors influence the processes, strategies and methods you use to address legal risk in WIL programs?” However the participant did describe a number of “challenges” which were consistent with the survey research and the university lawyer literature;
4. A change to Q10, Q11 and Q12 (Table 3.2). One participant found that previous references to “processes, strategies and methods you employ to address legal risk in WIL” made the questions long, complex and confusing;
5. Making clear at the beginning of the interview that international WIL programs were outside the scope of this thesis. Frequent references were made to legal risks in international WIL programs. This was the catalyst for “outside thesis scope” to be a pre-determined code for data analysis (section 3.4.7);
6. The addition of Q4 to the interview design (Table 3.2);
7. The ability to prompt and probe interview participants improved when the author’s interview notebook was divided according to the research questions: “Legal risk / risk management practice” in separate columns on one page and “risk management factors” on the second page;
8. The emergence of five areas for improving interview skills, which were included in an “interview lessons” analytic memo and used throughout the interview process (section 3.4.7); and

9. Expansion and clarification questions for Q7 and Q12 inserted in the interview guide (Appendix D). For instance one participant mentioned that a challenge can also be something which assists the university lawyer in managing legal risk.

3.4.5 Case selection

The university lawyer was selected as the relevant case. The alternative was to select the university as the case and interview all university lawyers at each university site who were involved with WIL programs. The author was guided by the purpose of qualitative research, the research questions and the risk of identification in this decision. University lawyers were being asked to disclose potentially sensitive information about their experiences with risk management. To study and report on each university site may have increased the risk of identification and discouraged lawyers at each site from participation. Further, the research questions focus on university lawyers, not universities, as the unit of analysis. As such the author wanted to obtain different perspectives and experiences from a mix of university lawyers in different university settings.

Maximal variation sampling was employed to select 13 university lawyers from 12 university sites for the case study (Creswell, 2008). In the quest to explore multiple perspectives that may promote a comprehensive understanding of risk management pertaining to WIL programs, university lawyers were selected from multiple university sites and stratified according to the following demographic characteristics: university lawyer length of experience and position; State and Territory of primary university site; university type; and size of legal office (total number). A case typology was maintained throughout the selection process to keep track of these characteristics and to ensure balance and variety in case selection (Stake, 2000). A finalised case typology is at Table 3.3.

Table 3.3: Case typology of university lawyers

State or Territory of main campus	N	University type (refer Glossary)	N	Office size (Number)	N	University lawyer experience	N
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	N	Recognised WIL lawyer	N	Office structure	N	University lawyer background	N
University lawyer	9	No	10	Flat	8	Mix	8
Manager	4	Yes	3	Hierarchical	5	Private sector	3
						Public sector	2

The two general categories of demographic information (as represented in the case typology) are university lawyers and university sites. University lawyers had to possess *experience* in delivering legal services to WIL programs; and a minimum two years' experience as a university lawyer. It was assumed that university lawyers with lengthier periods of service would have more experience with WIL programs and hence provide richer descriptions of their experiences. A mix of university lawyers who were General Counsel or Directors of the legal office was also sought. General Counsel and Directors have substantial experience with WIL as a university lawyer, but also may bring a different perspective on factors which influence risk management, given their supervisory and reporting responsibilities. General Counsel and Directors are labelled "Manager" in the case typology.

Australian universities are generally classified into five types based on age, origin and/or location: Technical; Group of Eight (GO8); Gumtree; New Generation; and Regional. The five types, including the relevant universities that apply to each type, are adapted from Moodie (2012) and defined in the Glossary of Terms. GO8 universities are over-represented in the case study due to the experience of university lawyers. GO8 university lawyers tended to have more experience than their colleagues at other universities, providing a better opportunity to learn about risk management. The purpose of the research took precedence over a representative sample. In terms of

geographic location, Tasmania and the Northern Territory were not considered due to travel costs and risk of identification, given that each State and Territory has one university.

Other demographic information not available during the selection process has also been added to the case typology (university lawyer background; recognised WIL lawyer and office structure), with existing information gleaned from university websites and insiders (position; office size; university lawyer experience) and authenticated by the interview data. 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. The legal office for each case was categorised as flat or hierarchical. A flat structure involves a maximum two lines of authority – university lawyers are supervised by and report to a General Counsel or Director. A hierarchical structure involves a General Counsel or Director of the legal office or multiple operating divisions (which includes the legal office), and a second-in-command (2IC) such as a deputy counsel, associate director or senior lawyer who has the formal responsibility for supervising university lawyers and reporting to the manager. The aggregation of particular demographic information in the case typology is to minimise the risk of identification as well as to facilitate analysis of potential demographic factors that may influence risk management by university lawyers.

Five of the 13 university lawyers were selected based on conversations during the 2013 SOUL conference. University lawyers discussed their experiences with WIL programs, revealed their legal concerns about WIL programs and in doing so demonstrated genuine interest and enthusiasm for the research topic. These conversations revealed a good understanding of legal risk and risk management issues. Seven university lawyers were selected based on the recommendations of insiders. There were three categories of insiders: Kim Heitman, President of SOUL at the time; university lawyers who had agreed to participate in interviews or had participated in pilot interviews (a type of snowball sampling); and WIL staff who had dealt with university lawyers. To protect anonymity and facilitate genuine consent, insiders did not actively recruit participants. Rather the insider's name (with their consent) was used in direct telephone communications with the university lawyer as an ice-breaker. The final university

lawyer was selected following a process of cold calling to gauge their experience with WIL programs and willingness to participate in the study.

3.4.6 Collection of interview and other data

The data collected for the case study is based on 13 face-to-face interviews with university lawyers plus one follow-up telephone interview, e-mail communications with university lawyers for the purpose of obtaining further information and/or clarification of their responses during the interview, and documents referred to by participants during the interview. Five general categories of documents were collected: university WIL agreements, university policies, WIL program documents, university strategic plans and WIL resources. The in-person interview was the predominant data collection method for practical reasons, with the e-mail communications and documents supporting the interview data. To observe university lawyers' work, a significant proportion of which does not relate to WIL programs, or to access legal office files (documents) involving WIL-related matters, would be time consuming, costly and would raise issues concerning confidentiality and legal professional privilege. In-person interviews were preferred, rather than telephone and video interviews, due to familiarity with this interview format in legal practice and academic research, as well as a personal belief that taking the time to travel to university sites demonstrated a genuine interest in the work of university lawyers and would strengthen relationships with them. Building rapport was critical in gaining both the rich descriptive data sought and the continuing participation of university lawyers following the interview (member checking, follow up e-mails and review of transcripts).

An e-mail invitation was sent to selected university lawyers attaching the Participant Information and Consent Form ("the form") (Appendix F). A phone call took place (before or after the e-mail was sent) during which the research project was pitched, as well as the logistics of the interview. The form sets out the research purposes, the interview process, the steps taken to protect confidentiality and anonymity, the risks and benefits of participation, informed consent and the opportunity for participants to review their interview transcript and parts of the case study attributable to their responses. Subsequent e-mail communications finalised an interview time and date. A document outlining key definitions and questions for the interview (including prompts

and probes) was then sent to participants prior to the scheduled interview (Appendix G). This enabled participants to prepare for the interview.

Participants were contacted before the interview to confirm location and that the interview questions were received, and to answer any questions. Prior to each interview the following documents were reviewed: the interview lessons learned from the pilot study and earlier interviews; an interview tips sheet collated from Bryman (2012), Seidman (2006) and Creswell (2008); and a list of clarification, expansion and steering questions entitled “General Interview Probes/Prompts”. The questions from the interview guide (Appendix D) were pasted into a hardcover notebook. Two pages were used in the notebook, divided into two columns each page – “Legal risk” / “Risk management practice” and “Risk management factors” / “Impact role-RM”. “Impact role-RM” was replaced in later interviews with “Assist-Challenge (Means)”. Keywords written in the first three columns were the prompts and probes, with the final column acting as a checklist to ensure the risk management factor was followed up during the interview.

The interview commenced by the author reading the script from the interview guide and asking the participants whether they had any questions about the four key definitions: WIL; legal risk; risk management and university lawyer. The questions were then ticked off in the notebook as they were asked during the interview. At the conclusion of the interview the author thanked the participant, requested the participant’s favourite wine blend for the delivery of a bottle of wine as a token of appreciation and as a matter of reciprocity (Seidman, 2006), and explained the steps following the interview as outlined in the form. Interviews were scheduled for 90 minutes, with the estimated interview time provided to participants being 60 to 90 minutes. 10 of the 13 interviews were between 58 and 93 minutes in length, with three interviews over 100 minutes. The interviews were audio recorded and professionally transcribed.

3.4.7 Data analysis

The general data analytic technique employed in this case study is inductive and comparative. Creswell (2013), Merriam (2009) and Stake (1995) are the primary influences in the specific context of multiple case study analysis, with the coding and analytic processes inspired by Saldana (2013), MacQueen (2008) and Miles and

Huberman (1994). The qualitative data were analysed in four stages: initial reflexivity; eclectic coding (Saldana, 2013); pattern coding (Miles & Huberman, 1994); and data representation. NVivo software facilitated the data analysis by storing and organising the qualitative data, analytic memos, codes, relationships and matrix coding queries in one location. Data analysis and data collection was conducted simultaneously until the pattern coding stage of analysis. Being a multiple case study, within-case analysis and cross-case analysis were conducted (Creswell, 2013; Merriam, 2009). The university lawyer was treated as a separate case, from initial reflexivity through to eclectic coding. Cross-case analysis commenced at the eclectic coding stage, when existing codes extracted from the qualitative data of other university lawyers were analysed. From that stage, existing codes were rejected, adopted, modified and/or new codes added. A summary of each stage of data analysis is provided in the sections which follow.

First stage – Initial reflexivity

Initial reflexivity involved reflection on the interview itself, with notes taken during the interview and the initial reflections stored in analytic memos. In fact four analytic memos were established and used throughout all stages of data analysis. First, there was a “Reflexivity” memo for each university lawyer, which documented and reflected upon a range of matters pertaining to the interview, such as: the interview environment; interview questions and technique; potential follow up questions and document requests for the participant; lessons learnt from the interview; and potential codes, categories, themes and assertions. A second analytic memo entitled “Thesis diary (excluding coding process and UL reflexivity)” was kept for the research project; it included all other observations and notes related to the thesis, including code maps, interview design and interview process. A third analytic memo, “Interview lessons”, collated the lessons learnt about each interview from the “Reflexivity” analytic memo, and was used as a review tool prior to each interview. The final analytic memo entitled “Coding Process” documented all the decisions made about deleting, adding, moving or modifying codes, as well as providing step-by-step instructions for the coding process.

Second stage – Eclectic coding

Eclectic coding involved a mix of various coding strategies: structural, descriptive, attribute, in vivo, versus, simultaneous and sub-coding to create an initial

code map. Each code had an operational definition, which was subject to change during eclectic coding. The structural codes were pre-determined codes aligned with the research and interview questions. They were at the time: Demographics (WIL lawyer; Experience; Office size; Organisational structure; Position); Legal risk; Recommendations; Risk management factors; Risk management; Role; and Traditional v WIL programs. “Quotes” and “outside thesis scope” were two other pre-determined codes added to support the case study write up. The latter code supported the discussion about the scope of the thesis in Chapter One and further research opportunities in Chapter Ten. The structural codes were a pre-cursor to more intensive coding of the data within each structural code. The data was first assigned to a structural code. The one structural code was attributed to a large segment of data. For example, the interview question and answer from a transcript, once reviewed and corrected by the participant, was assigned to one or more structural codes. That data was then further coded using simultaneous, attribute, in vivo, versus and descriptive techniques, with the resultant codes placed under the structural code (thereby creating sub-codes). The resultant code was an existing code; a new code; or led to the replacement or modification of a code title or operational definition of an existing code.

Another technique employed during eclectic coding was identifying potential relationships between codes within the same segment of data. Relevant data was assigned to a code-code relationship link in NVivo, with the requirement that at least one code was a risk management factor. These relationships were designed to facilitate broader category, theme and assertion generation, in order to answer the research questions and to improve the quality of the case study write up. For example, interview data would reveal a relationship between sub-codes under “Risk management factors” and “Risk management”, in terms of how a particular factor was associated with a risk management practice, strategy or method. The more data sources coded to a relationship, the stronger the case for the codes to represent a category or theme in the case study and for that relationship to be examined in the case study write up.

Eclectic coding of documents and e-mail communications took place after all the interview transcripts were coded. At times during this process a document, e-mail, transcript or code list was a trigger for codes not identified in earlier coding of interview transcripts, which led to additional review of transcripts and coding of data. The

interview transcripts were scanned a final time, after eclectic coding of the documents and e-mails, for new codes or to assign data to existing codes. A code map and a list of significant code–code relationships were generated after all the qualitative data was collected and analysed.

Third stage – Pattern coding

Pattern coding was used to develop categories from the “Risk management factor”, “Legal risk” and “Risk management” structural codes and sub-codes. The pattern codes represented the categories and sub-categories relevant to the research questions. Five major actions took place during pattern coding. First, codes with single or few data sources were reviewed to determine relevance and either deleted or subsumed within other similar codes; in exceptional cases, the code was maintained. Second, data from similar codes were merged into a new code or one of the existing codes. Third, data from the sub-codes under the “Role”, “Recommendations”, “Demographics” and “WIL v traditional programs” structural codes were scrutinised and if relevant, copied to the “Risk management factors”, “Legal risk” and “Risk management” structural codes. Fourth, a series of matrix queries was conducted between the demographic characteristics referred to in the case typology (Table 3.3) and each sub-code under the “Legal risk”, “Risk management practices” and “Risk management factors” structural codes, in order to identify the potential influence of demographic characteristics. Significant findings arising from the matrix queries were summarised in an analytic memo entitled “Matrix query analysis” and are referred to in the case study.

The fifth and final action during pattern coding was the creation of a conceptual model comprising sub-codes, codes, sub-categories, categories, themes and assertions for legal risk (RQ1), risk management (RQ2) and risk management factors (RQ3). A copy of each conceptual model is in Appendix H. Themes were generated by identifying relationships among and comparing categories and sub-categories from the “Risk management factors”, “Legal risk” and “Risk management” codes, with the categories and themes combined into assertions. For instance, the major themes that contributed to the assertions about risk management by university lawyers were “responsibility for risk management”; “risk management as a balance”; “relationships in risk management”; “factors as non-legal risks” and “risk management as a framework”.

Fourth stage – Data representation

The categories and sub-categories in the conceptual model (Appendix H) are presented as headings and sub-headings throughout the case study. University lawyers representing the 13 individual cases are not reported in separate chapters. Rather, the case study is presented as a cross-case analysis with the information from each individual case dispersed throughout each chapter (Yin, 2009). Each chapter in the case study responds to a specific research question. Chapter Five describes the legal risks in WIL programs that university lawyers manage (RQ1), Chapters Six and Seven describe how university lawyers manage legal risk, with the chapters organised into practices, methods and strategies (RQ2) and Chapters Eight and Nine describe the factors which may influence risk management, with the chapters organised into strategic, stakeholder and organisational factors (RQ3).

3.5 Validation strategies

A number of strategies were employed during the quantitative and qualitative phases to promote the validity of the mixed methods research. During the quantitative phase, survey error was minimised by the survey design, in particular the brevity of the survey instrument and the spaces available in Part 2 of the survey instrument for participants to indicate other legal areas, academic disciplines and risks not specified in the survey instrument (section 3.3.3). The use of Chronbach's alpha to analyse the results of Part 3 and a peer review of the themes which emerged about the role of the university lawyer with respect to WIL programs (Part 4) also promote the validity of the survey research (section 3.3.5). Validation during the qualitative phase of the mixed methods research includes triangulation; member checking; reflexivity; rich description; audit trail; sampling and adequate engagement in data collection (Creswell & Miller, 2000; Merriam, 2009). The validation strategies are set out under the sub-headings below.

Triangulation

Triangulation of the data occurs using multiple research methods, sources of data and data collection methods. Relevant data from the survey research is triangulated with qualitative data in the discussion sections of the case study (method). Further, interviews with 13 university lawyers (sources of data) generated transcripts as well as

e-mail communications and documents used to clarify, expand and support the interview data. The various data sources and types are then combined during the cross-case analysis in each chapter of the case study (data collection).

Member checking

On completion of the case study draft, university lawyers were given the opportunity to check the interview transcript(s) for any errors, as well as the accounts, extracts, descriptions and quotes attributable to them in the case study, for the purposes of protecting anonymity, and to correct any misinterpretations (if any) of their responses. As the case study was presented as a cross-case analysis and not a series of individual case studies, parts of each draft chapter in the case study attributable to each individual university lawyer were sent for checking.

Reflexivity

The author has articulated and reflected on his background, past experiences, decisions, assumptions, values and biases that may have impacted on this thesis. Personal background and origin of this thesis are located in Chapter One (section 1.9), the limitations of the case study and survey research are described in the next section of this chapter, and reflection is articulated at various points during the case study.

Rich description

The case study is the dominant strand of the mixed methods design, with five chapters devoted to rich description of university lawyer experiences with risk management in the specific context of WIL programs.

Audit trail

An audit trail is summarised in this chapter, with the case study project in its entirety stored by NVivo software. The case study project includes the analytic memos described in the data analysis, with the interview transcripts, e-mail communications pertaining to data collection and documents supplied by university lawyers stored in separate university lawyer folders.

Sampling

Maximal variation sampling was utilised to gain diversity of universities (by type and location), legal offices (by size) and university lawyers (by experience and position), to ensure that a greater range of readers may identify with the university lawyers' experiences and apply the findings described in the research.

Adequate engagement in data collection

Adequate time was spent in interviewing university lawyers and collecting relevant documents. 13 in-person interviews of between 56 and 118 minutes duration were conducted with university lawyers in multiple States and Territories across 12 universities.

3.6 Research limitations

Research limitations associated with the survey include survey error, social desirability bias and sample bias. Survey error is present with the survey instrument relating to non-responses and multiple responses (section 3.3.5). Sample bias associated with convenience sampling is evident from the geographical distribution of participants (Table 4.1) vis-à-vis the number of universities located in each State and Territory. The conference at which the data was collected took place in the Australian Capital Territory located in Eastern Australia. In particular, university lawyers from the Australian Capital Territory, Northern Territory and Tasmania appear over-represented (20% of participants) as only four of 39 Australian universities (at that time) were based in these States and Territories. University lawyers from the two states not located in Eastern Australia – South Australia (3 universities) and Western Australia (5 universities) – appear under-represented (9% of participants).

A research limitation common to both phases of the mixed methods research design is social desirability bias. University lawyers in Part 3 of the survey (Appendix B) are likely to overrate the risk management practices they engage in. The bias is acknowledged in the survey instrument and participants re-assured that the benefits of the research could only be realised by correct information and that their responses were strictly confidential. As with the survey research, social desirability bias in the case study may be present during a discussion of legal risks and risk management. University

lawyers may tend to over-inflate or over-emphasise their risk management framework and downplay or not disclose their experiences with legal risk as to do otherwise may negatively impact them and the university. To minimise this risk, the author disclosed his legal background to build rapport and assured university lawyers at the beginning of the interview that their responses would be de-identified and that there were no right or wrong answers to the questions. Accurate responses were also sought by using clarification and expansion questions, the most important of which was “can you provide me with an example?”

The case study has two other limitations. First, an inherent bias with the design lies with the author. A series of decisions during data collection and analysis were made about the construction of categories and themes, data that warrants further investigation as well as the data to report in the case study. Those decisions are influenced by the author’s background, past experiences, decisions, assumptions, values and biases. Due to the richness of the data, not all the data is included in the thesis. This raises a critical question: what is the basis for the selection and rejection of data? The validation strategies are aimed at minimising bias and improving the reliability of the case study.

A second limitation relates to the rich description of university lawyer experiences. University lawyers were understandably concerned about anonymity and confidentiality during the interview process. Legal risk and risk management are sensitive topics, with potential reputational as well as legal consequences for the university and lawyer involved. Despite the steps taken to protect anonymity and confidentiality, the author sensed reluctance by certain lawyers at times during the interview to provide complete responses to certain questions. Some lawyers de-identified persons, locations and academic disciplines during the interview, whilst others did not want to be directly quoted in the thesis with respect to particular experiences. In exceptional cases, university lawyers deleted particular examples from the interview transcript and provided instructions not to use them in the thesis or sought further assurances of de-identification during and after the interview. The concerns were genuine and justified, but any such reticence may have led to the non-disclosure of university lawyers’ experiences.

3.7 Conclusion

This thesis seeks to progress the existing literature by exploring risk management in the specific context of WIL from the perspective of Australian university lawyers. University lawyers are analysed through both quantitative and qualitative lenses as part of a mixed methods research design, the evolution of which is described in this chapter. The first phase of the design, a survey of 41 university lawyers, provides preliminary insight into university lawyer perceptions of role, legal risk and risk management. The survey has the dual purpose of informing the case study design and supporting the case study findings. Phase two is the dominant strand of the design – a case study of 13 university lawyers from 12 university sites. Consistent with the rationale and sequencing of the mixed methods design, the survey findings will be first presented in the next chapter.

Chapter Four: A survey of university lawyers

4.1 Introduction

This chapter presents the results and discussion of a survey of 41 Australian university lawyers with respect to legal risk, risk management and the role they play in WIL programs. As outlined in Chapter Three, a catalyst for the survey design was the absence of relevant empirical studies from the perspective of university lawyers. The survey, the first phase of a mixed methods study of university lawyers, is designed to deepen understanding about the role of university lawyers, legal risk and risk management afforded by university lawyers in the specific context of WIL programs. The survey findings inform the case study design as well as present university lawyers, university management and WIL disciplines with a series of questions, areas of interest and issues that warrant consideration, in terms of institutional risk management.

The structure of this chapter reflects the purposes of the survey and the topics covered by the four survey research questions (Table 1.2). The first section presents and describes the descriptive data relating to demographic characteristics of the university lawyers surveyed. This is followed by a discussion of the areas of legal work (a proxy for present legal risk), future legal risk, risk management by university lawyers and their role with respect to WIL programs. The concluding section summarises the answers to the survey research questions and articulates broader issues that the survey generated for further exploration in the case study.

4.2 University lawyers

The demographic information of survey participants provides some insight about the size of legal offices in Australia, the experience of university lawyers and the prevalence of recognised WIL lawyers, defined as 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. Pertinent demographic information of the participants is provided in Table 4.1 and discussed in the sections which follow.

Table 4.1: Demographic information

Item	<i>n</i> (%) (<i>n</i> = 41)
Location of main campus of university	
New South Wales	13(32)
Queensland	9 (22)
Australian Capital Territory, Northern Territory or Tasmania	8 (20)
Victoria	7 (17)
South Australia	3 (7)
Western Australia	1 (2)
University lawyers (full-time equivalent)	
1	3 (7)
2 or 3	11 (27)
4 or 5	12 (29)
6 or 7	8 (20)
More than 7	7 (17)
Dedicated person / person who handles most WIL matters	
Yes, and I am that person	7 (17)
Yes, but I am not that person	5 (12)
No	29 (71)
Employment at current university	
Less than 1 year	6 (15)
1 to 4 years	21 (51)
5 to 9 years	11 (27)
More than 9 years	3 (7)

4.2.1 Legal office size and university lawyer experience

Nearly two thirds of Australian university lawyers surveyed worked in relatively small legal offices of between one and five university lawyers and had less than five years' employment at their current university. A number of interesting questions arise from these personal and organisational characteristics. For instance, is the relative inexperience of university lawyers a product of high staff turnover, switching jobs between universities or just sample error? A higher proportion of less experienced university lawyers may have attended or were willing to complete the survey during the 2013 SOUL conference. Could the relative inexperience and size of the legal office be related? The establishment and growth of legal offices in Australian universities, arising from greater university demand for legal services and/or a greater proportion of legal services being conducted "in-house", may be relevant factors.

Very little is known about the history of university lawyers in Australia and this may be a topic for future research. In the United States of America (USA), the first legal office was established at the University of Alabama in 1925 (Ruger, 1997 from NACUA data). However, the rise of university lawyers to prominence did not occur until the 1960s and 1970s in response to student activism during the Vietnam War, the civil rights movement and substantial government regulation attached to federal funding of institutions (Bickel 1974; Bickel & Ruger, 2004; Daane, 1985; Ruger, 1997). Unlike the USA, there is a scarcity of research and consideration of Australian university lawyers. Fleming (1999) provides a small piece of Australian history when describing the start of her employment with the University of Sydney, a G08 university which currently has one of the largest legal offices in Australia, with more than 20 university lawyers (University of Sydney, 2015). Fleming's experience tentatively supports the proposition that university lawyers are a relatively recent phenomenon in Australia and that legal office growth may at least be partly responsible for legal office size and university lawyer experience:

When I joined the University of Sydney in 1990, the title of my position was "Legal Officer" and my job description could reasonably be described as: "... anything that looks remotely legal or quasi-legal"... I arrived at the University to find that they had not allocated me an office, furniture or a computer, let alone any administrative support. Moreover, there was a gap of about 18 months between the departure of my predecessor and my arrival, so things, especially files, were rather a mess. It was therefore up to me to essentially create my own practice and establish my credentials. (Fleming, 1999, p. 1)

4.2.2 The recognised WIL lawyer

Twenty-nine percent of university lawyers had a recognised WIL lawyer in their office. External counsel specialise according to area(s) of the law. However, higher education law is not a specialist legal discipline as such but is largely an amalgam of existing laws that apply to higher education. Given the nature of higher education law as well as the growth of WIL and its distinct risk profile (section 1.3), having university lawyers specialise according to program type may facilitate better risk management. For instance a review of Australian university websites reveals that some universities do have university lawyers specialising in research and non-research work, such as the

University of Queensland, Macquarie University and the University of Sydney. A recognised WIL lawyer may also improve collaboration with WIL staff, particularly in larger legal offices, by having one university lawyer as a point of contact, and could address the concerns of WIL staff that lawyers do not fully understand WIL and its objectives (section 2.3.2).

4.3 Legal risk

The six leading areas of legal work for participants were contracts (79 per cent of participants), intellectual property (66 per cent), confidentiality, privacy law (50 per cent each), university policy (47 per cent) and workplace health and safety (37 percent) (Table 4.2). However it should be acknowledged that the same item of legal work may cover multiple areas. For instance a common WIL agreement will include provisions concerning assignment of intellectual property (IP) and confidentiality, as well as workplace health and safety. As discussed in Chapter Three, the references to legal work in the survey are considered a proxy for legal risk on the assumption that a significant part of a university lawyer's role is managing legal risk, and that areas and disciplines the subject of legal work are a source of legal risk that university lawyers manage (section 3.3.3). The fact that all six areas featured in the top seven sources of future legal risk, amongst multiple responses of participants, provides support for the use of legal work as a proxy for legal risk (Table 4.3).

The survey results suggest university lawyers are aware that Australian universities may have a limited duty to take reasonable precautions for the safety of students on WIL placement (workplace health and safety), or otherwise the university may be liable in negligence for any harm suffered by the student. For example in the widely reported USA decision of *Nova Southeastern University v Gross* 758 So.2d 86 (Fla. 2000), the Florida Supreme Court held that the university owed a duty of care in regard to the safety of a psychology student who was abducted from the car park of the host organisation, robbed and sexually assaulted. The relevant circumstances supporting a duty of care were that the WIL placement was a mandatory component of the student's doctoral program; the university controlled the assignment of WIL placements; and the university was aware of previous incidents in the area (Bickel, 2001; Kaplin & Lee, 2013 for further commentary). Workplace health and safety and negligence feature prominently in legal work (37 per cent and 18 per cent of participants respectively)

(Table 4.2), and in future legal risk (31 per cent of single responses and 30 per cent of multiple responses collectively) (Table 4.3). This is not surprising given that universities lose some control when students are situated in the workplace and are relying on the host organisation to ensure a safe workplace (section 1.3).

Table 4.2: Legal work undertaken in the past 12 months relating to WIL programs

Area	N	% of total participants (N = 38)	% of total responses (N = 164)
Contracts	30	79	18
Intellectual property	25	66	15
Confidentiality	19	50	12
Privacy law	19	50	12
University policy	18	47	11
Workplace health and safety	14	37	9
Host organisation policy	9	24	5
Wages and other payments	7	18	4
Negligence	7	18	4
None	4	11	2
Other	3	8	2
Insurance	3	8	2
Fair Work Act	2	5	1
Discrimination	2	5	1
Workplace bullying	1	3	1
Sexual harassment	1	3	1
Criminal law	0	-	-

Table 4.3: Greatest future risk to the university with regard to WIL programs

SINGLE RESPONSES			MULTIPLE RESPONSES			
Area	n	% of total responses (N = 16)	Area	n	% of total participants (N = 20)	% of total responses (N = 64)
Wages and other payments	5	31	Workplace health and safety	11	55	17
Workplace health and safety	4	25	Negligence	8	40	13
Confidentiality	2	13	Privacy Law	6	30	9
Intellectual property	1	6	Intellectual property	6	30	9
Negligence	1	6	University policy	6	30	9
Insurance	1	6	Contracts	6	30	9
Fair Work Act	1	6	Confidentiality	5	25	8
Other	1	6	Discrimination	5	25	8
			Workplace bullying	3	15	5
			Wages and other payments	2	10	3
			Host organisation policy	2	10	3
			Sexual harassment	1	5	2
			Insurance	1	5	2
			Fair Work Act	1	5	2
			Other	1	5	2
			Criminal law	0	-	-

In terms of requests for legal work, health was the discipline that university lawyers received the most inquiries (44 per cent), followed by business (15 per cent) and science (13 per cent) over a 12-month period (Table 4.4). A proportion of participants had not undertaken any legal work related to WIL programs, as demonstrated by the four participants who marked “none” (Table 4.2), and five participants who marked “Not applicable” (Table 4.4). A review of the survey data revealed that four of the six participants who provided these responses did not have a recognised WIL lawyer but were part of a larger legal office (4 to 5 or more than 7 university lawyers). This result provided a lesson and a question for the case study. The lesson was that case selection required university lawyers with sufficient experience in WIL programs in order to obtain a rich description of their experiences (section 3.4.5). The question relates to delegation of legal work, given that there are recognised WIL lawyers as well as university lawyers in legal offices who do not deliver legal services pertaining to WIL programs. How is legal work related to WIL being delegated and undertaken and does it facilitate or impede risk management?

Table 4.4: Discipline in which university lawyer has received the most inquiries in the past 12 months

Discipline	<i>N</i>	% of total participants (<i>N</i> = 40)	% of total responses (<i>N</i> = 48)
Health	21	53	44
Business	7	18	15
Science	6	15	13
Not applicable	5	13	10
Arts	3	8	6
Engineering	3	8	6
Education	1	2	2
Architecture	1	2	2
Information technology	1	2	2

The survey result for health is not surprising and is consistent with empirical studies of legal risk (Appendix A). A review of the empirical studies reveals that health is the discipline most prominently featured. Conversely there are very few (or no) studies addressing arts, business (other than sport management), information technology, science or engineering. WIL programs in health are a mandatory requirement imposed by professional bodies, and thus have a significant student participation in WIL. Further, health disciplines such as nursing, social work and medicine involve “process-based” WIL: students are learning and applying processes through regular contact with

the host organisation's clients, which involves substantial time in the workplace. Negative consequences may ensue should harm occur to the student, host organisation or client during these interactions. Business, arts and science generally involve "project-based" WIL in which the student completes a research project part-time in the workplace which is assessed and which may also benefit the host organisation. A poor research project does not have the same legal risk as incompetence or error by health students when undertaking a process. The results may also suggest that non-traditional WIL disciplines are unaware of the distinctive legal risks associated with WIL or the university lawyer. Health (along with engineering and education) has a longer history of delivering WIL programs. WIL staff in these disciplines are presumably more experienced in identifying legal risk and working with university lawyers.

4.4 Risk management

The summary descriptive statistics of risk management practices by university lawyers are set out in Table 4.5. Items Four, Five and Six in Table 4.5 refer to "WIL administrators", which had a similar definition in the survey to WIL staff. Cronbach's alpha was 0.914, which supports internal consistency of the eight items measuring risk management. The primary risk management practice of participants was contract review (mean score of 3.24), followed by advice (2.78), education (2.71) and review of university policies (2.56). This is consistent with the WIL and university lawyer literature in which the risk management function of university lawyers focuses on review, advice and education. The results for discussion amongst university lawyers concerning legal risk and risk management in WIL are 2.54 and 2.27, respectively. It is not expected that discussion would take place on a regular basis, particularly in legal offices where there is a recognised WIL lawyer. University lawyers are at least attuned to the legal risks associated with WIL programs. The review of host organisation policies (1.88) is also not a surprising result, given that it is likely to occur only when WIL staff request legal services on an issue that relates to host organisation policy.

The review of the policies and practices of WIL administrators (1.98) is a result of concern because of their legal implications. The education agreement between student and university may incorporate not only university policies, but also discipline-based policies and procedures such as student handbooks, catalogues, WIL learning plans and the curriculum (Kaplin & Lee, 2013). Thirty-one of the 41 university lawyers never or

very rarely review the policies and practices of WIL staff. Five of the 10 university lawyers who did undertake review were recognised WIL lawyers. The question for university management is this: who ensures that discipline-based mechanisms comply with the law, are consistent with university policy and are appropriate risk management practices? The results suggest that WIL staff may be making and reviewing discipline-based policies and practices without reference to university lawyers.

Table 4.5: Risk management practices of university lawyers

Item No.*	To what extent do	Mean	Median	Mode	Standard Deviation
1	you review university policies with respect to WIL programs	2.56	3	3	1.03
2	you review contracts involving the host organisation, the university and/or the student with respect to WIL programs	3.24	3	4	1.22
3	you review the policies of the host organisation in WIL programs	1.88	2	1	0.87
4	you review the policies and practices of WIL administrators in WIL programs	1.98	2	2	0.91
5	you educate WIL administrators about legal risks and/or risk management in WIL programs	2.71	3	3	1.15
6	WIL administrators seek your advice concerning legal risks and/or risk management in their WIL programs	2.78	3	3	1.04
7	your legal department discuss as a group the legal risks associated with WIL programs	2.54	3	3	0.95
8	your legal department discuss as a group risk management practices in WIL programs	2.27	2	3	1.00

*Cronbach's alpha for eight items = 0.914

The variation in the preceding results and the discussion about policy and contract review also raise a critical, broader issue, namely, that the boundaries of responsibility for managing legal risk may not be clear to either university lawyers or WIL staff. Newhook (2013), who examined the perceptions regarding the legal and ethical risks in WIL programs of 14 WIL convenors from 10 Canadian universities, found that more than half of the participants were not clear about the boundaries of their responsibility for managing risk. In particular, academic administrators and risk managers were not sufficiently communicating with WIL convenors on risk issues, with WIL convenors relying on their own knowledge and judgement to manage and determine responsibility

for risk in the absence of proper guidance on risk management responsibilities. Whilst most WIL convenors agreed that risk management was their responsibility and the responsibility is shared amongst various parties (including the university and student), their opinion on the balance varied considerably (Newhook, 2013). WIL convenors made very few references to university lawyers during the interviews and the “risk managers” referred to by Newhook were part of a specific risk management division (which is common in Canadian universities) who may or may not have been qualified lawyers (R. Newhook, personal communication, February 23, 2014). Nevertheless the study by Newhook (2013), combined with the survey results, suggest that there may be ambiguity in the boundaries of responsibility for risk management by university lawyers and WIL staff. Such ambiguity is of concern, as it may result in legal or other risks not being managed at a legal office, discipline or institutional level.

4.5 Role of university lawyers

Thirty-three of the 41 participants responded to the open-ended question “describe your role as a university lawyer in terms of WIL programs”. Four of the 33 participants stated that they had no identified role. Overall three general themes emerged from the data: the university lawyer’s general role; specific aspects of role associated with legal area and discipline; and factors which impact their role as risk manager.

The primary roles of the university lawyer involve contracts, policy, advice and education. This is consistent with the WIL and university lawyer literature (Chapter Two), the quantitative data on legal work (Table 4.2) and the risk management practices of university lawyers (Table 4.5). University lawyers provide legal advice (20 responses), review WIL agreements (15 responses), review university policies related to WIL programs (5 responses), and educate WIL staff through formal training sessions and informal arrangements (3 responses). A number of lawyers discussed the subject areas of such advice. The legal advice included university and host organisation WIL agreements, assignment of student IP, compliance with the *Fair Work Act 2009 (Cth)* (“Fair Work Act”), student exploitation on WIL placement, student misconduct, and liability and insurance issues. University lawyers also provided preliminary insight about why contract is a legal risk to the university. Two references were made to liability clauses in WIL agreements. One university lawyer noted that: “Determining

who is liable in WIL programs can be complicated – it needs to be clearly specified in student Placement Agreements”.

The extent of the university lawyers’ involvement with the agreement and policy-making process varies. In addition to their review function, university lawyers may also prepare contracts (7 responses), develop policies (2 responses), amend contracts or policies (2 responses each), and draft and update template agreements (4 responses). Host organisation policies were mentioned only once but the lawyer’s comment does warrant further consideration in the context of other survey results: “I am a contact point for questions from faculties and placement offices. The queries are diverse and often triggered by the policies of host organisations”. This lawyer’s advisory role is often triggered by concerns of WIL staff with host organisation policies. As previously discussed, the legal work in this area is not insignificant (Table 4.2) and therefore is worthy of further consideration.

University lawyers specifically referred to legal areas and disciplines in the execution of their role. Consistent with the quantitative data, health (in particular nursing and medicine) was the discipline university lawyers referred to most when discussing their role in contracts, policy and advice. IP and insurance were the most prominent legal areas associated with role. Participants review non-disclosure and IP assignment agreements that place obligations on the university and student and “changes to university template agreements to ensure (most often) the Host does not prevent the student from using their research data/IP in assessable work”. Negligence, workplace health and safety and consumer protection law were other legal areas mentioned by university lawyers.

Passivity or lack of collaboration by WIL staff (4 responses), resources (1 response) and organisational structure (1 response) appear to impact risk management by university lawyers. One university lawyer lamented that available resources restricted their risk management role: “Essentially limited to review of contracts with the third party workplaces. Would very much like to take a more proactive role but currently limited by resources”. In terms of organisational structure, one university lawyer noted that their role in WIL programs was influenced by legal specialisation. As a commercial lawyer, they provided advice in relation to WIL agreements across all disciplines,

whereas employment aspects attached to the WIL placement such as discrimination, harassment and bullying were referred to a specialised in-house employment team.

The literature reiterates the importance of collaboration and proactivity in communication between university lawyers and WIL staff as effective risk management (sections 2.2.2 and 2.3.2). Collaboration is an identified issue for some university lawyers. University lawyer involvement with agreement making was influenced by the timing of WIL staff requests for legal assistance. One university lawyer described part of their role as “reviewing intellectual property management in WIL contracts ALREADY SIGNED!*!!” This experience (and frustration) was shared by others: “Usually only get contracts at a late stage so rarely have an opportunity to guide the process. Sometimes receive copies of executed agreements that have been amended without seeking further advice”. The failure by WIL staff to collaborate with university lawyers early in the agreement-making process would appear to undermine university lawyers’ risk management function. The university lawyer cannot engage in effective risk management because the contract, a risk management mechanism but also a source of legal risk, is already signed.

A related criticism by university lawyers was passivity by WIL staff. University lawyers suggested that “legal advice is rarely requested in relation to WIL programs” except with the establishment of WIL agreements, and that WIL staff needed to be “more proactive” in seeking legal advice. Such passivity by WIL staff may be a consequence of bureaucratic processes or budgetary constraints that prevent access to legal services (Daane, 1985; Fleming, 1999) or may be inadvertent due to a lack of awareness of the university lawyer or the distinct legal risks associated with WIL programs. The next section summarises the research findings and describes a series of issues and areas of interest for exploration in the case study of university lawyers.

4.6 Survey insights for case study

This chapter has answered each of the four survey research questions (Table 1.2) and in the process has deepened understanding about university lawyers, role, legal risk and risk management with respect to WIL programs. Most university lawyers work in relatively small legal offices and have less than five years’ employment at their current university. The majority of their legal work involves review, drafting, education and

advice in relation to contracts, IP, confidentiality, privacy law, policy and workplace health and safety – all areas of legal risk (SQ1, SQ3 and SQ4). WIL programs in the health discipline appear to be a substantial source of legal risk to the university (SQ1). Legal issues surrounding wages and other payments, along with workplace health and safety and negligence, are considered by university lawyers to be the greatest areas for future legal risks to the university (SQ2). The most frequently cited issue by university lawyers that may impact their role with respect to WIL programs was passivity or lack of communication by WIL staff, in particular the delay in making requests for legal services (SQ4).

The survey findings have also informed the case study design (Chapters Five to Nine). A series of issues and areas of interest derived from the survey findings will be explored in the case study as described in sections 4.6.1 and 4.6.2 below.

4.6.1 Legal risk

There are five areas of interest about legal risk that warrant further investigation in Chapter Five of the case study. The first is privacy law. Privacy of data collection and disclosure by Australian universities is governed by Commonwealth, State and territory privacy laws. It is a statutory obligation which sits outside contractual obligations of the university under a WIL agreement. What factors have prompted significant legal work in privacy law? At the time of the survey (November 2013), the Commonwealth government had passed the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth), which introduced a new set of privacy principles (the Australian Privacy Principles) for the handling of personal information by private and public sector entities. It may be that university lawyers were reviewing and updating policies, processes and contracts to comply with the new privacy laws before they took effect on 12 March 2014. Privacy law may also be a source of growing legal risk.

The second area of interest relates to contracts and IP. The study of WIL stakeholders by Turcotte et al. (2016) confirmed the survey findings published from this thesis (Cameron & Klopper, 2015) about IP “as a growing and significant area of risk” (p. 38). However there is no systematic study of university lawyers that has addressed the WIL agreement or the IP rights of students, the host organisation or the university. What are the events or circumstances that give rise to risk associated with contract and IP and

how are they managed? University policy, a significant area of legal work and future legal risk for university lawyers, is also worthy of further investigation in the case study. University policy may be a risk management tool, but it also appears to be a source of legal risk. For instance have university lawyers dealt with contraventions of university policy by students and/or WIL disciplines?

The fourth area of interest is host organisation policy, in which 24 per cent of participants undertook legal work (Table 4.2). What event or circumstance prompted WIL staff to seek legal services with respect to host organisation policy? It may be that WIL staff are concerned with provisions of a host organisation policy that are inconsistent with university policy or that expose the university to liability through inadequate risk management practices. The event or circumstance represents legal risk that could be the subject of further exploration with university lawyers who have dealt with host organisation policy. A fundamental legal question is whether WIL staff should be involved with host organisation policy in the first place and if so, the extent of their involvement. For instance is the university taking on additional legal risk if the WIL staff member reviews and approves policy as part of an audit of the host organisation?

The fifth area of interest is “wages and other payments”, with 18 per cent of participants undertaking legal work in the area and recognition by university lawyers as the greatest future risk to universities amongst single responses to the survey question (Table 4.3). WIL placements may involve payments by the university to host organisations or to host supervisors, as well as by host organisations to students. The critical issue arising from these survey results is: What makes wages and payments a risk to the university and how is the risk being managed by university lawyers? The survey data and the author’s previous research (Cameron, 2013) suggest that their primary concern may be the creation of an employment relationship between student and host organisation. In fact, a prominent legal issue in Australia and the USA is whether a student undertaking WIL placements or work experience is an employee. University lawyers referred to the *Fair Work Act* as an “other” area in which legal work was undertaken as well as a future legal risk to the university (Tables 4.2 and 4.3). Responses to the open-ended survey question on role included advising as to “risks of infringement of *Fair Work Act* and issues relating to employment entitlement” and to “whether placement is acceptable under *Fair Work Act* (i.e. does it fit the definition of ‘vocational placement’)”.

The *Fair Work Act* regulates the terms and conditions of employment for the vast majority of Australian employees. Students enrolled in an unpaid WIL program would appear to be completing a vocational placement and thereby excluded from the definition of employee under the *Fair Work Act* (Cameron, 2013). It is not clear how the issue of student employment within a WIL program represents a legal risk *to the university*. Employment is a contract between the host organisation and the student and thus the legal obligations associated with employment such as workplace health and safety, workers compensation and minimum conditions under the *Fair Work Act* rest with the host organisation.

The final area of interest relates to the lack of work by university lawyers in discrimination, workplace bullying and sexual harassment (3 per cent of participant responses). Interestingly, university lawyers do not consider these areas a significant future risk, with no references amongst participants with single responses and collectively just nine of 64 multiple responses (14 per cent). This was a surprising result, given that the majority of empirical studies involve the incidence of abuse, discrimination and sexual harassment towards students (Appendix A). Well-established university policies and education programs may have reduced legal risk, or WIL staff are dealing with these issues at a discipline level without referral to university lawyers. Conversely, students may not be reporting incidents to WIL staff. This result is worthy of further consideration by university management, for example by seeking out WIL staff or students about their experiences with discrimination, sexual harassment and bullying on WIL placement, to identify the scale of legal risk.

4.6.2 Risk management

The survey results have raised four broader issues about risk management by university lawyers in the context of WIL programs: these issues will be explored in Chapters Six to Nine of the case study. The first issue is the reasons for the appointment or non-appointment of a recognised WIL lawyer. WIL is an increasingly popular curriculum design but carries significant and potentially different legal risks to traditional study programs. As external counsel specialise in legal areas to provide improved legal service delivery for their clients, so too the appointment of a recognised WIL lawyer could potentially deliver improved legal services to WIL programs for their client – the university. The second issue is the articulation and allocation of risk

management responsibilities between university lawyers and WIL staff. The risk management practices of university lawyers varied greatly (Table 4.5). Review of discipline-based policies appears to be of particular concern, as any misunderstanding regarding responsibility may create gaps in the institutional risk management framework, which thereby could increase legal risk.

The third issue relates to IP. When university lawyers identified IP as an area of legal work and future legal risk, it is assumed that they were referring to the use of host organisation IP by the student on WIL placement; and/or the host organisation use of IP generated by the student during the WIL placement. If this assumption is correct, then IP is confined to the relationship between host organisation and student. How do the IP rights governing the host organisation–student relationship represent a legal risk to the university that requires the intervention of a university lawyer? Further, should university lawyers be involved in the first place and if so, how are they involved? It should be recalled that the university is the sole client of the university lawyer. In fact the vast majority of universities make explicit on their legal office websites that university lawyers do not provide personal legal advice to university staff or students. How does the university lawyer negotiate the fine line between the university supporting student interests and not delivering legal advice to the student? The final consideration relates to collaboration, particularly the agreement-making process which is part of the university lawyer's role. University lawyers and WIL staff in the literature have emphasised the importance of communication and collaboration in their relationship. The open-ended survey responses suggest that university lawyers may want to take a more proactive role in managing legal risk, but it appears that poor communication by WIL staff and to a lesser extent, a lack of resources, is restricting preventive lawyering that could seek to reduce risk.

4.7 Conclusion

The survey is a lesser strand within a mixed methods study of university lawyers. However its significance should not be underestimated. At a methodological level, the survey informed the case study design and focused the research purpose of this thesis. Viewed as a stand-alone research item, the insights provided by university lawyers in the survey have raised issues for consideration by university management, WIL staff and university lawyers that may stimulate evaluation of and positive changes

in institutional risk management. Particular considerations arising from the survey include the appointment of a recognised WIL lawyer; the handling of IP issues; the delineation of risk management responsibilities; and collaboration between university lawyers and WIL staff. All of these considerations will be explored in the case study to address the thesis research questions.

The next chapter is the first of five chapters detailing the case study. It describes and examines university lawyers' experiences of legal risks associated with WIL programs. As discussed in Chapter Three, a limitation of the survey design is that it does not provide university lawyers with the opportunity to describe in detail their own experiences with legal risk. For example, university lawyers could not explain why particular legal areas or disciplines presented significant future legal risk or a source of significant legal work. Chapter Five addresses this limitation.

Chapter Five: The legal risks of work integrated learning

5.1 Introduction

The purpose of this chapter is to describe and analyse university lawyers' experiences of legal risk with WIL programs. Empirical studies raise a number of legal risks involving the conduct of the university, the host organisation and the student before, during and after the WIL placement, as well as student characteristics which expose the university to legal risk (refer Appendix A). Nevertheless the voice of the university lawyer is virtually non-existent in these empirical studies. The survey in Chapter Four was the first known empirical study that addressed legal risk in WIL programs from a university lawyer perspective. University lawyers identified areas that represent current and future legal risks for the university. The case study moves beyond identification to seek out university lawyers' experiences with legal risks. Their experiences described in this chapter answer the first research question: *what legal risks do university lawyers manage with respect to WIL programs?* It will be seen that university lawyers manage two categories of legal risk – program risk and contract risk. It is argued that university lawyers are predominantly involved with contract risk, more specifically events or circumstances pertaining to contract terms and the contract practices of the WIL discipline. Whilst many of the program risks substantiate existing literature, the contract risks described by university lawyers represent a significant category of legal risk not previously addressed in empirical studies.

The first part of this chapter analyses the distinction between program risk and contract risk in WIL programs. The second part of the chapter describes and analyses the experiences of university lawyers with program risks. Student disability and medical conditions, and workplace hazards are the two primary categories of program risk that emerged from interviewing university lawyers. The discussion of program risks concludes with a new program risk experienced by one university lawyer – misuse of social media by students during the WIL placement. The third part of the chapter describes and analyses the experiences of university lawyers with contract risks. The contract is a mechanism that transfers rights to the host organisation, student and university, but it can also transfer legal risks to the university. Contract risks associated with contract terms and contract practices of the WIL discipline are discussed in this part.

The final section of each part addressing university lawyer experiences with program and contract risks provides an additional layer of analysis by situating the cross-case analysis of the preceding sections in the existing empirical studies, the WIL literature and the survey in Chapter Four. In particular, the discussion reveals three themes which underpin the contract risks: student exploitation; risk transference; and flaws in contract practices. Before proceeding with this case study, it is important to acknowledge that the views on legal risk and risk management were the personal views of the university lawyers studied and are not necessarily those of the university by which they are employed.

5.2 Program risks and contract risks distinguished

Program risk and contract risk emerged as two specific categories of legal risk in WIL programs. 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. Program risks are represented in the table of legal risks derived from empirical studies and reported judicial decisions in Chapter One, with the ID of the university lawyer who discussed the legal risk also denoted in the table (Appendix A). Contract risks are associated with contracts involving the host organisation, student and/or university. The contract, via the WIL agreement, is a mechanism which manages legal risks associated with WIL, but it can also be a source of legal risk for universities. There were two types of contract risk – contract terms and contract practices. Table 5.1 sets out the contract risks and the university lawyers who described the contract risks (as denoted by their ID). Both tables produce descriptive statistics that provide some insight about the types of legal risk managed by university lawyers.

Table 5.1: Contract risks in WIL programs

Legal risk	UL No.
<i>Contract terms</i>	
The host organisation retains the rights to intellectual property generated by the student	1, 3, 4, 5, 6, 7, 9, 10, 11, 13
The host organisation is an inadvertent employer of the student	1, 8, 9, 11
The host organisation takes disciplinary action or requires the university to take disciplinary action against the student	4, 5, 12
The risk is not insured or is underinsured by the university or host organisation	2, 8, 10, 11, 12, 13
The university indemnifies the host organisation for losses incurred in connection with the student's involvement during a WIL placement	4, 5, 8, 10, 11, 12, 13
The university provides assurances about student competence, character and conduct to the host organisation	5, 7, 11
<i>Contract practices of WIL discipline</i>	
The incorrect host organisation entity is a party to the WIL agreement	8, 13
More than one WIL agreement applies to the WIL discipline or a WIL agreement applies to multiple disciplines without the knowledge of all disciplines	4
The person signing the WIL agreement does not have authority on behalf of the university	2, 13
The WIL agreement is not reviewed by a university lawyer	10, 13
The WIL discipline maintains the status quo associated with WIL agreements	1, 2, 7, 9
The WIL discipline misuses a university WIL agreement template	4, 8

The case study findings suggest that university lawyers are predominantly involved with managing contract risk in relation to WIL programs. University lawyers made 46 references to 12 contract risks and 35 references to 22 program risks. Approximately 57 per cent of all university lawyer responses related to contract risk, with five of the 12 contract risks discussed by at least four university lawyers and the five leading responses being contract risk. 33 references dealt with contract terms and 13 references dealt with contract practices. 10 university lawyers referred to intellectual property (IP) rights during interviews, the most of any legal risk identified in this study. The survey in

Chapter Four revealed that contracts (79 per cent of participants) and intellectual property (66 per cent), an area related to contract, were the two leading areas of work for university lawyers pertaining to WIL programs (Table 4.2). The survey supports the case study findings that university lawyers are predominantly involved with managing contract risk. Further, health was the discipline mentioned the most by participants during interviews, in the context of contract and program risk, which is consistent with the survey results in which health was the discipline that received the most inquiries from university lawyers over a 12-month period (Table 4.4).

The potential reasons for the focus by university lawyers on contract risk are many and varied. Many of the program risks are incident-based, arising from the conduct of the student, host organisation or university. An incident may be less likely to occur than a contract risk. Preventing these incidents and controlling losses should they take place may also be the responsibility of WIL staff and not university lawyers, who are one step removed from the day-to-day operation of the WIL program. Further, a clear role of the university lawyer identified in the WIL literature is to draft and review WIL agreements (section 2.3.1). Most WIL programs will involve one or more WIL agreements, so it is not surprising that university lawyers are more regularly dealing with contract risk than with incidents during the operation of the WIL program.

The remainder of the chapter describes university lawyer experiences with program risks, followed by contract risks, and then situates those experiences in existing empirical studies and the survey reported in Chapter Four. Two categories emerged from the 19 program risks discussed by university lawyers – student disability and medical conditions, and hazards in the workplace. Student misuse of social media, a third category of program risk identified by one university lawyer, is also included in the analysis. Nevertheless, most of the chapter is devoted to contract risk because it was referred to most by university lawyers, and because it makes a unique contribution to understanding legal risks in WIL programs.

5.3 Program risks

5.3.1 Student disability and medical conditions

A student disability or medical condition appears to be a catalyst for many legal risks managed by university lawyers. Legal risks that can arise from a student's

disability or medical condition include the disclosure or non-disclosure of student characteristics to the host organisation; questions put to students prior to WIL placement that seek disclosure; the failure to provide reasonable adjustments; the competency of the student during the WIL placement; and the health and safety of clients and students in the workplace. University lawyers described the inherent conflict between the legal risks that can arise in this situation. University Lawyer 2 (UL2) encountered conflict twice in the nursing discipline. One nursing student had an allergy to latex, which meant that she could not wear or be near rubber gloves; another nursing student with dwarfism was significantly hampered in treating patients during rounds in the hospital. UL2 found it very difficult to negotiate these two legal risks – facilitating student participation in the workplace may expose patients to harm, but a failure to provide reasonable adjustments may lead to claims of disability discrimination. On balance, UL2's position was that patient welfare should take precedence over student rights to participate in WIL programs: "I mean it is fine to try to make reasonable adjustments, but the main thing is the patients aren't put at risk".

The WIL discipline, as part of its due diligence process prior to a WIL placement, will ask students questions about disability and medical conditions for the purposes of assessing a student's suitability for a placement and whether reasonable adjustments to the WIL program are required. The questions are designed to elicit information that supports the university's duty of care to students and that protects clients of the host organisation from harm, whether that is physical injury, property damage or economic loss. However UL10 noted that care must be taken with phrasing such questions. A direct question about the student's medical condition or disability may contravene discrimination laws, whereas a question framed in terms of whether there are any issues that may impact on the student's ability to complete the requirements of the WIL placement is more appropriate.

Whilst the questioning may comply with discrimination law, it does not necessarily provide the disclosure of disability or medical condition that the university seeks. Such is the experience of UL8, where a student had a medical condition that exposed clients to harm in a hospital. Prior to the WIL placement, the student completed a form which included a question as to whether they had any condition that would prevent them from completing the placement. The student did not disclose their medical condition because,

according to UL8, “they had every belief that they could do it... so their self-awareness of how they impacted others wasn’t strong”. The framing of the question created a conflict between legal risks. A direct question which elicits the student disability or medical condition may be considered discriminatory. However, a question that requires the student to judge whether their medical condition or disability prevents them from completing the requirements of the WIL placement may not elicit their disability or medical condition, thereby exposing the student and clients to harm. Such is the importance of this issue that UL10 is currently examining the practices of WIL disciplines in conjunction with insurance and risk personnel at the university.

UL8’s experience highlights the legal risks when a student fails to disclose their medical condition prior to WIL placement. Due to concerns about privacy, disability and discrimination (amongst other things), the student refused to disclose their condition to the host organisation or agree for the university to disclose their medical condition to the host organisation. The host organisation knew there was an issue with the student but could do nothing about it. As UL8 recalls, “it got to the point where the host said, ‘look until we know what’s going on, we can’t have this person here anymore... this is putting lives in danger’”. This was a complex situation – disclosure of the student condition without student consent would expose the university to legal risk associated with privacy law and discrimination, but the subsequent withdrawal of the student from the compulsory WIL placement component of their health degree could jeopardise the student’s ability to graduate. Furthermore UL8 noted that any action which would enable the student to graduate without meeting the inherent requirements of the course may misrepresent to the health sector that the student was suitably qualified. UL8 attributed this complex situation to poor supervision by university supervisors on-site and poor gatekeeping, that is, the student had not been identified by the WIL discipline at the right time as having special needs for the WIL placement.

A similar claim concerning gatekeeping and supervision was made by UL9 in relation to a colleague’s experience with a student suffering from a mental illness. The student had repeatedly failed a WIL placement and was subsequently excluded from the degree following repeated breaches of host organisation policy. WIL staff allowed the student to start a WIL placement “when she actually shouldn’t have gone at all”. The exclusion led to protracted conflict between the student, WIL discipline and the legal office. A

lesson learnt from this incident was that students may take a “scattergun approach” to resolving situations in their favour by making demands of WIL staff and other university divisions. UL9 remarked that “people feel bombarded, and they just give in to the student’s demands, and things happen that shouldn’t happen”.

5.3.2 Hazards in the workplace

Another category of program risk is hazards in the workplace. University lawyers deal with a series of hazards in the workplace for students that expose the university to legal risk. The hazards described by university lawyers can be classified into three areas: host organisation personnel; the workplace environment and host organisation supervision and attitude. Each area will be discussed in turn.

Host organisation personnel

The sexual harassment (UL3, 11) and bullying (UL3, 10) of students by host organisation personnel, being legal risks managed by university lawyers, are compounded if WIL staff do not handle student complaints appropriately. Universities have harassment and bullying policies which contain procedures for handling student complaints. The responsibility for handling these complaints typically rests with WIL staff. A failure to handle the complaint in accordance with university policy, for example by failing to put the allegations to the alleged perpetrator before making a decision, can support legal action by the student, host organisation or alleged perpetrator against the university. UL10 recalled an allegation of bullying made by a student in which WIL staff did not provide the alleged perpetrator with an opportunity to respond. The alleged perpetrator accused the university of defamation. A subsequent investigation revealed that the allegations were not entirely correct and there was another side to the story – the parties had been in a relationship – which added another layer of complexity to the situation.

University lawyers suggested that a breach of university policy may be due to WIL staff reacting with emotion to the situation rather than with the rationality reflected in university policy. According to UL10, WIL staff can possess “a propensity to try and react emotionally as well... to salvage the situation very quickly but not following the procedures and then you get into trouble”. An emotional impulse to resolve the situation can ignore the procedures in place for handling student complaints. The concept of

“emotive WIL staff” was also discussed by UL2 in relation to disciplinary action against a student who took “selfies” of a patient during a health WIL placement (section 5.3.3). The student was remorseful for her actions, apologised to the host organisation, the action was innocent as opposed to deliberate and there was no reputational or financial consequences for the host organisation. Nevertheless the reaction by WIL staff was to withdraw the student from the course. Pragmatism prevailed and the student was directed to repeat a part of the WIL program.

The workplace environment

The workplace is an authentic learning environment for students but may also expose students to physical and psychological harm. Students have been involved in motor vehicle accidents whilst they were driving to a workplace (UL11) and have suffered needle stick injuries during a clinical placement (UL13). There is also potential psychological harm to students associated with their involvement in workplace incidents. UL6 recalled a medical student who assisted in the treatment of a patient in the emergency section at the hospital. The patient subsequently died and there were concerns about the level of care provided to the patient. Although the student was not involved in decision-making, they “felt very exposed”. To the best of UL6’s knowledge, the university was not liable for the patient’s death. The immediate concern was the student’s psychological well-being from exposure to the incident. Whilst the workplace provides a rich learning experience for students by enabling them to interact with clients, it is clear that the nature of the client and the workplace can increase program risk. UL4 provided an example of youth work students on placement interacting with at-risk youth at night. UL4 asserted that this workplace is higher risk compared to a student attending an office and working with finance staff as part of a WIL placement in commerce.

Host organisation supervision and attitude

Student supervision in the workplace is necessary to minimise the risk of student mistakes which may cause harm to the client or patient of the host organisation (UL10). A student who is poorly supervised or unsupervised can hamper the quality of the student’s learning experience, as well as expose the student and the host organisation to harm. UL6 recalled a WIL placement in a processing facility. The student was allocated

decision-making responsibilities which were not appropriate in the circumstances. Issues with the processing facility resulted in physical injury to consumers. As a consequence, the student felt very exposed. This was an example of allocating duties which were the responsibility of host organisation staff and were not part of the learning objectives of the WIL program.

The attitude of the host organisation to the WIL program can be a hazard that exposes students to harm in the workplace. Host organisations may consider the student as “free labour” and fail to appreciate that the primary purpose of the WIL program is student learning. WIL disciplines in their promotion of the WIL program may be responsible for creating or reinforcing such a host organisation attitude. For instance UL1 came across promotional documents in a WIL program which had words to the effect of “let our students work for you for free”. This attitude was clear to UL5 by the reaction of a host organisation to a university WIL agreement: “‘well what are you on about? This is just work for no pay’”. According to UL5, the attitude arose because the host organisation could not understand the learning imperative of a WIL placement. As UL5 reflected on the situation, “...to me it just seemed like, you know, exploitation. We get this cannon fodder coming through, we’ll stick them on this project”. The host organisation was looking for students to work for free, contrary to the university expectation that learning was the primary objective of the WIL placement and integrated with work. The host organisation attitude can potentially generate a number of hazards in the workplace, including poor supervision and a workplace environment that condones the exploitation of students as free labour. UL13’s experience with a WIL placement in the education discipline demonstrates the potential impact of host organisation attitude to the WIL program on student supervision. The WIL agreement reviewed by UL13 was not appropriate in the sense that the student was unsupervised and the placement was effectively free labour for the host organisation, without any corresponding commitment to supervision as part of the learning experience.

5.3.3 Student misuse of social media

A third program risk is student misuse of social media. Social media networks such as Facebook, Twitter, Google+ and Instagram have a loyal following of student users. As at August 2015 Facebook alone had nearly 1.5 billion active users with Twitter, Google+ and Instagram boasting at least 300 million users (Statista, 2015).

WIL is likely to represent the student's first exposure to the workplace environment of their chosen field. Their new experiences with clients, host supervisors and staff can be discussed, summarised, criticised, photographed and video recorded with relative ease using web-enabled technologies. There is a risk that students may misuse social media on WIL placement. UL2 has experienced this risk on at least two occasions. UL2 recalled a situation in which a student on placement entered a morgue. Despite the host organisation prohibiting mobile phones in the morgue, the student proceeded to photograph a dead body and posted the photographs on Facebook with inappropriate comments. A more innocent situation involved a nursing student taking self-portraits or selfies with a patient that the student worked with during the WIL placement. The photo was subsequently posted on Facebook. Despite obtaining patient consent, the conduct was not appropriate and may have violated health and privacy laws. As UL2 acknowledged, "there was nothing untoward about it, but the reality is, you just can't do it. I mean, it's in the health business... same as taking a photo with a kid... you just can't do it and put it up on Facebook".

The next section situates the experiences of university lawyers with program risks in empirical studies addressing legal risk (Appendix A) and the survey in Chapter Four.

5.3.4 Discussion

The challenge of negotiating conflicting legal risks associated with student disability or a medical condition has been expressed by WIL staff in empirical studies and is shared by the current university lawyers. There can exist a tension between student rights, student competence and workplace safety. Student rights include the provision of additional support on WIL placement by the university and/or host organisation (known as reasonable accommodations or adjustments), as well as the right not to disclose their disability or medical condition. However, competence entails the student's ability to perform the tasks required of the WIL placement to an acceptable standard and their suitability to practice in their chosen field on graduation. Workplace safety involves the safety of clients/patients, students and host organisation personnel in the workplace. Rankin, Nayda, Cocks, and Smith (2010) describe this tension as a "dichotomy between balancing the rights of individuals, disclosure, the organisations involved and their clients" (p. 539).

Reeser (1992) and Nolan, Gleeson, Treanor, and Madigan (2014) described the concern of WIL convenors and supervisors with balancing the safety of the patient or client and providing appropriate support for students. UL2 also experienced this tension in relation to the students with dwarfism and the allergy to latex. UL2 adopted the position that patient safety was paramount. The ability of the university and host organisation to provide appropriate support in the first place is contingent on the student disclosing their disability or medical condition. Students exercise their right not to disclose for fear of being excluded from the WIL program (Anderson & Wylie, 2004; Stanley, Ridley, Manthorpe, Harris, & Hurst, 2007; Walker, Dearnley, Hargreaves, & Walker, 2013) or being treated differently (Morris & Turnbull, 2006; Nolan, Gleeson, Treanor, & Madigan, 2014). The university cannot compel disclosure by asking direct questions about the student's disability or medical condition. But the student's decision not to disclose compromises a safe workplace environment and places the student, host organisation, staff and clients at risk (Rankin, Nayda, Cocks, & Smith, 2010). The experience of the host organisation in UL8's case is insightful. The host organisation's hands were bound by a series of legal obligations. The host organisation knew the student had an issue which it could not compel the university or student to disclose. Nevertheless the student's continued participation in the workplace was jeopardising patient safety. The tension here is between the student's rights to privacy and confidentiality and protecting the public from harm by ensuring the competency of the student in the workplace (Conway & Swain, 2002; Goldstein, 1990).

There is also a tension between student rights and competency, more specifically the ability of the student to complete the WIL placement and the suitability of the student to practice in their chosen field on graduation (Anderson & Wylie, 2004; Gilbert, 1998; Karickhoff & Howley, 1997; Nolan et al., 2014; Walker et al., 2013). A WIL discipline that admits students with a disability or medical condition to a WIL program supports their right to equal treatment in higher education. However, the WIL discipline is considered a poor gatekeeper to the profession if the student does not have the minimum level of competence required to complete the WIL program or to practice in their chosen field (Gillis & Lewis, 2004). Poor gatekeeping was identified by university lawyers as a legal risk that may lead to the repeated failure of students on WIL placement or removal of the student from the WIL placement. The student may be subsequently excluded from the university, which can lead to protracted legal dispute or

to the university enabling the graduation of students who are not suitable for the profession.

A number of legal areas underpin the risks associated with student disability and medical conditions: confidentiality, workplace health and safety, negligence, privacy law and discrimination. These areas were all significant sources of legal work and/or future legal risk in the survey (Tables 4.2 and 4.3). Further, the privacy law concerns of UL8 about disclosure of student disability suggests that the disclosure of student information may be one of the topics that has prompted significant work in privacy law, as reported in the survey (Table 4.2). In particular, university lawyer experiences with hazards in the workplace are supported by the survey findings in which workplace health and safety was a prominent area of legal work, and considered to be the greatest future legal risk to the university with respect to WIL programs (section 4.3).

University lawyer experiences of workplace bullying, sexual harassment and poor supervision are shared by WIL staff and students in many empirical studies (Appendix A) and were referred to by university lawyers as a source, albeit not a significant one, in the survey (section 4.3). The significant number of empirical studies addressing hazardous workplace environments or work practices is generally limited to three events or circumstances: student exposure to diseases in medical practice, most notably needle-stick injuries; physical injury to students caused by workplace equipment; and musculoskeletal injuries suffered by dental students whilst operating workplace equipment (Appendix A). University lawyers expanded the legal risks identified in the empirical studies by describing personal factors of WIL staff, students and host organisations as the cause or consequence of workplace hazards. The reactions of emotive WIL staff to allegations of workplace bullying or student misconduct may be a breach of university policy. A host organisation attitude that students represent free labour may expose students to an exploitative workplace environment. Further, the psychological impact of student involvement in a traumatic event such as serious injury or death of a patient can be as significant as the physical injuries described by university lawyers.

UL2's experiences of students using social media to publish prohibited client and host organisation images advances existing empirical studies addressing legal risk and is supported by case law from the United States on the topic. Cain and Fink (2010), in a

legal review of social media in higher education, did find two cases involving student use of MySpace, the popular predecessor to Facebook, during their WIL placement. In *Yoder v University of Louisville*, a nursing student made “caustic and profane observations on race, sex, and religion when commenting in MySpace postings about patients she had encountered” (Cain & Fink, 2010, p. 2). In *Snyder v Millersville University*, a student teacher posted a photograph of herself wearing a pirate hat and holding a plastic cup with the caption “drunken pirate”. As social media applications continue to evolve in terms of functionality and remain popular with student users, it is likely that universities will encounter more incidents of student misuse of social media while on WIL placement.

The next part of this chapter describes a new category of legal risk not previously covered in empirical studies – contract risk.

5.4 Contract risks

WIL programs may involve contracts, by agreement or imposed by law, involving the host organisation, student and/or the university, which create legal rights and bind the parties to legal obligations. The WIL agreement is generally the contract that sets out the rights and obligations of the parties involved with WIL. As will be discussed in Chapter Six, contract is a mechanism used by university lawyers to manage legal risks associated with WIL. However, the contract can also be a source of legal risk for universities. In particular, there are contract terms which have the effect of transferring legal risk from the host organisation to the university and of transferring rights, including disciplinary action and student IP, to the host organisation, each of which is discussed below. The final section outlines the flaws in contract practices by the WIL discipline.

5.4.1 Assignment of intellectual property to the host organisation

Host organisations may, as a condition of the WIL agreement, require ownership of any IP generated by the student on WIL placement. Host organisation ownership of IP is contrary to the general rule under university policy that IP created by the student is owned by the student. Notwithstanding this, a review of university IP policies by the author reveals an exception to the rule – the assignment of IP created by the student. Students may assign their IP directly to the host organisation by written agreement

(UL3, 5) or indirectly, in the sense that the student's IP rights are first assigned to the university, and are then assigned by the university to the host organisation under a separate WIL agreement (UL8, 10, 11).

University lawyers described two circumstances arising from the assignment of student IP rights that create legal risk. First, the student may not understand the legal implications of assigning their IP rights to the host organisation or may feel compelled to do so in order to complete the WIL program or their degree. Second, the breadth of IP rights assigned to the host organisation is such that the student cannot complete the assessment attached to the WIL program because the host organisation, as owner of the IP, has the right to prevent publication of the student's work. The underlying theme of both circumstances was student exploitation by the host organisation. UL3 couched risk in terms of the university owing a duty of care "to make sure that students aren't being exploited and perhaps are also aware of their rights in this respect (before the placement commences)". Each circumstance will be discussed in turn.

Student understanding about assigning intellectual property

University lawyers were generally opposed to students assigning their IP rights. Nevertheless university lawyers recognised that in particular circumstances, namely paid WIL placements (UL4, 9) and patient records and documents in the health discipline (UL4, 13), the host organisation should own IP created by the student, other than authorship in published works. The legal position is that an employer owns the IP generated by employees in the course of their employment unless the parties agree otherwise (*Copyright Act 1968* (Cth); s 35(6)). Therefore it was expected that a host organisation retains the IP created by the student on a paid WIL placement where that student is an employee of the host organisation (UL4, 9). Nevertheless UL6 warned that students may be "selling their soul" by assigning their IP in return for payment. Although the host organisation is entitled to IP generated by students who are employees, students cannot make an informed decision without weighing the potential costs of relinquishing their IP rights against the potential benefits (payment and workplace experience) of the WIL placement.

WIL is in demand by students who want experience in the workplace to complement their traditional studies and enhance their employability. The risk according to UL4 is

that students, in their haste to obtain a WIL placement, may sign an agreement to assign their IP rights without thinking about the consequences of doing so. The consequences may be significant in a postgraduate context if the student does not appreciate the breadth of IP assigned to the host organisation. UL6 provided this example: “a student who has been here for a year and doing a placement on their PhD may well have plenty of background IP, and sometimes they don’t even understand what that concept is”. So the risk is that IP generated by the student before the placement, as part of their higher degree in research, may be inadvertently assigned to the host organisation because it involves a subject area related to the placement. For UL9 it was imperative that the university made it clear to students the nature and extent of IP rights assigned by the student to ensure that they make an informed decision before proceeding with a WIL placement.

The inadvertence of WIL staff may be responsible for students’ failure to appreciate the consequences of assigning IP that they create during the WIL placement. According to UL4, WIL staff may not consider the issue until prompted by the university lawyer. Student enthusiasm to start the WIL placement can be matched by enthusiasm by WIL staff to secure the placement. UL4 noted that by the time the legal office receives a request to document the WIL placement, all parties may be in a position to start the WIL placement. UL4’s experiences infer that the university lawyer may scuttle an assumption held by WIL staff that the WIL agreement is a mere formality when in fact IP rights still need to be understood and discussed with students. Some would consider that correcting assumptions in the process of documenting or reviewing WIL agreements represents good risk management by the university lawyer. But what happens in situations where WIL agreements are not handled by university lawyers? WIL staff who do not engage with students about the issue of IP rights, due to their own lack of understanding or their haste to finalise a WIL placement, may be exposing the university to claims of student exploitation by the host organisation.

Student compulsion to assign intellectual property

Many university IP policies stipulate that the decision to assign IP is voluntary and will not impact on the student’s progression in a course or degree. However students may feel compelled to assign their IP, such that their decision is not truly voluntary. According to UL11, the legal risk to the university arises from the fact that

“the university is asking the students to give up a right that belongs to them”. Whilst it is preferable that students have the option whether to assign their IP rights, UL11 acknowledged (like UL4 and 9) that this is not always possible. The risk of not giving the student options was a student claim that they were under duress to assign their IP under a WIL agreement. UL11 put the legal risk in these terms:

Because the last thing we want to have is a student down the track when something they worked on while they're on placement becomes the new... the next iPod, or you know, Apple phone... saying, 'well you actually made me do it... I had no choice'.

Any suggestion to the student that they seek legal advice may not be sufficient to mitigate this risk because the student may not have the financial capacity to obtain legal advice about their IP rights. As UL11 remarked: “it's almost pointless to say... if the situation were, 'you must get legal advice', and if we say that, knowing that it's going to cost them \$5000... most students are not going to do that.” This example reveals a potential conundrum for the university lawyer that may apply to any student IP matter in WIL programs. The university lawyer cannot provide legal advice to the student because the student is a separate entity from the university lawyer's client, being the university. UL13 acknowledged that student IP was a difficult issue because the practising certificate of the university lawyer extends to the university only and not to the students. However, the university has a legal, ethical and/or reputational interest to minimise the risk associated with student misunderstanding of their IP rights or a claim of duress against the university. Consequently, the university lawyer must find a way to support student welfare, thereby minimising risk to the student and university, without providing legal advice to the student.

Breadth of intellectual property rights

In the event that the student makes an informed and voluntary decision to assign their IP, another legal risk arises from the breadth of IP rights so assigned. The university expects that students are able to produce work for assessment as part of the WIL program (UL11). UL4 asserted that a potential problem between the host organisation and university in negotiations was where a host organisation was not agreeable to the student using examples of their work on placement that might be

required for assessment for the relevant WIL discipline. Should the host organisation retain all IP, the student may be prevented from producing assessment as part of a WIL program that they paid for. In a research higher degree context, UL11 described situations in which the host organisation has requested that the student not have any rights to publish their academic work. The risk of ceding to that request was a serious one in terms of academic freedom and the inability of the student to complete the qualification that they had paid for:

We have been asked on occasion to not give the student any rights to publish their academic work. If you've got a host saying, 'if you come here, you will not be able to publish your work' you can't just say yes to that, because it undermines the principles that are very near and dear to the University, like academic freedom... and you know, why would we put a student in a position where they can't get the qualification that they're seeking because we're also saying to them as a University that you have to get this experience... this is the one we've organised for you...

A WIL placement may result in the assignment not only of student IP rights, which prevents publication of academic work, but also the IP rights of academic staff. UL7 provided the story of an international student who was offered a PhD position in Science. Part of the PhD involved a WIL placement. Shortly after the student arrived in Australia, the host organisation produced an agreement which assigned all IP to the host organisation and was "not negotiable". The student's academic supervisor was opposed to the agreement because any IP created by the academic in conjunction with the student would be owned by the host organisation. The student refused to sign the agreement because they wanted to publish out of the PhD and use the IP created for future academic purposes. After extensive attempts by UL7 to negotiate the IP terms with the host organisation failed, the student continued with their PhD but decided not to proceed with the WIL placement. This was a case where the student did understand the legal implications of assigning their IP and made an informed decision not to proceed with WIL.

The breadth of IP rights as a legal risk in postgraduate study was also evident in UL13's experience with a government agency in a Psychology placement. The definition of IP in the WIL agreement proposed by the government agency not only gave the agency all

student IP relating to the WIL placement, but also any works of the student generated during the time of the WIL placement, even if unrelated to the placement. The student was writing a thesis at the time, which would have been caught by the definition of IP. UL13's feeling was that the government agency did not consider or understand the nuances of the proposed definition and its potential impact on the student. For UL13, getting the agency to an appropriate level of understanding "was just like hitting your head against the wall". The experiences of UL7 and UL13 demonstrate how important it is for university lawyers to review host organisation WIL agreements to identify any legal risks associated with student IP rights.

5.4.2 The student as an employee

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

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

Consequently, a student will not be an employee if the WIL placement is a vocational placement. If the WIL placement is not a vocational placement, the issue becomes whether the student is on work experience or is an employee according to the "ordinary meaning" or common law definition of employee (*Fair Work Act*, ss11 and 15). If the student is an employee, the host organisation has a number of statutory obligations:

paying the student remuneration as prescribed by the industrial instrument that applies to the host organisation, paying superannuation (*Superannuation Guarantee (Administration) Act 1992* (Cth)), withholding Pay As You Go (PAYG) tax from the remuneration (*Income Tax Assessment Act 1936* (Cth)) as well as providing statutory leave entitlements.

The legal risk of a student being deemed an employee arises in an unpaid WIL placement that is not a vocational placement according to the *Fair Work Act*, if students remain with the host organisation after the specified term of their WIL placement (UL1), or if students are paid during a WIL placement. With respect to placements in unpaid WIL programs, UL8 and UL11 acknowledged that the reference to “requirement of an education or training course” in section 12(b) is a “grey area” in the *Fair Work Act*. However their interpretation differed as to whether placements in compulsory and elective unpaid WIL programs were covered by the vocational placement exemption. Such a difference in opinion highlights the ambiguity in this area, and thereby a source of risk that needs to be managed by the university lawyer. The position of UL11 was that *all* unpaid WIL placements are vocational placements:

We’ve taken the more liberal view and said, ‘as long as it is a course requirement, doesn’t matter whether it’s an elective subject or a compulsory subject’... as long as it’s written into the handbook that in order to pass this subject that you need to do this (and it can be an optional part), but as long as it’s written in there we’ve taken the view that that should satisfy the definition... not tested in the courts anywhere, but that’s certainly the view we’ve taken.

In contrast, UL8 has adopted a more cautious approach to the issue, in that unpaid placements in *elective* WIL programs may not be covered by the vocational placement exemption:

The vocational placement exemption under the *Fair Work Act* doesn’t necessarily cover you. It clearly covers the required course, it’s not so clear whether it covers elective courses... depends on who you talk to as to whether you say that is or isn’t the case. We’ve taken the cautious approach of until someone tells us, absolutely, that it is covered... we have to assume that it may not be, and that there may be an opportunity for a claim.

For UL8 and UL11, uncertainty will persist until the vocational placement exemption is subject to judicial scrutiny. For UL3, the *Fair Work Act* was not an issue because, based on discussions with the Fair Work Ombudsman (the government agency which enforces the *Fair Work Act*) and advice from an external law firm, any activities that are part of the unpaid WIL placement would be exempt from the *Fair Work Act*.

Any direct or indirect payment by the host organisation to a student raises the issue of whether the student is an employee. In some WIL programs, the host organisation wants to create an employment relationship and pay the students as an employee. Other host organisations want to make a payment to students in the form of a stipend, bursary or scholarship, but they also make it clear to the university that the creation of an employment relationship is not intended by the payment. The student is either paid directly by the host organisation or indirectly as part of a “tripartite arrangement” (UL9) – the host organisation provides the funds to the university which are subsequently distributed to the student (UL6, 9, 11). University lawyers agreed that the description and structure of the payment does not negate the existence of an employment relationship. In fact, UL8 and UL9 have treated the tripartite arrangements with a healthy dose of scepticism. Classifying the payments as a scholarship may be viewed as an attempt to circumvent tax, superannuation and salary obligations. UL9 was adamant that the tripartite arrangement, which had been a longstanding practice of some universities, was for all intents and purposes a contract of employment:

The student is liable to pay PAYG tax... it's not a scholarship under the definition of the *Income Tax Assessment Act*. They're an employee as far as the *Fair Work Act* is concerned, so at the end of the day these scholarship tripartite arrangements are really just a historical aberration that needs to be now stopped, and students need to be directly hired by the organisations and regarded as an employee, entering in an employment relationship, paid as such, and the student pays PAYG tax, and that's it.

UL11 also described the tax implications of the payment: “if a payment can be interpreted by the tax office as in lieu of services, it doesn't matter how it's paid... whether it goes through us, and then to the student... it could ultimately still be taxable income.”

University lawyers differed in their opinion as to whether the deeming of a student as employee represented a legal risk to the university (as opposed to a reputational risk). A host organisation that fails to pay the student if deemed an employee is in breach of the *Fair Work Act*. According to the advice received by UL1, a university that sets up a WIL program that does not fit within the vocational placement exemption may be complicit in the breach by the host organisation. Both UL6 and UL8 rejected the notion that compliance with the *Fair Work Act* was a legal risk to the university. UL8 intimated that the legal risk to the university is in a WIL agreement where the university provides a guarantee to the host organisation that the student is not an employee and indemnifies the host organisation from any liability under the *Fair Work Act*. The following example by UL8 relates to unpaid placements in elective WIL programs:

They want more guarantees from the University that they couldn't possibly be subject to a claim under Fair Work, and they will want indemnity... they will want to make it look like an employee/employer relationship more in the agreement, but absolve themselves of any risk... And I'm sure they're doing that from their own lawyer's perspective, or an insurance perspective, or their own shareholder risk perspective... but that's not the purpose of the program.

The wording of the WIL agreement (contract) is crucial as to whether the student, as an employee, is a legal risk to the university. An acknowledgment by the host organisation and university that an employer–employee relationship is not intended (UL1, 11) may not create a legal risk, whereas a contractual warranty by the university to the host organisation that a student is not an employee during the WIL placement may represent a legal risk.

5.4.3 Disciplinary action on the host organisation's terms

A number of WIL agreements reviewed for this research enable the host organisation to remove the student from the workplace. This action effectively terminates the WIL placement. The legal risk is with those WIL agreements which do not require the host organisation to consult with WIL staff and agree on termination as the appropriate course of action; or to provide a valid reason, such as misconduct, incompetence or breach of host organisation policy, to terminate the WIL placement. The termination of a WIL placement by the host organisation without a valid reason or

prior consultation with the university represents disciplinary action on the host organisation's terms. Termination in these circumstances may be inconsistent with university policies designed to afford students procedural fairness when decisions are made affecting their participation in a WIL program. UL12 provided an example of a host organisation that terminated a WIL placement without adhering to the principles of procedural fairness:

There was one involving a student on placement who had... it involved children, and the placement provider was concerned about the way the student was interacting with the students and cancelled the placement... they had a right to do so under the terms of the contract unfortunately, without providing reasons... and at the time we asked them to submit a formal reason, or formal complaint so we could action it, and they refused to... so basically there was very little that we could do in that instance.

UL12 wanted to afford the student procedural fairness (as per university policy) but the host organisation had a contractual right to terminate without reasons. Even if the university applies its own policies, such an exercise may be considered futile because the university has no contractual right to reverse the host organisation's decision to terminate the WIL placement. UL12 was engaged in another matter involving a counselling student who made a personal admission which caused the immediate termination of their placement. The student then retracted the admission and the university investigated the matter, applying the rules of natural justice. Given that the student had already been terminated and it was a "he said / she said" situation "there was very little we could do in that situation as well" (UL12).

Disciplinary action can also be on the host organisation's terms if the university is required by the host organisation to take particular disciplinary action. UL4 distinguished between a host organisation's right to request the removal of a student from the WIL placement with a valid reason and the host requiring the university to take disciplinary action against the student. According to UL4, a provision in the WIL agreement that requires the university to discipline the student at the direction of the host organisation without following internal disciplinary processes may breach university policy. This highlights the importance of university lawyers reviewing the

proposed WIL agreement against university policies in order to identify any legal risks associated with disciplinary action.

5.4.4 Uninsured or underinsured risks

Insurance is a contract designed to transfer legal risk from the insured to the insurer. The university and host organisation generally hold insurance policies which cover events and circumstances in their respective workplaces. The insurance policy is a product which manages the financial burden of risk by providing monetary payment in adverse circumstances. University lawyers discussed two situations pertaining to insurance maintained by host organisations. First, a host organisation may not want a provision in the WIL agreement which requires them to maintain insurance coverage for the student on WIL placement (UL10). Second, the host organisation may have a monetary cap on liability (UL4, 10). UL10 provided an example of where the university had a \$20 million requirement for public liability insurance to be maintained by the host organisation, but the insurance coverage of the relevant host organisation was capped at \$5 million. The risk in both situations is that events or circumstances involving the student on WIL placement may not be insured or underinsured by the host organisation. However both UL11 and UL12 remarked that a host organisation not holding public liability insurance for visitors (which includes students on WIL placements) was very unlikely, even in small organisations. In the case of large organisations, UL10 acknowledged that the failure by host organisations to warrant they have insurance is not a significant financial risk: “We know that they would have some form of insurance, we know the balance sheet is such that if there were any problems, it would be covered”.

University lawyers discussed the risks associated with WIL disciplines not engaging in appropriate due diligence pertaining to insurance. The concern for UL2 was WIL disciplines that do not have systems in place to check the qualifications of university supervisors and its implications under the university insurance policy. For UL8 the lack of due diligence resulted in the wrong university insurance policy being included on a form signed by a student before the WIL placement. WIL staff must also ensure that the host organisation is named as the insured party on its policy or to use UL13’s words, “you need the right person with the right insurance”. UL13 imitated a brief exchange with WIL staff on the topic: “Have you checked the insurance? No, that’s a different

party to who we need to see who's got insurance for our student going in there, so that's an issue". The issue is that student activities in connection with a WIL placement may not be insured by the host organisation. The university, under the misapprehension that the host organisation has insurance, may not have its own policy to cover particular student activities. In this way the potential assurance provided by insurance could be undermined.

5.4.5 The university indemnifies the host organisation

A host organisation, in its attempt to shift legal risk to the university, may insist on an indemnity provision in the WIL agreement. In such a case, the university indemnifies the host organisation, that is, the host organisation has a right to receive money from the university to cover a financial liability arising from the WIL placement. The level of risk transfer by the host organisation depends on the scope of the indemnities. A review of university WIL agreement templates by the author revealed that the indemnity generally accepted by the university is limited to negligent acts or omissions by students and staff of the university. However university lawyers referred to many WIL agreements in which the indemnity was much broader, requiring the university to indemnify the host organisation for any losses incurred in connection with the WIL placement (UL4, 5, 10, 13). The effect of the indemnity was that the university "is absolutely liable for everything that happens when a student walks in that door" (UL5). UL10 also acknowledged that this was a very broad indemnity, which transferred risk to the university irrespective of whether the student or host organisation was at fault: "because even if the agency is negligent, and an injury ensues so the patient for example is injured (or dies), and our student was involved, that provision could expose the University to liability... can we accept that?" This illustrates how a WIL agreement with such an indemnity can be a source of risk, which can be extremely difficult for the university lawyer to manage.

Some WIL agreement templates reviewed included a reciprocal indemnity, or what UL4 described as a "carve out", for the negligence of host organisation personnel. In the absence of a reciprocal indemnity, the responsibility for anything connected with the student's involvement on WIL placement shifts to the university. UL13's frustration with the position of host organisations on indemnities is evident in this passage:

They usually want everything, and sometimes they won't even give a reciprocal reduction for their own negligence... so it's all about, you know, 'you indemnify us for all your students' acts, wilful or otherwise'...

It is clear why the university does not include indemnities as a matter of course beyond the negligence of students and staff. The university does not control the workplace or the behaviour of its students, with the exception of WIL placements with university supervisors employed in the workplace. Such an indemnity shifts the responsibility (and risk) of the workplace and the conduct of some or all of its participants from the host organisation to the university.

5.4.6 The university assures the competency and conduct of students

The host organisation generally seeks competent students for the WIL placement. Where the university is responsible for the recruitment and placement of students, the host organisation may seek assurances, or in contract terms warranties, from the university about the student. It is the extent of these assurances which can generate legal risk. UL4 argued that it is appropriate for the university to assure the host organisation that the student has a particular level of learning and that the student has received specific information and training as part of an induction prior to the WIL placement. This enables the host organisation to minimise adverse incidents in the workplace by delegating work which is within the student's competency. However, the line of university responsibility for students appears crossed when the university is required to assure host organisations of student characteristics that cannot be foreseen or controlled by the university. UL5 made the distinction between the level of learning or skills that the student has obtained in coursework, which is an appropriate assurance and one which is also supported by UL4, and a warranty that the student is suitable for the WIL placement:

Some of the [host organisation names] have asked us to warrant the suitability of students for the placement, both in terms of competence and character, and we don't do that ... we will tell you what level of skill they've achieved.

The university can provide evidence of competency to the host organisation, in terms of course completion as well as the learning objectives and skills attached to the courses,

but to warrant in a WIL agreement that the student is in fact competent and of good character is a significant shift of legal risk from the host organisation to the university.

Universities cannot control the behaviour of students on WIL placement. WIL programs replace the classroom with the workplace as the student's learning environment. As a consequence, the university relinquishes much of its control over students, which it previously possessed in the classroom. To then make the university responsible for student actions beyond its control is a significant legal risk. UL7 unsuccessfully argued the issue of control during negotiations with a host organisation over terms in a WIL agreement:

... they kept putting in these clauses that [university name] will ensure that the students do x, y, z, and I kept trying to explain to [host organisation name] that unlike with our employees we can give them directions, and they must undertake reasonable directions, but students are completely separate legal entities to us, and we don't have control over them. There were things in there that they must behave a certain way, they must dress a certain way, all these things... and I kept trying to explain, 'well we can't control that'.

UL7 evokes a powerful image as part of the argument against university warranties about student behaviour. Whilst the university has legal control over what the employee does in the workplace, including the manner and method of work, the student is akin to a legal entity with its own rights and obligations separate from the university. As a separate legal entity, the student decides whether to dress and behave in a certain way. The concept of the student as separate legal entity applies equally to host organisations in unpaid WIL placements. The student is an employee of neither the university nor the host organisation. Both parties can attempt to regulate student conduct through policy and can impose disciplinary sanctions should the student fail to meet acceptable standards as good risk management practice. But if the university makes assurances about student behaviour and competency in the WIL agreement, the legal risk shifts responsibility, and therefore risk, to the university. The university is exposed to a breach of contract action by the host organisation if, as UL7 succinctly puts it, "our student goes and does something stupid". A contractual assurance about student behaviour during their WIL placement appears to be a contract risk that is difficult, if not impossible, for the university lawyer to control.

5.4.7 Contract practices of the WIL discipline

Specific contract practices of some WIL disciplines represent contract risks and can contribute to the legal risks associated with contract terms discussed in the preceding sections.

The incorrect host organisation entity is a party to the WIL agreement

University lawyers were mindful of the incorrect host organisation entity being a party to the WIL agreement (UL8, 13). There may be legal consequences associated with the WIL agreement and the host organisation insurance policy, should WIL staff insert the wrong legal entity for the host organisation into the WIL agreement. UL13's experiences with this administrative error were prevalent in health disciplines when WIL staff were required to identify the correct legal structure of medical practices: in particular, is the host organisation a partnership or operating under a trust structure? The university may have difficulty enforcing the WIL agreement if the host organisation is not the named party on the WIL agreement. More significantly for UL13, a host organisation on the WIL agreement which does not match up with the host organisation on its insurance policy may mean that student activities are not covered by the host organisation policy. As a consequence, this may be a non-insurable risk which remains with the university.

Two WIL agreements for one WIL discipline, one WIL agreement for multiple WIL disciplines

A host organisation may be involved with WIL programs in various disciplines. For instance a hospital may host students completing finance, psychology, medicine and nursing WIL placements. UL4 recalled past issues with WIL agreements that extended to multiple disciplines, without each of those disciplines being consulted on the agreement. As a consequence, contract terms appropriate to the discipline responsible for finalising the WIL agreement were not appropriate for other disciplines inadvertently bound to the agreement.

Further, the disciplines not consulted may already have WIL agreements with the host organisation, meaning that there were multiple or overlapping agreements covering the same WIL program. UL4 attributed this risk to the diversity of WIL disciplines and host

organisations, combined with a lack of communication within the university and awareness by WIL disciplines about the activities of other disciplines.

WIL agreements that contravene university policy

The university is a legal entity that requires persons with authority to execute contracts on its behalf. Universities have delegation policies and procedures which identify the persons with authority to sign documents such as WIL agreements, as well as the power to delegate that authority. As UL2 has experienced, academic administrators may not be clear about the extent of their authority to sign WIL agreements. Although they hold a senior position within university management, the academic administrator may not have the authority to sign WIL agreements under delegation policy. This risk would be more likely to occur at universities where WIL disciplines (UL2) and not university lawyers (UL13) are responsible for having the WIL agreement executed by the appropriate contract delegate. Nevertheless the involvement of the university lawyer is contingent on WIL staff forwarding the agreement to the university lawyer for review. UL13 could not be certain that the WIL agreement was being sent to the appropriate person under delegation policy, with respect to those WIL disciplines that bypassed the university lawyer. Such bypassing undermines the university lawyers' ability to manage risk.

WIL staff may also bypass, deliberately or inadvertently, the contract approval process enshrined in university policy. A scan of university websites reveals that many universities have a legal services or contract policy which requires staff to obtain legal services with respect to contracts. UL10 argued that over time the relationships developed between the legal office and WIL disciplines has contributed to fewer instances of WIL staff breaching policy. With UL13, the adherence to policy varies with disciplines. Whilst Health sends through most WIL agreements for signing, the WIL agreements for Education are not seen. University contract approval and delegation policies are aimed at managing legal risk but in UL13's case, WIL staff may be exposing the university to legal risk by contravening both policies. Consequently, it is important for university management to ensure WIL staff understand the importance of, and comply with, policies designed to manage risk. Otherwise risk management by university lawyers could be bypassed.

The WIL discipline maintains the status quo with WIL agreements

Maintaining the status quo with respect to WIL agreements represents a legal risk if unacceptable contract terms persist in the WIL agreement (UL1, 2, 7, 9). There may be a perception, particularly amongst traditional WIL disciplines such as health, engineering and education, that changes to longstanding processes and practices associated with WIL agreements were not necessary. UL2 noted that the university had very few issues amongst thousands of WIL placements, making WIL a relatively low risk activity. Nevertheless UL2 acknowledged that “just because it’s worked well for a period of time, it doesn’t necessarily mean it’s always going to work well”. For instance WIL agreements had been signed on an annual basis in Education without review or advice from the university lawyer. The response by Education to legal services was “well we’ve signed these for 20 years, so what’s the issue?” Unfortunately, such status quo fails to acknowledge the dynamic nature of law, and how rights and obligations can change with new legislation, case law, policies and practices.

Maintaining the status quo is an approach exhibited by both host organisations and WIL disciplines. WIL agreements that are signed without amendment over a long period of time set a precedent and culture that the university lawyer finds very difficult to overturn. UL7 argued that precedent places the university in a poor negotiating position: “then we get stuck with something that we’ve had for a million years, and then they say, ‘oh well you signed up to this last time’, and it’s like... well, we did... but we didn’t want to”. The legal risk of maintaining the status quo was evident when UL8 encountered the situation involving a student who chose not to disclose their disability to the host organisation (section 5.3.1). The student signed a form acknowledging that they could meet the requirements of the WIL placement and were covered by a particular insurance policy. The form had been used for a while but not updated or reviewed by the insurance office. It was only in the process of managing other legal risks that UL8 discovered that the form made reference to the wrong insurance policy.

WIL staff misuse a WIL agreement template

The misuse of WIL agreement templates involves one WIL discipline replicating the WIL agreement template from another discipline without understanding the legal consequences of doing so. Maintaining the status quo with respect to

university WIL agreements can also have a “ripple effect” of misuse. An error in a WIL agreement can be compounded by its adoption in other WIL disciplines. UL8 discovered that the same form signed by students with the incorrect insurance information had been circulated to other WIL disciplines when it began appearing in material received by the legal office from other WIL disciplines. For UL4, misuse of WIL agreement templates is a challenge to risk management by university lawyers. UL4 recalled one matter in which a WIL discipline offering a “project-based” WIL placement utilised a university WIL agreement designed for clinical or “process-based” WIL placements. The issue with replicating this agreement related to the indemnities requested by the hospital and granted by the university. Whilst hospitals generally expected the university to provide an indemnity with respect to damage caused by the university or its staff, it was not particularly appropriate for non-clinical placement settings. UL4 questioned why the university would be offering an indemnity when it did not need to and was not asked by the host organisation to provide. Consequently, ensuring that WIL agreements are tailored to the WIL program is important in managing the legal risks associated with WIL.

5.4.8 Discussion

Contract risk is a new category of legal risk not previously subject to empirical study in relation to WIL. Accordingly all the events and circumstances associated with contract risk represent a unique contribution to existing knowledge of risk management in WIL programs. There are two reasons why WIL staff may not have addressed contract risk (as authors or as units of study) in the prior empirical studies. First, WIL staff may consider that the responsibility for managing contract risk is with university lawyers because they draft, review, amend and advise on WIL agreements. Second, WIL staff may not appreciate the contract risks because they do not seek the university lawyer’s involvement in a WIL agreement. In fact WIL staff may bypass university policy mandating the review of WIL agreements by the university lawyer. The experiences of university lawyers indicate that the WIL agreement (contract) is a mechanism for managing legal risk, but it may also be a source of legal risk in relation to WIL programs. The discussion which follows focuses on student IP, employment, insurance and indemnities, being those contract risks that can be situated in the WIL literature and/or the survey findings in Chapter Four for comparative purposes.

University lawyer experiences with contract risks answer questions raised in the survey about IP, contracts, university policy, wages and other payments, and the *Fair Work Act*, as significant sources of legal risk and areas of interest (section 4.6). In Chapter Four the question was posed: “How do intellectual property rights governing the host organisation–student relationship represent a legal risk to the university?” IP issues can present a legal risk to the university because students may not understand the legal implications of assigning the IP they create; they may feel compelled to assign their IP in order to complete their course or degree; or the IP rights assigned are so broad that the student cannot submit assessment or publish work without host organisation consent, which may not necessarily be provided. University lawyers’ experiences also suggest that university policy may represent a contract or a program risk. WIL disciplines may prepare and/or approve agreements that may breach university policy and WIL staff may not abide by university policy when dealing with program risks.

University lawyers expanded the responses made in the survey to the *Fair Work Act* and wages and other payments as sources of legal risk. They described the host organisation’s legal obligations if there is a contract of employment with the student. The legal risk is that the university’s involvement in an arrangement which circumvents the host organisation’s legal obligations as employer may be considered a breach of the *Fair Work Act*. Although not made explicit by university lawyers, a related legal risk is the university’s association with scholarship or bursary monies, as part of an arrangement deemed a “back door method” of employing students. Further, a warranty that the university provides to the host organisation that there is no employer–employee relationship exposes the university to legal risk. The legal risk may also lie in legal uncertainty – unpaid WIL placements that are an elective component of the degree may not be covered by the vocational placement exemption in the *Fair Work Act*. The underlying theme with the legal risks associated with employment and IP was student exploitation, namely that the WIL agreement may undermine their IP and employment rights.

The contract risks associated with insurance and indemnities also have a common theme – the transfer of risk from the host organisation to the university. The discussion of insurance and indemnity is also supported by university lawyers in the survey, who identified both areas as specific aspects of their role (section 4.5). University lawyers’

experiences with host organisation insurance coverage extend the literature. University lawyers have advocated university insurance to manage legal risk in WIL programs (Biddinger Gregg & Schrink, 1997; Goldstein & Wolk, 1987). However they have not described the events or circumstances in which the university may be uninsured or underinsured, nor have they discussed host organisation insurance. As Cooper, Orrell and Bowden (2003) note in the context of risk management by WIL staff, an understanding of both university and host organisation policies is essential when negotiating the WIL agreement. For instance, does the insurance policy cover the student and if so, what types of claims are included and excluded by the policy? A proper understanding of host organisation policies enables WIL staff to manage risk by evaluating potential hazards in the workplace against host organisation and university policies. Legal risk may remain with the university if both parties are underinsured or uninsured for hazards in the workplace. The failure by the host organisation to warrant insurance coverage in the WIL agreement and a monetary cap on host organisation insurance coverage are two such circumstances, identified by university lawyers, that create legal risk. With respect to university insurance policies, university lawyers discussed legal risk associated with WIL disciplines not engaging in appropriate due diligence pertaining to insurance. Their experiences are consistent with the WIL literature in which authors recommend that university insurance policies are reviewed by a university lawyer (Bailit, 1999, Cobb, 1994; Goldstein, 1981).

Indemnification can transfer risk from the host organisation to the university. Whilst university lawyers acknowledged that indemnification for negligent conduct by students or WIL staff was appropriate, the indemnity in many WIL agreements was much broader, requiring the university to indemnify the host organisation for any losses incurred in connection with the WIL placement. Although not subject to empirical study, lawyers involved with higher education have discussed contract risk associated with indemnities in favour of the university (Goldstein & Wolk, 1987; Litch & Cameron, 1999). The risk identified in the literature is that the host organisation may indemnify the university but not have sufficient financial resources to meet any liability. This was not a risk discussed by university lawyers, possibly because the host organisation is sufficient in size or has appropriate insurance to cover the indemnity. The contract risks described by university lawyers were in terms of the university

indemnifying the host organisation, a circumstance not previously raised in empirical studies.

5.5 Conclusion

The university lawyers interviewed provided new insights about legal risks in WIL programs. Contract risk and program risk are the two categories of legal risk managed by university lawyers. The case study confirms an empirical theme of conflicting program risks pertaining to student disability and medical conditions, expands the range of hazards in the workplace that are considered program risks and reveals student misuse of social media as a new category of program risk. University lawyers also manage a number of contract risks that have not previously been addressed in empirical studies. These new contract risks can be further classified into three areas: student exploitation; risk transference; and flaws in contract practices. First, student rights to IP, employment and procedural fairness in disciplinary action can be undermined or exploited by WIL agreements. Second, risk transference to the university can occur by indemnities that are weighted heavily in favour of the host organisation; risks that are not insured or underinsured by the host organisation and university; and assurances by the university about the competence and conduct of students on WIL placement. The third area is flaws in contract practices of the WIL discipline that can contribute to legal risks associated with student exploitation of rights and risk transference.

This chapter demonstrates that university lawyers need to manage a series of contract risks and program risks with respect to WIL programs. The description of *what* legal risks university lawyers manage presented in Chapter Five is essential to understanding *how* university lawyers manage these legal risks. Risk management by university lawyers involves two related elements: the risks themselves, as well as the practices, methods and strategies used to address the risks. The first element is covered in Chapter Five. The second element is examined in Chapters Six and Seven to answer the research question: *How do university lawyers manage legal risk with respect to WIL programs?* The practices, methods and strategies are collectively described in Chapters Six and Seven as a risk management framework of university lawyers, with facilitation being the dominant strategy employed by university lawyers to address legal risk.

Chapter Six: The risk management practices of university lawyers

6.1 Introduction

The purpose of this chapter is to describe and examine the risk management practices of university lawyers with respect to WIL programs. University lawyers have articulated, both in the university lawyer literature (section 2.2.2) and the survey (section 4.5), the various roles they play with respect to risk management. The university lawyer is an advisor, educator, draftsman and reviewer of documents. These roles, with the exception of educator, represent the risk management practices that are recommended to WIL staff in the WIL literature (section 2.3.1). However no systematic research exists which describes the practices, *methods and strategies* of university lawyers that address legal risk with respect to WIL. The risk management practices of university lawyers represent one part of the answer to the second research question: *how do university lawyers manage legal risk with respect to work integrated learning programs?* It is argued that risk management by university lawyers can be viewed as an intricate framework of practices, methods and strategies in relation to WIL programs. The risk management practices of university lawyers are the services, delivered to representatives of the university, that are designed to manage legal risk. Collectively, the practices described in this chapter, as well as the methods and strategies described in Chapter Seven, represent the risk management framework of university lawyers.

The first part of this chapter describes and analyses the risk management practices of university lawyers that form part of the risk management framework. 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. The second part of this chapter provides an additional layer of analysis, by situating the risk management practices in the literature (Chapter Two) and the survey (Chapter Four), as well as examining these practices from an ERM perspective. Overall, the risk management practices represent a comprehensive explanation of the services that university lawyers deliver to manage legal risk in WIL programs.

There are two important notes before proceeding with this chapter. First, a number of WIL agreements, resources and policies described by university lawyers in this case study are publicly available. To minimise the risk of identification, the ID of university lawyers are not included in sections 6.2.4, 6.2.7 and 6.2.9. The second important note relates to the identity of the client who, acting on behalf of the university, requests legal services from the university lawyer. Academics and university lawyers in the literature have articulated the difficulty as well as the importance of ascertaining the client, so as to avoid conflicts of interest in the delivery of legal services (section 2.2.3). However, ascertaining the client was not an issue raised by university lawyers during interviews. It is assumed for the purpose of this thesis that WIL staff did have the authority (whether through university policy, delegation by university management or otherwise) to request legal services from the university lawyers and to make decisions related to the WIL program on behalf of the university. It is also acknowledged that WIL staff acting without authority could expose the university to operational and legal risks.

6.2 Risk management practices

Risk management practices are the services, delivered by university lawyers to representatives of the university, that are designed to manage legal risk. University lawyers provide advice, communicate directly with the host organisation, refer legal matters to a higher level of university management, draft and review WIL agreements, educate WIL staff, consult during the development of WIL policy, review WIL program documents and prepare WIL resources. Each risk management practice is presented separately in the case study. The legal and strategic advice of university lawyers in relation to program and contract risk is the first of the risk management practices discussed in this part.

6.2.1 Provide 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 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 is examined under the sub-headings below.

Program risk

When a program risk materialises, the advice by 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” (UL10). 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” (UL11). This coaching role is akin to strategic, as opposed to, legal advice. UL11 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 (UL10). The nature of the alleged incident may dictate that student safety in the learning environment 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 (UL3, 10, 11), and that future WIL placements with the host organisation be suspended pending the outcome of an investigation (UL11). Some university lawyers may also coach WIL staff as to the sensitive conversation required with the student as well as with the host supervisor about the incident, and the reasons for the university’s actions, without breaching student confidentiality (UL3, 11). UL3 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 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 (UL3, 11). This message is not trumpeted to the offending host organisation – instead the students are quietly directed to other host organisations (UL11). As UL3 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 UL3 and UL11.

Contract risk

The university lawyer's advice on contract risk is the end product of reviewing the host organisation WIL agreement, or the amendments proposed by the host organisation to the university WIL agreement. Chapter Five revealed that the primary sources of contract risks identified by university lawyers in their advice related to intellectual property (IP), the student as employee, insurance, indemnities, contractual warranties about students, disciplinary action and flaws in contract practices of the WIL discipline. 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 organisation WIL agreement in its current form constitutes risk avoidance. UL8 explained the process in these terms:

Every time we review those [host organisation 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 (UL11);
- Assignment of student IP to the host organisation which was contrary to university IP policy (UL1), was not related to the WIL placement (UL13) or prohibited the student from publishing their academic work (UL6, 11);
- An agreement provision requiring the university to take disciplinary action against a student, which bypassed university policy (UL4); and
- Scholarship and stipend payments to students in WIL programs (UL9).

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 (UL1, 11). As UL11 explained:

... our process is if it [the WIL agreement] 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'.

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. UL4 described the purpose of this advice as empowering the staff responsible for the negotiations. The advisory roles of the university lawyer relating to agreement review, risk assessment, risk avoidance and coaching are encapsulated in

UL8's re-enactment of an exchange with a WIL staff member concerning proposed changes to a university WIL agreement:

So we put our agreement out there. The host wants all these changes to it, and I'll think about it... and the faculty will be really anxious, and say, 'oh my God, X global company really want us to make all these changes, and oh my God they want to take some students, please say yes to the changes', and I'll look at the changes, and I might say, 'you know what... they're really dumb things they're asking for... and I can't, we can't just say yes to those, I'm sorry... maybe go back to them, and use that parity and equity... so it's not that we don't like your changes, but the form is for everyone, and if we made an exception for you then we'd have to make one for everyone, and this is to protect you....', and so they have gone back and given that scripted speech that I've given them, basically saying, 'rack off' (but in the nicest possible way). 90% of the time, they will agree to our agreement.

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 re-negotiate, often using strategies and contract terms suggested by the university lawyer (UL1, 4, 8, 11). This strategic advice demonstrates the dual perspective on risk, as articulated by ERM. University lawyers appreciate the strategic importance of WIL to the university but want to ensure that the WIL agreement minimises contract risks to the university.

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. Insurance is an important mechanism used to transfer legal risk. As such the university lawyer's advice may involve referring WIL staff to insurance personnel for review of the host organisation WIL agreement. Insurance personnel can ensure that the university has adequate insurance coverage of the contract risks (UL13) and that all the insurance provisions included in the agreement can be complied with by the university (UL7).

A common example of risk control raised by university lawyers was the assignment of student IP rights to the host organisation. In Chapter Five, university lawyers identified

lack of student understanding and compulsion associated with assigning their IP as a contract risk to the university (section 5.4.1). However the legal office cannot technically advise the student because the client is the university – in fact this message is made clear on many legal office websites. 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 (UL1, 3); what their IP rights are under university policy and the law (UL1, 3); and the availability and importance of accessing the free student legal service on campus (UL6, 7, 10, 11). In this way the legal literacy of the student is addressed. The student legal service is operated by the student union at some universities and engages practising lawyers. According to UL7, 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 UL11 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.

6.2.2 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. UL5 noted, “we try to leave that [communication] at the relationship level, because if smaller organisations are getting heavied by lawyers, that might put an end to the program”. According to UL8, 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 (UL4, 5, 7) and when a stalemate in negotiations has occurred (UL6, 8). University lawyers’ experiences with host organisation legal representatives were mixed. UL4 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. UL5’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 UL7 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 (section 5.4.6).

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. UL6 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. So 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.

UL8 has intervened in negotiations to clarify the purpose of the WIL program. Host organisations, particularly in project-based WIL programs, were requesting guarantees from the university that they would not be subject to a claim under the *Fair Work Act*, agreement provisions which were akin to an employee–employer relationship, as well as indemnities which absolved the host organisation of risk. For UL8 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 OK.

The strategic focus of university lawyers when communicating directly with representatives of the host organisation is a clear example of ERM. By clarifying the purpose of WIL and WIL agreements, university lawyers can minimise the legal risks associated with WIL *and* facilitate the delivery of WIL placements for students.

6.2.3 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 (section 7.3.1). 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” (UL8, 9, 11). “Higher level” means an operational level higher than the WIL staff member who received the initial advice. UL9 referred university participation in tripartite scholarship arrangements 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 (section 5.4.2). WIL staff conduct associated with the WIL program may also be escalated to senior management (UL8, 9). Whilst UL9 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:

Unless there is a high risk to the University, I don’t need to escalate it above to see what’s happened at an operational level, whether they’ve actually acted in accordance with our advice. I mean we are to advise, we’re not to act out... at the end of the day it’s their commercial decision, but we’ve advised. It’s only when it’s high risk that we might escalate it up, my boss will want to escalate it right up to ensure that those operational people actually do what they need to do.

If UL8 considers that the activity proposed by the WIL staff member is “wrong”, UL8 “might go and have a quiet word to say to Senior Executive, and say, ‘oh, I’m not sure if you know... but ‘x’ in your area is really pushing that he wants to do this...”

UL11 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. UL11's approach is 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, the referral of WIL-related matters by university lawyers to a higher level of university management is a clear example of ERM. University lawyers appreciate that effectively managing high-risk WIL activities may require the involvement of a higher authority.

6.2.4 Draft university WIL agreements

Drafting contracts can be seen as a traditional risk management practice of university lawyers. Contracts are a source of legal risk but they are also a device used by university lawyers to manage legal risk. The university loses much of its control over students when they move off-campus to engage in WIL activities, and has no control over entrants in the workplace such as clients, employees and third parties or the workplace itself. The university relies on the host organisation to protect the health and welfare of students and to provide positive student learning experiences. 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. University lawyers also review amendments to the university WIL agreement proposed by the host organisation. This section analyses various WIL agreement templates drafted by university lawyers to ascertain their distinguishing features and common terms, with particular attention paid to the provisions of WIL agreements that address the contract risks identified in Chapter Five.

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. The university WIL agreement for non-clinical placements is generally not a “one size fits all” template. University lawyers have drafted 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 added to or deleted from the agreement. The distinguishing features can be classified under four headings:

- *Parties to the agreement:* Individual (a Student Deed or letter of agreement signed by the host organisation); 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.

The sub-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 examined in Chapter Five. Appendix I 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 fewer clinical WIL agreements can be explained by the fact that these agreements tend to be created by the host organisation (i.e. host organisation WIL agreements). The summary in Appendix I 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, as well as the risk management methods

and strategy of university lawyers, as they apply to university WIL agreements in the next chapter.

Assignment of intellectual property to the host organisation

Two contract risks emerged from students assigning their IP rights to the host organisation (section 5.4.1). First, the student may not understand the legal consequences of assigning their IP rights or may feel compelled to do so. University lawyers can manage this legal risk by including a recommendation in a Student Deed that the student should 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. University lawyers manage this legal risk in the university WIL 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.

Student as an employee

An employment relationship between the student and host organisation may be an unintended consequence of the WIL placement (section 5.4.2). University lawyers manage this legal risk by including an agreement provision that the student is not, or is not intended to be, an employee of the host organisation. Further the host organisation makes a number of promises designed to minimise the risk that a student is deemed an employee during or after the WIL placement including:

- The student will not receive remuneration or payment of any kind;
- 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. In other words the student is not replacement labour.

For paid WIL placements, the university WIL agreement distinguishes scholarship and stipend payments from remuneration by stating that any stipend or scholarship payment is not payment for services rendered to the host organisation. If the student is remunerated, the university lawyer seeks to distinguish the parties' contractual rights and obligations attached to the WIL program from that of employment by requiring the host organisation and the student to enter a separate contract of employment. This clause effectively distances the university from participating, or being perceived to participate, in the employment relationship, which could otherwise expose the university to legal risk.

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. These provisions may also be contrary to university policy designed to afford the student procedural fairness (section 5.4.3). 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 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.

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 (section 5.4.4). 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.

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 (section 5.4.5). 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 (e.g. loss of profits and anticipated savings), special or incidental damages.

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 (section 5.4.6). 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 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 Appendix I. 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 one university lawyer 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.

6.2.5 Review host organisation 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 organisation WIL agreements are also referred to by university lawyers “as non-standard agreements” (UL4, 11) or “agreements on the host’s terms” (UL4). 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 Chapter Five (Table 5.1) have been identified by university lawyers, following a review of the host organisation WIL agreement. Such non-standard agreements need to be carefully considered by university lawyers, given their attendant contract risks.

6.2.6 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 (UL2, 6). UL2 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 UL2, this education may lead to better instructions if legal services are required by WIL staff in the future, because they know in advance what

UL2 will be looking for in the WIL agreement. The legal office of UL11 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. UL11 explained that “those training sessions were more about understanding the purpose of the agreements, and what the clauses (a) meant and (b) were trying to protect against, so they tended to be more generic sort of training sessions”.

Training by university lawyers in agreements and risk management tends to be generic, that is, not specifically focused on WIL programs. UL12 has conducted risk management training, which educates all academic staff about what is legal risk, 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 UL6 conducts generic training sessions on contracts, consumer protection law, indemnities and intellectual property. “War stories” are an important part of staff education about the importance of having detailed agreements to address legal risk. UL6 translates the war stories into lessons so that academics can appreciate the practical consequences for their activity or program. UL6 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.

6.2.7 Consult as to WIL policy

A further risk management practice occurs when university management turn to the university lawyer for guidance during the development of WIL policies (three university lawyers). 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.

6.2.8 Review WIL program documents

A risk management practice of all 13 university lawyers in this study was the review of host organisation 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 (UL1, 4, 8). The review is not a “stand-alone” responsibility of the university lawyer, but is conducted in conjunction with another risk management practice such as the provision of legal advice (UL8) and the review of WIL agreements (UL1, UL4). University lawyers have identified legal risks when reviewing these documents. UL1 reviewed one guide which suggested that students could work for free (section 5.3.2). UL1 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” (UL1). UL8 identified the legal risk of a WIL discipline referring to the wrong insurance policy when reviewing a handbook distributed to a student who initially elected not to disclose their disability (section 5.4.7). The experiences of UL1, UL4 and UL8 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.

6.2.9 Prepare WIL resources

The final risk management practice of university lawyers is the preparation of WIL resources. Five of the 13 university lawyers have been involved – in conjunction with WIL staff or solely responsible – in the preparation of resources for WIL staff

(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. 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. The recommendations of university lawyers pertaining to WIL resources are addressed further in Chapter Ten.

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 and access to WIL agreement templates, and the process for making changes to the agreement. Many of the contract risks examined in Chapter Five 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 (section 5.4.7). 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 (section 5.4.7). All of these resources can be critical in ensuring that fundamental administrative errors do not occur.

The next section of this chapter is a discussion which situates the risk management practices of university lawyers in the literature addressed in Chapter Two and the survey in Chapter Four, as well as examining these practices from an ERM perspective. In particular, the risk management practices of university lawyers answer a number of issues raised in the survey.

6.3 Discussion

Advice, drafting, review and education are risk management practices of university lawyers identified in the university lawyer literature, recommended in the WIL literature (with the exception of education), confirmed in the survey and explored further in the case study. For instance, authors in the WIL literature have sought advice, or have recommended that WIL staff seek advice, in a number of areas of contract and program risk the subject of advice by university lawyers in this case study. The examples include termination of students from WIL programs, insurance coverage, indemnification of the university, scholarship/stipend payments to students and handling of problematic students. The university lawyer literature focuses on the policy-based work of the university lawyer when exploring their role as a draftsman and reviewer of documents in the context of risk management (section 2.2.2). However, it is clear from the case study and qualitative responses in the survey (section 4.5) that the primary risk management practices of the university lawyer, in regards to WIL programs, involves “agreement-based” work, that is the advice, review and drafting of WIL agreements.

The risk management practices of university lawyers, combined with the legal risks discussed by university lawyers in Chapter Five, provides an explanation for the apparent lack of work by university lawyers pertaining to workplace bullying, discrimination and sexual harassment, as reported in the survey (section 4.3). Chapter Five revealed that university lawyers predominantly manage contract risks. The program risks associated with student disability and medical conditions and with hazards in the workplace were generally isolated incidents (sections 5.3.1 and 5.3.2) in

which the university lawyer provided legal and strategic advice. Further, it is clear that WIL disciplines are responsible for drafting and review of the WIL program documents distributed to students and host organisations, as well as the resources for WIL staff associated with program risks, such as discrimination, bullying and sexual harassment. University lawyers may review WIL program documents, but only if it is necessary to complete their agreement-based work; WIL agreement information and instructions make up the predominant category of WIL resources that university lawyers prepare.

A theme which emerged during the case study, and which will be further explored in future chapters, is the responsibility for risk management in relation to WIL programs. The delineation of responsibility for managing legal risk was a potential issue, identified from the survey results, that warranted further consideration in the case study (section 4.4). Drawing on the study of Newhook (2013) and the variation in risk management practices of university lawyers reported in the survey (Table 4.5), a concern was that the boundaries of responsibility for managing legal risk may not be clear to university lawyers or to WIL staff. However the risk management practices of university lawyers suggest that the delineation of risk management responsibilities is (or should be) clear to university lawyers and WIL staff. University lawyers are responsible for delivering services to WIL disciplines that are designed to manage legal risk in relation to WIL programs. For instance, the provision of advice, WIL resources and education by university lawyers assists WIL disciplines with managing legal risk in their WIL programs. However, the responsibility for implementing risk management is with the WIL discipline. The WIL discipline has the onus of seeking out the legal office, insurance-risk and other university divisions, including student equity and disability services, to support their risk management responsibility. Consequently it is essential that the WIL discipline appreciates their responsibility for risk management.

From an ERM perspective, the risk management practices of university lawyers reflect traditional concepts of risk management integrated with ERM (Ackley et al., 2007; Cassidy et al., 2001). The strategic and legal advice by university lawyers, as well as the WIL instruments that they prepare and review, incorporates at least one of the four traditional approaches to risk management – risk control, risk acceptance, risk transfer and risk avoidance. Nevertheless, two distinguishing features of ERM begin to emerge from the risk management practices of university lawyers. First, university lawyers who

communicate directly with the host organisation demonstrate a strategic focus in terms of risk management. This direct involvement by the university lawyer can clarify the purpose of the WIL program, as well as the provisions of the WIL agreement, for host organisations. The university lawyer engages in direct communication for the purpose of finalising the WIL agreement, which thereby enables students to undertake a WIL placement. This risk management practice supports the university goal of maximising the strategic value of WIL.

The second distinguishing feature of ERM, as it applies to WIL, is that responsibility for risk management is shared across the institution. University lawyers are responsible for delivering legal services to the WIL discipline designed to manage legal risk, and the WIL discipline is responsible for implementing risk management in their WIL program. Further, insurance and risk personnel are also responsible for advice about transferring and controlling legal risk, and senior university management may be called upon by university lawyers to assess high-risk WIL placements, WIL agreements and conduct of WIL staff, and may make the final decision on whether to accept or reject a WIL opportunity. University lawyers may also be requested by university management to assist them with WIL policy designed to regulate WIL programs across the university. The practices of university lawyers demonstrate that effective risk management requires multiple risk managers who interact with one another to fulfil their risk management responsibilities. The notion that “everybody must be a risk manager” is embedded within ERM (Blustein et al., 2016, p. 6). University management, university lawyers, insurance and risk personnel and WIL staff are all responsible in various ways for managing risk with respect to WIL programs.

Overall, the 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. Specific advice of university lawyers to address contract risks has not previously been analysed in empirical studies. 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

(discussed in Chapter Five) they advise WIL staff to avoid, and in particular, the advice they provide when addressing the assignment of student IP to the host organisation. Recall that the assignment of student IP is the legal risk that university lawyers most frequently referred to in Chapter Five.

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 the six legal risks associated with contract terms (Table 5.1) in the WIL agreement. Authors in the WIL literature have listed and described common terms in a WIL agreement, based on their personal experience (Broughton & Overby, 1993; Goldstein, 1981; Miller et al., 2002), or as part of an empirical study of WIL agreements (Gelman, 1990). What makes the cross-case analysis of agreement templates in this chapter unique is the connection made between the risk management practice and the contract risks identified by university lawyers. The cross-case analysis describes the agreement provisions, drafted by university lawyers, that manage the six legal risks associated with 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 in Chapter Ten. 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.

6.4 Conclusion

This chapter offers insights into the risk management practices of university lawyers with respect to WIL programs. 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. University lawyers also produced a variety of WIL agreements that specifically addressed the legal risks as to the contract terms in Chapter Five. 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 discussion of risk management practices concluded with the preparation of WIL resources pertaining to the WIL agreement and risk management.

The next chapter completes the answer to the second research question: *how do university lawyers manage legal risk with respect to work integrated learning programs?* Chapter Seven describes and analyses the risk management methods and strategies of university lawyers. Collectively, the risk management practices, methods and strategies represent the risk management framework of university lawyers.

Chapter Seven: The risk management methods and strategies of university lawyers

7.1 Introduction

This chapter describes and analyses the risk management methods and strategies of university lawyers with respect to WIL programs. As discussed in Chapter Two, no systematic research exists which describes the practices, *methods and strategies* of university lawyers that address legal risk with respect to WIL. The risk management methods and strategies complete the answer to the second research question: *how do university lawyers manage legal risk with respect to work integrated learning programs?* It is argued that risk management by university lawyers represents an intricate framework of practices, methods and strategies in relation to WIL programs. The risk management methods are *how* university lawyers approach their risk management practices, whereas the risk management strategies of university lawyers are the overall plans for risk management which are aligned to university goals associated with WIL. The risk management strategies represent *why* university lawyers engage in risk management. The practices and methods of university lawyers execute the risk management strategies. Collectively, the practices, methods and strategies represent the “risk management framework” of university lawyers.

The first part of this chapter describes and analyses the variety of methods university lawyers employ to manage legal risk, which include asking staff questions, participation in formal WIL groups, external support for risk management practices, communication with lawyers at other universities, collaboration with insurance and risk personnel, as well as accessibility and pragmatism in legal service delivery. The second part of this chapter describes and analyses facilitation as the risk management strategy of university lawyers. Facilitation operates on two levels. University lawyers facilitate the delivery of WIL placements for students as well as facilitate risk management by WIL disciplines. From an ERM perspective, facilitation demonstrates the strategic focus of risk management by university lawyers, in particular the alignment of their risk management framework with the university goals of maximising strategic value and minimising the legal risks associated with WIL. The final part of this chapter provides an additional layer of analysis by situating the risk management methods and strategy in the literature (Chapter Two) as well as ERM. It is argued that the risk management framework

represents a comprehensive explanation of how university lawyers manage legal risk in WIL programs.

7.2 Risk management methods

The risk management methods of university lawyers are how they approach their risk management practices. For instance, how do university lawyers go about advising and educating WIL staff and drafting and reviewing WIL instruments such as agreements, program documents, policies and resources? The case study reveals that university lawyers are pragmatic and accessible, ask staff questions, garner external support for risk management practices, and communicate and collaborate with WIL staff, insurance-risk and lawyers from other universities when engaging in the risk management practices discussed in Chapter Six. Each risk management method is presented separately in the case study. The first of the risk management methods discussed in this part is asking staff questions.

7.2.1 Asking staff questions

A risk management method of university lawyers is to ask staff questions about work-based activities for the purpose of eliciting the information necessary to manage various legal risks, including contract and program risks associated with WIL programs. A formal method of asking staff questions is a request for legal services form which staff complete and forward to the legal office (UL8, 11). The form asks simple questions about the matter, what the staff member wants the university lawyer to do, and requests documentation (if applicable). The responses provide context about the activity so that the university lawyer can ask more targeted questions during the first conversation with staff (UL8, 11). As UL11 explained, the form:

helps us get a couple of steps forward before we have that first conversation. We've already got at least some information about it which we can read, and then ask questions if there's anything that is unclear, as opposed to starting right at square one.

During the first conversation, an aspect often explored is whether student activities constitute work experience, a scholarship (with a work component), employment or a WIL placement (UL1, 4, 8). The first question that UL1 and UL4 ask is whether the

work experience is a required part of the degree or part of a particular course that the student is enrolled in. Other questions include “what work are they actually doing, how long are they spending?” (UL1), “is it paid or unpaid?” (UL4), as well as a request for documentation already used by the academic discipline to gain a better understanding of the activity (UL1, 4). The university lawyer can then provide advice to structure the activity so that it meets the vocational placement exemption under the *Fair Work Act* (UL1). Asking targeted questions about student activities also enables the university lawyer to determine the appropriate agreement for managing risk, whether that is a scholarship, employment or WIL agreement (UL8).

University lawyers ask WIL staff questions about WIL programs for the purpose of assessing legal risk, solely or in conjunction with insurance-risk. Questions include the location of the WIL placement (UL4), any accreditation requirements attached to the WIL program (UL4), the responsibility for supervision (UL2, 10), IP created by students (UL4), the activities of the host organisation and the proposed student activities during the WIL placement (UL2, 4, 10, 11), the year level of the students, which is related to their level of knowledge and maturity, as well as the orientation/induction processes conducted by the university and the host organisation (UL10). UL11 will also ask WIL staff questions about the value or benefit of the activity to the university, when a contract risk is identified. In this example, UL11 recommended that a contract risk concerning insurance coverage of the host organisation be transferred to the university’s insurer because the value of the WIL experience outweighed the contract risk:

... And you have to weigh up... we don’t do this alone, we do it obviously with our academic or WIL staff colleagues... what is the benefit of this experience to the student? Does it really outweigh any risks? Is there anything we can advise the student to do to sort of mitigate what we might see as potential risk by agreeing to take a particular clause out? You know, an easy example is if the company says, ‘we just don’t have insurance for visitors...’ (it would be very unlikely). We can then say ‘well, we’ve weighed it up... this experience is so valuable, we’ll actually buy an extra piece of insurance to cover this cohort of students, or this student’, but it’s about sort of making that assessment about the value, about the risk, and about the benefits ...

UL11's line of questioning reflects the dual perspective on risk articulated by ERM, in which the positive (student learning experience) and negative (insurance coverage) aspects of an activity are identified when managing risk. This example also demonstrates the strategic focus of UL11 in relation to risk management, which is characteristic of ERM. For UL11, the strategic value of the WIL activity was such that UL11 recommended additional insurance coverage to control and transfer the legal risk, which would thereby facilitate the WIL placement.

The purpose of the questioning at times is for WIL staff to think about the legal risks associated with the WIL program. For instance the student with the latex glove allergy and the student with dwarfism (section 5.3.1) stimulated a number of questions in which UL2 placed the onus on WIL staff to identify the risks and to provide solutions to address the risk: "I tried to get them to think through where the risks are, and what we can actually do. Is there a solution to it?" UL10 will ask WIL staff, "what's the worst case scenario?" and "what could go wrong in this placement in your view?" In the context of contract risk, UL4 and UL6 ask questions intended to promote WIL staff awareness about the legal consequences of students assigning their IP rights to the host organisation. In this way, an informed decision can be made by the WIL discipline about the legal risk. For instance UL6 asked WIL staff, "do you realise what this means?" with respect to the proposed assignment of IP created by a postgraduate student before the WIL placement (known as "background IP"). UL4 asks WIL staff whether they are aware of the general rule under university IP policy that the student owns the IP they create in the course of their studies, and asks whether WIL staff will need examples of the work for assessment purposes. UL4 also has WIL staff think about whether assignment of IP to the host organisation is essential, because the student may not appreciate the legal consequences of relinquishing their IP rights.

7.2.2 Participation in formal WIL groups

Another risk management method of university lawyers is to participate in formal WIL groups. Formal collaboration with university management and WIL staff arises from the university lawyer's participation on a project, working party or committee related to WIL programs (WIL group). University lawyers and WIL staff primarily collaborate during the review of existing university WIL agreements and the

drafting of new WIL agreement templates. For instance UL3 drafted a simple WIL agreement template that could be used across disciplines:

So my role in the working party was to help establish a simplistic (when I say ‘simplistic’, it’s not to take away from the importance of it) placement agreement, a template which [university name] could use without having to reinvent the wheel every single time a student went on placement.

The WIL group of UL11 first conducted an audit of WIL programs across the university to identify their types, size and scope and then developed appropriate systems and structures required to support the programs. A catalyst for the group review of WIL programs was the attention paid by the media and the Fair Work Ombudsman (FWO), a government department which enforces the *Fair Work Act*, to work experience and WIL programs (Cameron, 2013). UL11 drafted multiple WIL agreement templates tailored to the specific concerns of host organisations from the engineering and science disciplines, such as the ownership of IP and the protection of trade secrets and confidentiality. Like UL11, UL9 drafted a series of WIL agreement templates as part of a new streamlined process for making and recording WIL agreements. UL9 also advised the WIL group about the agreement templates, as it was each group member’s responsibility to then present the agreements to the academic disciplines.

UL12 is a current member of a WIL group. For UL12, the WIL group is valuable as a central point for communication of all WIL-related matters. This has enabled UL12 to gather university WIL agreements from group members across disciplines, in order to understand the types of agreements WIL disciplines enter into, and to identify any contract risks. The ultimate aim is to standardise the WIL agreements and thereby minimise the contract risks. The WIL group is also a forum for UL12 to advise WIL disciplines about various contractual issues and to promote the role and accessibility of the university lawyer to WIL staff.

7.2.3 External support for risk management practices

External parties can also support the risk management practices of university lawyers. Clarification from external sources is a method employed by university lawyers to improve risk management in WIL programs. For example, UL3 turned to FWO and external counsel for advice and information about the legal risk of a student

being deemed an employee of the host organisation (section 5.4.2). UL1 explained that the fact sheets on unpaid work and internships published by FWO have “been useful to actually point to and say, ‘this is a real issue, we need to make sure that we’re doing the right thing by our students... I’m not just saying this because I want to be a nuisance’”. UL11 went one step further, meeting with representatives from FWO as a member of the WIL group reviewing WIL programs, to gain a clearer understanding of this legal risk:

We had some meetings with officers from the Fair Work Commission [*sic*] and really worked through a process of getting a good understanding of what the law was, where the grey areas were, and one of the grey areas is the definition of vocational placement.

UL9 sought external support of a different kind – a tax firm about the taxation implications of scholarship arrangements attached to WIL programs; in particular, tripartite arrangements where the host organisation pays the university scholarship monies that are then distributed by the university to the student. The advice supported UL9’s position conveyed to WIL staff that the arrangement was not a scholarship under the *Income Tax Assessment Act*, the student was liable to pay PAYG tax as an employee, the arrangement needed to stop and procedures be put in place to ensure the student was employed directly by the host organisation. These external support mechanisms appear to be important for university lawyers, especially considering the demographic characteristics of university legal offices in Australia (refer Tables 3.3 and 4.1). University lawyers generally work in small teams and can have limited experience in the tertiary sector.

7.2.4 Communication with lawyers at other universities

A risk management method of university lawyers which also involves external support is communication with lawyers at other universities. University lawyers are a collegial group, a fact at odds with the popular notion of lawyers as combatants in an adversarial environment. University lawyers communicate with their colleagues at other universities individually and as a group, through the Society of University Lawyers (SOUL). SOUL is the national association of university lawyers in Australia. SOUL administers an electronic list for discussion on topics of interest (“SOUL discussion

list”). E-mails sent to the SOUL discussion list are forwarded to all SOUL members and saved in an archive for member-only access. As the SOUL discussion list is a “closed shop”, the electronic archive could not be accessed. Nevertheless UL6 did search the archive following the interview and noted that most of the topics relevant to WIL involved compliance (e.g. the *Fair Work Act*) and war stories on specific host organisation WIL agreements. SOUL also holds regular regional meetings of university lawyers from Eastern, Southern and Central/Western Australia, and convenes an annual conference attended by university lawyers and external counsel. A previous SOUL conference in Tasmania (2010) included a presentation and subsequent discussion concerning the impact of the *Fair Work Act* on work-based activities, including WIL programs. However it appears that the more productive outlets for university lawyer communication on WIL-related issues are regional meetings and the SOUL discussion list.

Lawyers from other universities advise, validate and educate their colleagues, many of whom may work in small legal offices and have limited tertiary experience. The SOUL discussion list provides a forum for university lawyers to share an issue about a host organisation or a WIL agreement, to check whether other university lawyers have had the same issue, and to seek responses about how the issue was dealt with (UL6, 7, 8). Whilst WIL may not be a frequently discussed topic, the feedback from other university lawyers in a WIL context assured UL9 that “you’re on the right page, and you’re in the right space, and you’re not barking up the wrong tree... and we’re all pretty much doing the same thing”. The e-mails sent and received on a topic are also an education resource for the time-poor university lawyer (UL12). In fact UL7 and UL8 are in the habit of saving e-mail strings on a topic from the SOUL discussion list for possible future reference.

Lawyers from other universities serve as a source of truth when negotiating with large host organisations that are involved in WIL placements across States and Territories. For instance UL7 was once concerned with insurance provisions in a WIL agreement. The relevant host organisation insisted that the WIL agreement it proposed had been signed by other universities, thereby setting an apparent precedent for UL7 to follow. UL7 was able to e-mail colleagues on the SOUL discussion list to verify the

truthfulness of this statement. Communication with other university lawyers “destroys the bluffing” by host organisations (UL8). UL8 provided this example:

Like a [host organisation name] saying, ‘everyone else has signed it, don’t know what your problem is’, and you ring around and they go, ‘oh no, we’ve got a problem with it, we heard you signed it... no we didn’t’. So it’s dispelling those sort of myths where it’s been really useful.

University lawyers not only engage in myth busting but also form a collective voice that may strengthen the bargaining power of universities in contract negotiations. UL7 noted that, through the SOUL discussion list, “sometimes you’re able to hook up with some other unis, and then you can negotiate as a group of universities, and it’s much more effective”. UL8 recalled a case involving a suite of host organisation agreements. The suite included a WIL agreement which proposed the assignment of student IP rights to a host organisation as part of a stipend/scholarship arrangement:

There have been five emails go around about that from different universities that when the lawyers get to them, they go ‘ooh jeez this is awful’, and they send around an email saying, ‘has anyone else had any... read this one... what were your thoughts... and did you get any concessions from [host organisation name] on it?’, because we try and use that collective bargaining as well...”

In this way the university lawyer may increase the negotiating power of its client, the university, by obtaining information from other universities and, in particular circumstances, by joining other universities in collective action.

Regional meetings also represent an excellent opportunity for university lawyers to discuss issues and developments related to WIL. The regional meetings provide an open forum for university lawyers to communicate with one another on WIL issues. UL8 compared the freedom of communication at regional meetings with the annual conference in these terms:

So when we have regional university lawyers meetings, for example, those are the meetings where we tend to talk freely about stuff that’s been going on... so the national conferences we don’t really get that chance to be in a room, and say,

‘hey, did you guys know blah de blah’, so when we’re at those meetings people talk about what’s being happening at the university...

7.2.5 Collaboration with insurance and risk personnel

A further risk management method of university lawyers is collaboration with insurance and risk personnel, who themselves engage in risk management with respect to WIL programs by conducting formal risk assessments and dealing with insurance-related issues. A risk assessment involves quantifying the probability and consequences of the legal risk and making a recommendation about its treatment (UL4, 10). Universities allied to the university lawyers studied generally delivered risk management and insurance services as part of a combined operating division (with other functions) or in separate divisions (collectively described as insurance-risk). A university employee may perform one or both functions. Two of the university sites employed an insurance officer, but had no person with an explicit risk management function. Although they are fellow risk managers, the nature and extent of collaboration with insurance and risk personnel varied amongst university lawyers. All four managers indicated during interviews that they collaborate with insurance-risk, compared to six of the remaining nine university lawyers (refer Table 3.3). This may be explained by the delegation practices of three managers, in which matters assessed as high risk or complex requiring the input of insurance-risk are retained by the manager, or the manager has a longstanding relationship with insurance and risk personnel.

Most university lawyers will refer WIL staff to and communicate directly with insurance-risk on WIL matters. Referral, communication or a combination of the two on a WIL matter is generally dependent on the nature of the legal risk. UL11 refers clients directly to insurance-risk when a program risk materialises, such as bullying, assault or student injury, or the risk of an activity during the WIL placement is assessed as high, whereas an insurance clause requested by the host organisation, a potential contract risk, will result in direct contact with insurance-risk. UL8 often approaches insurance-risk following a referral, to provide advanced warning (or “heads-up”) about the impending request for advice, and later seeks feedback from insurance-risk about the advice, to ascertain its impact (if any) on current legal work for the client. Whilst general questions on insurance coverage are referred to insurance-risk, UL8 approaches insurance-risk directly if an insurance issue arises during contract negotiations.

Insurance-risk may also provide the legal office with a heads-up on matters requiring legal services in WIL programs. For UL1, risk management by university lawyers is often sparked by an enquiry about insurance coverage made to insurance-risk when an academic discipline proposes a new WIL program. Insurance personnel then share this intelligence with UL1 about the new WIL program. Equipped with this information, UL1 can approach the relevant WIL discipline and complete a review of the WIL program to ensure legal compliance.

The three primary matters which university lawyers refer clients to, and/or collaborate with insurance and risk personnel on, are the capping of liability in WIL agreements (UL4, 10), unusual clauses in WIL agreements requested by the host organisation (UL4, 5, 8, 11) and insurance coverage for indemnities in WIL agreements that are in favour of the host organisation (UL4, 10, 12). The common objective of the latter matter is to determine whether the contract risk can be transferred by the university through insurance. For UL4 and UL10, the process of addressing contract risk associated with indemnities is an informed one. The risk is identified by the university lawyer, quantified by risk personnel and transferred or avoided by recommendation of insurance personnel. UL10 will not only refer WIL staff to insurance-risk following identification of the risk, but will also participate in discussions with the insurance broker, as well as insurance and risk personnel, before a final recommendation is made. Risk may be transferred by extending existing insurance coverage to meet the indemnity, known as a “reinstatement of insurance” (UL4). UL10, who appeared to have the closest professional relationship with insurance and risk personnel from the university lawyers studied, described why a close relationship is invaluable in terms of risk management. First, the university lawyer gains a greater appreciation of legal risk associated with WIL programs, so that an informed decision can be made on addressing risk. Second, legal risk can be dealt with very quickly through collaboration. In ERM terms, the nature and extent of collaboration between the legal office and insurance-risk demonstrates how responsibility for risk management is shared between both university elements.

7.2.6 Accessibility in legal service delivery

Another risk management method is by university lawyers making themselves accessible to WIL staff. This risk management method is critical, given that the legal

office can be unaware of WIL programs and the legal risks they may entail, unless WIL staff request legal services. For UL11, being accessible means that WIL staff can receive the right advice, which at times may be a simple reassurance that “yes what you’re doing is fine”. UL2 explained the concept of accessibility and its importance in these terms:

... I come from the school of thought that it is incumbent on me to make people feel comfortable enough with me to come and tell me scenarios so that I can protect the University if there is an issue. So I’m not a believer in the ‘ivory tower’. I believe in being approachable, and actually building up really solid relationships, so someone can pick up the phone... so we’ve got an instruction mechanism where people will send an email and fill out forms ... some people find that just a pain in the backside if you want something really quick, now. My view is ‘just pick up the phone and ask’... I’d rather be asked than not asked. So I’m trying to be inclusive, and trying to be included in things rather than not.

An interesting side issue here is the suggestion by UL2 that for some WIL staff the request for legal services form, a formal method of asking WIL staff questions designed to improve service delivery (section 7.2.1), may deter WIL staff from accessing legal services. In the interests of accessibility, WIL staff have the option of contacting UL2 direct.

University lawyers advocate and demonstrate their accessibility to WIL staff when educating WIL staff (UL2, 6) and participating in WIL groups (UL12). The legal office of UL6 is proactive in educating WIL staff, approaching an academic discipline to offer training on an issue that the legal office may be dealing with on a regular basis. UL6’s experience is that conducting the training on the academic discipline’s “home turf” encourages more WIL staff to participate in training, thereby appreciating that university lawyers are accessible. The notion of accessibility is clearly an important attribute of risk management for university lawyers. Further, training relieves the fear factor of university lawyers, particularly for lower level staff as demonstrated by this exchange with UL6:

UL6: If we seem to be getting a flood of a particular thing... one of us, [name deleted] or I, will approach that area, and say, ‘do you want us to come in to your next morning tea, and have it face to face so we’re approachable?’, because the lawyers are often seen as scary... and we’re not very scary, but you know what I mean. Sometimes it’s people that are lower level that don’t feel they’ve got the right to come and ask us those things, so it would benefit a lot from us being out there as well.

Interviewer: So availability is important, being seen to help...

UL6: and going there on their turf. We used to do them here (downstairs), and I think the whole concept of even coming to [building name] puts people off. We go out to the areas, and we find it much more receptive.

A similar message of accessibility is promulgated by UL12 to the formal WIL group: “I’m your lawyer, I’m friendly... if you’ve got an issue, knock on the door”. Accessibility appears to be a condition for achieving shared responsibility for risk management in WIL programs. University lawyers are responsible for delivering services that support risk management by WIL disciplines, but this support is contingent upon the WIL discipline approaching the legal office. University lawyers encourage collaboration in risk management by being accessible, as well as by being pragmatic.

7.2.7 Pragmatism in legal service delivery

University lawyers are pragmatic in their method when addressing contract and program risks. They appreciate the unavoidable legal risks associated with WIL, but also the strategic value of WIL to the university, which may necessitate the acceptance of risk in order for the WIL placement to proceed. For the student with dwarfism and the student with the latex allergy (section 5.3.1), UL2 collaborated with WIL staff to devise practical solutions which ensured that reasonable adjustments were made in the workplace. UL2 adopted a pragmatic approach when advising WIL staff about the appropriate disciplinary action to take against the nursing student who took selfies of a patient and posted them on FaceBook (section 5.3.3). UL2 had WIL staff, who were “quite emotive”, to think about the gravity of the student misconduct, and about the financial and potential psychological consequences for the student of being withdrawn from the program.

Pragmatism was particularly evident when university lawyers managed contract risks. In the process of drafting WIL agreements, UL3 and UL8 were concerned that a WIL placement may not proceed if the host organisation was presented with a legally complex and lengthy WIL agreement. As UL3 explained:

If we couldn't be a bit practical in our approach, then organisations wouldn't want to take our students for placements, for example if we had a 30 page legal agreement for them to sign for every student they took, they would run a mile – hence we have tried to in our legal agreement (well not do the bare minimum) but do enough so that both [university name] and the student are protected.

UL8 explained that there were two “flavours” of university WIL agreement prepared by the legal office – “soft” and “legalistic”. The university lawyer tailors the WIL agreement according to the flavour selected by the WIL discipline. A food metaphor also appears in UL8's explanation of the pragmatic approach to preparing a soft WIL agreement:

Interviewer: You actually obtain instructions from your client about the “flavour” of the document that they want?

UL8: Yes, because... again, it's that digestibility by the sector. If we create a document that scares the bejesus out of everybody... look, it's legally lovely, but it scares the bejesus out of every host, and no one will sign it, then it's not a useful document. So if the document can sound nicer, but still have all of those legal bells and whistles in there (but just in different language), that protects the University, they set the expectations, they protect the student, they do everything they're supposed to do, but they don't seem legalistic... that may be the preferred model.

The comments of UL3 and UL8 also reveal the balance between risk management and pragmatism. It is all very well to have a short agreement devoid of technical legal language so as not to deter host organisations, but both university lawyers are conscious that the agreement must ensure student and university interests are protected. The pragmatism demonstrated by UL3 and UL8 is a clear example of the dual perspective on risk articulated by ERM. University lawyers are mindful of both the strategic

opportunity of securing the WIL placement and the legal hazards that the WIL placement may entail for the student and the university.

When reviewing WIL agreements, university lawyers are mindful of the practical consequences of rejecting provisions of a host organisation WIL agreement or of not accepting amendments proposed by the host organisation to a university WIL agreement that may pose a contract risk. A pragmatic approach is required by university lawyers; otherwise the WIL placement may not proceed. University lawyers acknowledged three practical truths with respect to WIL programs (UL2, 3, 4, 8 and 10):

1. The university needs the WIL placements – “the business wants this to happen from the Vice Chancellor down” (UL10);
2. Risk is unavoidable – “if we wanted no risk, we would do nothing. So we can’t have a no-risk situation” (UL8); and
3. The university may have to accept contract risks associated with the terms proposed by the host organisation by virtue of truths 1 and 2 above.

UL2 described the approach to reviewing WIL agreements as “exception-based”. Unless the contract risk is a “deal breaker”, UL2 will advise WIL staff that the WIL agreement be accepted. Risk avoidance is the exception rather than the rule in approaching legal risk with respect to WIL programs. This pragmatic approach is reflected in the practices of UL3, 4 and 11. UL3 asks the question “‘look, can we live with that?’ As long as the roles and responsibilities and what they’re asking of our students (and of [university name]) are not totally outrageous, then generally speaking we agree”. Events or circumstances the university has no control over, such as agreement provisions that will cause the university to break the law or put the student at risk in some way, represent the contract risks that UL11 will say to WIL staff, “can’t live with this... you need to try and negotiate this”. UL4 described contract risks which should be avoided and cannot be changed through negotiation with the host organisation as “deal-breakers”, meaning that the student should not be placed with the host organisation.

UL2 used an excellent analogy of a Commonwealth Bank of Australia loan document to explain pragmatism when reviewing host organisation WIL agreements. The reference to the Commonwealth Bank of Australia is poignant as the case study revealed it tended

to be larger organisations retaining multiple students on WIL placements that prepare their own WIL agreements. The analogy also covers the three truths understood by university lawyers about the demand for WIL placements, the unavoidability of risk and risk acceptance:

... The way I explain it to people is it's like a mortgage document. If I put a Commonwealth Bank mortgage document in front of you, you either take it or you don't take it, and you look like an idiot if you go back with a marked up version of it. So you either sign it knowing the risks, or you don't ... And so with the Commonwealth Bank scenario, you can either sit there and go, 'I never want to sign a mortgage in my life', but you'll never own a property. So everything has its risk.

Simply put, the university either accepts contract risk in the WIL agreement (mortgage document) or avoids contract risk and misses out on the WIL placement (property). The role of the pragmatic university lawyer is to ensure WIL staff understand the contract risks before a decision is made to accept the risks and proceed with the WIL placement.

The preceding sections revealed the risk management methods of university lawyers. University lawyers can have both informal and formal methods for asking staff questions in the process of providing advice and handling WIL agreements. University lawyers participate in formal WIL groups and collaborate with insurance and risk personnel. In particular circumstances, university lawyers seek external support through government agencies and private firms for their risk management practices. Lawyers at other universities who advise, educate and validate their colleagues on WIL-related matters provide external support of a different kind. Pragmatism and accessibility are two professional characteristics of university lawyers which underpin their risk management practices.

The next part of this chapter describes the risk management strategy of university lawyers, the third and final pillar of the risk management framework.

7.3 Facilitation as the risk management strategy

The risk management strategies of university lawyers are the overall plans for risk management which are aligned to the university goals associated with WIL.

Facilitation is the risk management strategy of university lawyers. Figure 7.1 illustrates how facilitation is aligned to the university goals attached to WIL. This alignment is consistent with the strategic focus of risk management and the dual perspective on risk articulated by ERM. The university challenge discussed in Chapter One can be expressed as two goals of WIL – to maximise the strategic value of WIL (positive risk) but minimise the legal risks of WIL (negative risk). Facilitation as a risk management strategy has two aspects. Firstly, university lawyers facilitate the delivery of WIL placements for students, which supports the university goal of maximising the returns from WIL as a strategic activity. University lawyers also facilitate risk management by the WIL discipline, which promotes the university goal of minimising the legal risks of WIL. Both aspects are addressed separately in the sections which follow.

Figure 7.1: The risk management strategy of university lawyers in WIL programs

7.3.1 Facilitate risk management by WIL disciplines

This case study reveals the risk management framework of university lawyers, being the practices, methods and strategies used to address legal risk. Nevertheless, the WIL discipline is responsible for implementing risk management in its WIL programs. Chapter One identified some of the substantial body of Australian and international literature, including texts, empirical studies and guides, which articulate risk management by WIL staff (section 1.8.6) and Chapter Two outlined the subject areas of legal advice requested from WIL staff to fulfil their risk management responsibilities (Table 2.1). University lawyers facilitate risk management by the WIL discipline through collaborating with WIL staff and providing advice to WIL staff which identifies risk, assesses risk and suggests risk management methods. These represent the first three elements of the traditional risk management process (section 1.8.6). The activities

of university lawyers which also support risk management by WIL staff involve WIL agreements, resources, program documents, policy and education.

UL1 and UL8 asserted that the university lawyer establishes a “framework” for WIL staff to manage legal risk. The framework to which they refer includes the WIL agreements, program documents and resources drafted and reviewed by the university lawyer. University lawyers establish a framework for managing legal risk, but it is the responsibility of WIL staff to employ the framework because university lawyers are not, nor do they have the time, resources or expertise to be, “on the ground” managing the day-to-day operation of the WIL program. UL8 described the challenge of designing a framework for WIL staff which has an appropriate balance between minimising risk and facilitating the placement or “not spooking hosts”:

We can't predict every problem. So all we can do is set up a framework that we think has the right balance, and then give instructions on how to apply that framework and let people get on with it. We don't have the resources to look over people's shoulders all the time... we don't have the resources to manage those programs. So the risk... the issue... the challenge for us is getting the system right, that we think is balanced, so we're not spooking hosts, but you've got all the bells and whistles you need whether it's in fluffy language or not. Everyone knows the expectations of the program, so there is a process for the implementer of the program to manage the expectations of each level appropriately, and then there is the process for notifying us of any issues when they come up and need legal management. So as long as you've got that structure in place, that's really all the legal team can do to manage that risk. They try and put in place a structure that minimises the risk as best it can without killing the program.

University lawyers produce a range of risk management tools for the WIL discipline, including their advice on legal risk and various WIL instruments, but the responsibility for whether and how the tools are then implemented rests with the WIL discipline.

University lawyers provide advice to support the decision-making of WIL staff pertaining to risk management. University lawyers stressed during interviews that they were advisors, not decision-makers, in WIL programs (UL1, 2, 4, 7, 8, 9, 10, 11, 12,

13). In fact UL4 makes sure that WIL staff understand that they are better placed to make decisions because of the relationship they have with the host organisation and their superior knowledge of the WIL program. The advisor role of the university lawyer is to identify and assess risk and to suggest actions to manage risk, but the final decision remains with WIL staff on behalf of the university. UL8 explained the distinction between advice and decision-making in the context of reviewing a host organisation WIL agreement:

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', but you know, it's for the person who's got the delegation to make that decision.

WIL staff (with the appropriate authority) can elect to reject the advice and accept legal risks that the university lawyer disagrees with (UL8). As UL12 put it, "they don't have a problem with us providing fearless and independent advice... but they also don't have a problem with choosing not to necessarily go with our recommendations as well". This recognises the reality that a university lawyer can develop frameworks and provide advice to manage legal risk, but the ultimate decision, as well as the ultimate responsibility, for implementing risk management is with the WIL discipline.

7.3.2 Facilitate the delivery of WIL placements for students

Another strategy of university lawyers is to facilitate the delivery of WIL placements for students when they provide advice, communicate directly with the host organisation and deal with WIL agreements. Facilitation is evident when UL8 communicates directly with legal representatives from the host organisation. UL8 may accept changes to a WIL agreement that UL8 does not agree with but that involves no shifting of risk to the university. This enables the WIL placement to proceed and gives the host organisation representatives what UL8 described as "a pyrrhic victory". For UL2, facilitating the WIL placement means adding value to the WIL agreement and not being unduly difficult, even in circumstances when the WIL discipline has negotiated and finalised a deal with the host organisation before approaching the legal office for

advice. UL2 explained the thought process in risk management and distinguished lawyers who facilitate from lawyers who obstruct:

Generally I try to work through the parameters [of the situation] thinking about the relationship and what the real risk is. I mean, at one end of the spectrum you get some really anally retentive lawyers. I'm at the other end of the spectrum where we're here to not be an obstacle, we're here to keep a bit of an eye on things... and then jump in as necessary.

UL1 operates on "a green light basis" with WIL placements if the risk associated with a WIL placement is low: "If risk is low, then I try to operate on a green light basis (for example, keep the contracts short and simple). No point trying to overcomplicate things or create roadblocks". Similarly UL9 facilitates the WIL placement by drafting short, plain English WIL agreement templates as revealed in this exchange:

UL9: ... there are a number of objectives [of the agreements]... one not to just have parties to the agreement, but two to make it user friendly for all parties (take out legal ease, make it as short as possible, but cover the essentials), and all the things that were not imposing obligations... weren't obligatory came out of the agreement.

Interviewer: Now why did you want to get rid of the legal ease and make the agreement shorter? Doesn't that put the host organisation in a better bargaining position?

UL9: No, because it made it easier for the WIL practitioners that it was coming from them, just to... not hold up the process by them [host organisation] having to send it off to their legal departments.

In ERM terms, the simplified WIL agreement templates prepared by UL9 and the green light operation of WIL placements by UL1 demonstrate the strategic focus of risk management by university lawyers.

UL11 specifically referred to "facilitation" when discussing the creation of WIL agreement templates for paid engineering placements. For WIL agreement templates that made provision for the assignment of student IP, UL11 explained that facilitation

was part of a balancing act involving risk management and student awareness of their IP rights:

We're not trying to rip the students off. We're trying to get a reasonable... middle ground that facilitates the placement, manages the risks (as the host perceives them and the University), but makes sure that they're aware.

The same theme of balance was previously identified by UL8, when designing a risk management framework for WIL staff which minimises legal risk but does not “spook hosts” (section 7.3.1). UL12 expressed the balance as a challenge in terms of risk management. At the time of interview, UL12 was in the process of gathering agreements from members of the formal WIL group for the purpose of standardising the WIL agreements (section 7.2.2). University WIL agreements had already been developed with respect to the larger host organisations in the health discipline. UL12 explained that small businesses “have no appetite to enter into a complex legal agreement”. The challenge for the legal office will be “trying to come up with an agreement that covers our risk to our satisfaction, whilst not scaring off the provider and having them walk away from being willing to provide a placement”.

UL11 again referred to the balance when discussing the role of university lawyers. Consistent with the dual perspective on risk articulated by ERM, UL11 acknowledged that risk management by university lawyers involves a balance between student learning outcomes (positive risk) and risk to the university (negative risk). Nevertheless, the legal office should not obstruct teaching and learning activities such as WIL programs: “It’s a balance between risk to the University and the student outcomes... and we’re here to do teaching and research, so... the legal office isn’t meant to be an impediment to that”. In both examples shared by UL11, the goal of the university lawyer when balancing the risk to the university and the promotion of student interests, whether that be awareness of their IP rights or achievement of student outcomes, is to facilitate the WIL placement. UL1 also alluded to the balance between facilitation of WIL placements and management of legal risk. UL1 was conscious of not putting in place roadblocks but also ensuring that the WIL program was compliant with the law:

It’s not something where we want to say ‘look, it’s a bad thing, it’s dangerous, don’t do it’, it’s something we want to encourage, so the less road blocks we put

in place the better. We just have to make sure that we're doing that in the proper manner.

Facilitation is reflected in the exception-based approach by university lawyers to risk management. The university lawyer will facilitate the WIL placement unless the legal risk is a “deal breaker” (UL2, 4). A deal breaker is a legal risk that should be avoided because it cannot be controlled or transferred by the university. Some examples of deal breakers discussed in the previous chapter included bullying by host organisation representatives (UL3) and agreement provisions which may cause the university to breach internal or external regulations (UL4, 11) (section 6.2.1). If the deal breaker cannot be resolved, the student should not be placed with the host organisation. The facilitation strategy underpinning the exception-based approach was also evident when UL3 discussed their role with respect to WIL programs: “I want to be able to assist it... I don't want to hinder... unless it's outrageously unacceptable”.

University lawyers also make explicit their risk management strategy when fostering relationships with WIL staff. The ability of university lawyers to manage legal risk in WIL programs is generally contingent upon WIL staff requesting their services, as WIL staff initiate first contact with the university lawyer. University lawyers encourage WIL staff to request and return for legal services by spreading a message of facilitation: they are not a “road block” (UL1, 4) or an “obstacle” to WIL placements (UL2, 10). Rather the risk management practices of university lawyers are designed to help WIL staff (UL3, 4, 10). UL4 makes clear that the university lawyer is trying to help, enhance and build upon, rather than knock down and criticise, the work of WIL staff. According to UL3, WIL staff are more open to approaching the university lawyer if they understand that the university lawyer is not a hindrance but can help them with delivering the WIL program. WIL staff can see that the university lawyer is aware of the strategic value of WIL to the university. A shared vision attached to the risk management activity appears to facilitate a better relationship between WIL staff and university lawyers.

The language used by university lawyers when providing advice is critical for ensuring WIL staff are aware that university lawyers are facilitators of WIL placements and not obstacles. The following passage in which UL1 is advising WIL staff about the legal risks associated with the *Fair Work Act* is instructive. UL1 describes the difference between facilitative and obstructive language:

I mean no one has actually resisted our intervention, and in most of the cases we're not saying to them, 'you can't do it, we need to shut it down', we're basically just saying 'look, you can do it, but you just have to make sure that you're across these things, and that we are not exploiting the student', and so when you put it that way, then they're fine with it.

UL8 is also conscious about communicating a message of facilitation whilst working with WIL staff in managing risk:

It's not about 'we are legal, and we can tell you not to do something'. It is that 'we are here to help you get this off the ground. Let's just rethink this', rather than, 'that's really dumb because it breaches the law and you're going to put the university at risk, and I'm going to go dob you into the Vice-Chancellor you idiot!' We don't take that approach.

The preceding section revealed that facilitation of the WIL placement for students can be manifested in the words and actions of university lawyers. As a whole, facilitation represents the plan of university lawyers for risk management to achieve university goals associated with WIL, and completes construction of the risk management framework. The next part of this chapter is a discussion which situates the risk management methods and strategy of the university lawyer in the literature addressed in Chapter Two, as well as examining these methods and strategy from an ERM perspective.

7.4 Discussion

The risk management methods and strategy of the university lawyer, when combined with the practices described in Chapter Six, represent a risk management framework with respect to WIL programs. The concept of a risk management framework emerged from the analysis of interview data. To define risk management as *what* university lawyers do to manage legal risk, that is, their risk management practices, would be simplistic. Risk management is more than the "end product" delivered by university lawyers and discernible to recipients of legal services. University lawyers also have methods (*how* they manage legal risk) and strategies (*why* they manage legal risk) which underpin their risk management practices. The characterisation of practices, methods and strategies as a framework recognises the

different elements that support risk management by university lawyers and explains how university lawyers support the goals of maximising the strategic value of WIL and minimising the legal risks associated with WIL.

Some risk management strategies and methods have been identified when the role of university lawyers is discussed in the literature. For instance, communication with lawyers at other universities has been noted by Ruger (1997) as well as by the Australian university lawyer Fleming (1999), who suggests that university lawyer networks are a resource for sharing ideas, identifying problems and being a collective voice in contract negotiations. It has also been recommended that university lawyers collaborate with insurance-risk (Ende et al., 1997; Kaplin & Lee, 2013) and academic decision-makers (Bickel & Ruger, 2004). The case study extends the university lawyer literature by describing the nature and extent of collaboration and communication with insurance-risk, lawyers at other universities and WIL staff in the specific context of WIL programs. For instance, university lawyers collaborate with WIL staff by asking questions about the WIL program, and through their participation in formal WIL groups to create WIL agreements and resources. Evidence of pragmatism and accessibility in the delivery of legal services and external support for risk management practices complete the range of methods employed by university lawyers to manage legal risk.

As a risk management strategy, facilitation of WIL placements is consistent with the primary role of the university lawyer discussed in Chapter Two – to support the institutional goals and objectives of the university related to teaching, research and service (Daane, 1985; Orentlicher, 1975). Facilitation has been used to describe the advisory role of the university lawyer. Corbally (1974), Daane (1984) and Ward and Tribbensee (2003) argue that the role of the university lawyer, when providing advice, is to facilitate activities which achieve university objectives. A related point from the university lawyer literature is that the university lawyer's role is to advise and not make decisions about an activity the subject of the advice (Bickel, 1993; Kaufmann et al., 2001). The case study provides an empirical basis for both propositions.

Facilitation is conceptualised in the case study as a risk management strategy of university lawyers. University lawyers facilitate risk management by WIL disciplines and the WIL placement, both activities, to achieve university objectives associated with minimising legal risk and delivering WIL placements for students respectively. The

university lawyers who stressed that they were advisors and not decision-makers provide empirical evidence to support the argument that university lawyers facilitate risk management by WIL disciplines. The analogy by Daane (1985) when describing the university lawyer as facilitator – “the red light function is important, but the green light should shine more often” – is reflected in UL1’s “green light” strategy for WIL placements and the exception-based approach by university lawyers to reviewing WIL agreements. University lawyers will facilitate the delivery of WIL placements for students unless there is a deal breaker, namely a risk that cannot be controlled or transferred by the university. The deal breaker is a risk that should be avoided and represents the “red light”. Consistent with a strategy of facilitation, the university lawyer’s advice with respect to contract risks is not simply to identify the legal risk and say “no” to the activity (Ward & Tribbensee, 2003). The university lawyer will advise WIL staff to go back to the host organisation and re-negotiate, often using strategies and amendments to contract terms, suggested by the university lawyer, that are designed to minimise the legal risk and give the WIL placement a green light.

The significance of the framework extends beyond a simplistic description of risk management by university lawyers. The risk management framework explains how university lawyers support the goals of maximising the strategic value of WIL and minimising the legal risks associated with WIL. In Chapter One it was argued that WIL is a strategic and legal risk to universities. The challenge for universities is to maximise the strategic value of WIL but minimise its legal risks. Risk management requires a balance between maximising the returns from WIL as a strategic activity and minimising the unavoidable legal risks of students participating in a workplace. The balance described by university lawyers in the case study between facilitating the delivery of WIL placements for students (maximising strategic value) and risk management (minimising legal risk) is an acknowledgement of this challenge from a university lawyers’ perspective, and reflects the dual perspective on risk articulated by ERM. University lawyers address the challenge by employing a risk management framework of practices, methods and a strategy of facilitation. Facilitation of WIL placements for students is a strategy of the university lawyer which is designed to maximise the strategic value of WIL programs, a goal of the university. Facilitation of risk management by WIL disciplines is consistent with the theme, revealed in the previous chapter, that the responsibility for implementing risk management is with the

WIL discipline. Each WIL discipline is responsible for managing the program risks as well as the contract risks associated with the terms of a WIL agreement and the practices of the WIL discipline. University lawyers support the risk management responsibilities of the WIL discipline by their risk management practices and methods, which are geared towards the university goal of minimising the legal risks attached to WIL programs.

University management and WIL staff may also better appreciate the work of university lawyers upon a review of the risk management framework. Whilst the risk management practices of university lawyers are visible to university management and WIL staff, the methods and strategy are two covert pillars of the risk management framework not previously addressed in the WIL literature. This has the potential to create misconceptions about the university lawyer that may stop WIL staff from accessing legal services. For instance, Corbally (1974) noted that some academic administrators perceive the university lawyer to be obstructive, whereas authors in the WIL literature have been critical of university lawyers for their perceived lack of knowledge about WIL programs (Cobb, 1994; Gelman, 1990; Madden & Cobb, 2000; Reeser & Wertkin, 1997) and the production of legalistic agreements that may undermine the delivery of WIL placements (Gelman, 1990). The risk management framework may dispel these preconceptions. Whilst other university lawyers may not be as informed or have the experience in the tertiary sector to appreciate the strategic value of WIL to the university, it is clear from the university lawyers interviewed that they do understand the purpose of WIL programs, and appreciate their importance to achieve institutional objectives (Bickel & Ruger, 2004). University lawyers are also pragmatic when addressing legal risk; they draft plain English WIL agreement templates that protect student and university interests and are conscious of not being an obstruction or a “road block” to WIL placements.

From an ERM perspective, the risk management methods and strategy of university lawyers in relation to WIL reflect the characteristics of shared responsibility and strategic focus associated with ERM. The strategic focus of university lawyers is made explicit by their risk management strategy. University lawyers appreciate the strategic imperative as well as the legal risks associated with WIL (dual perspective on risk). WIL presents a strategic opportunity for the university, and as such, unavoidable legal

risks may be accepted by the university to facilitate the WIL placement. The university lawyer negotiates the balance between maximising the strategic value of WIL for the university and minimising its legal risk by engaging in risk management practices and methods which are intended to facilitate the delivery of WIL placements for students but which also facilitate management of legal risk by the WIL discipline. This strategy is aligned to the goals of the university (Figure 7.1).

The university lawyer strategy of facilitating risk management by the WIL discipline explains the nature of shared responsibility for risk management. University lawyers and WIL disciplines are both risk managers with respect to WIL programs, but effective risk management dictates that they should not act in isolation from one another. This notion of isolation represents the traditional silo approach to risk management in higher education (Ackley et al., 2007). University lawyers are responsible for delivering legal services to the WIL discipline designed to manage legal risk. The practices and methods of university lawyers support the responsibility of WIL disciplines to implement risk management in their WIL programs. However, the sharing of responsibility is conditional upon WIL staff collaborating with university lawyers and not managing legal risk within the silo of their discipline. University lawyers encourage collaboration by being accessible and pragmatic as well as making explicit their risk management strategy of facilitating the delivery of WIL placements for students. University lawyers produce a variety of risk management tools for the WIL discipline. However the responsibility for accessing these tools and then deciding whether and how to use them rest with the WIL discipline.

Responsibility for risk management may also be shared with other university elements and across WIL disciplines. Insurance and risk personnel are responsible for risk management in relation to WIL programs by conducting formal risk assessments and dealing with insurance-related issues. In particular, insurance-risk may collaborate with university lawyers about WIL placements that have significant strategic value but that also carry significant legal risks. The responsibility of insurance-risk is to ensure that there is sufficient insurance coverage to transfer the legal risks and thereby facilitate the WIL placement. Responsibility for risk management is also shared among WIL disciplines when WIL staff and university lawyers participate in formal WIL groups. WIL staff collaborate with the university lawyer as well as their colleagues in other

WIL disciplines to develop WIL agreement templates. These risk management tools can then be adopted and adapted by WIL disciplines across the institution.

Overall, the risk management framework provides a cohesive and comprehensive explanation, based on empirical evidence, of how university lawyers manage legal risk with respect to WIL programs. Risk management practices and methods not previously addressed in the literature are situated in the framework, and observations about the role of university lawyers in terms of collaboration and facilitation are contextualised as methods and strategies within the risk management framework, providing empirical support for and extending the existing literature. The risk management framework also explains how university lawyers support the university goals of maximising the strategic value of WIL but minimising the legal risks it entails.

7.5 Conclusion

The university lawyers interviewed provided new insight about how they manage legal risks with respect to WIL programs. The risk management strategy of university lawyers is to facilitate the delivery of WIL placements for students and risk management by WIL disciplines. To execute the strategy, university lawyers are pragmatic and accessible, ask staff questions, garner external support for risk management practices, and communicate and collaborate with WIL staff, insurance-risk and lawyers from other universities when advising, educating, drafting and reviewing various WIL instruments in relation to WIL programs. The practices, methods and strategy of university lawyers represent a risk management framework which provides a coherent and comprehensive explanation of risk management by university lawyers in relation to WIL programs.

With a more complete understanding of the legal risks in WIL programs (Chapter Five) and how they are managed by university lawyers (Chapters Six and Seven), the case study moves to addressing the third and final research question: *what factors may influence risk management by university lawyers in WIL programs?* Strategic factors relevant to the delivery of WIL programs as well as organisational factors associated with the legal office are examined in Chapter Eight.

Chapter Eight: Strategic and organisational influences on risk management

8.1 Introduction

This chapter describes and analyses the strategic and organisational factors which may influence the risk management framework of university lawyers. The strategic and organisational factors are one part of the answer to the third research question: *what factors may influence risk management by university lawyers with respect to work integrated learning programs?* The central argument in this chapter is that there are strategic factors associated with the delivery of WIL programs and organisational factors associated with the day-to-day operation of the legal office that may influence whether, which and how university lawyers manage legal risk in relation to WIL programs. The factors are then conceptualised as strategic, reputational and operational risks that affect the university's ability to achieve the goals of maximising the strategic value of WIL and minimising its legal risks. Translating the factors into risks provides a consistent language and has significant practical application for university management, WIL disciplines and university lawyers, in terms of evaluating and improving risk management at their own institution.

The first part of this chapter describes and analyses four strategic factors which may influence risk management by university lawyers: WIL as a specific objective of the university; university demand for WIL placements; managing the host organisation relationship; and preserving university reputation. The second part of this chapter describes and analyses four organisational factors which may influence risk management by university lawyers: the workload of the legal office, the delegation practices of the legal office, the experience within and history of the legal office, and the university policies and procedures. The third part of this chapter is a discussion which situates the strategic and organisational factors in the literature (Chapter Two) and the survey (Chapter Four), and which examines these factors from an ERM perspective.

The final part of this chapter conceptualises the organisational and strategic factors as strategic, reputational and operational risks ("non-legal risks") that university lawyers may encounter and manage in relation to WIL programs. Consistent with the discussion of legal risks in Chapter Five, a table of risks is presented which is translated from the

organisational and strategic factors. The conceptualisation is designed to deepen understanding about risk management by university lawyers and to be a more purposeful evaluative tool for university lawyers, WIL disciplines and university management.

8.2 Strategic factors

Strategic factors operate at an institutional level and relate to the goals and objectives of the university in research, teaching and learning, and service, as specified in university strategy. As discussed in Chapter One, the delivery of WIL programs is a teaching and learning activity designed to meet professional accreditation requirements of academic disciplines such as health and education in which WIL is a compulsory component of the degree, as well as provide engaging learning environments for students that can improve student learning, satisfaction, retention and success as a graduate (section 1.2). The university lawyers interviewed referred to four strategic factors that may influence their risk management framework: WIL as a specific university objective; university demand for WIL placements; managing the host organisation relationship and preserving university reputation. Each factor will be discussed in turn.

8.2.1 Work integrated learning as a specific university objective

Many universities have incorporated WIL as part of their objectives (Cooper et al., 2010; McLennan & Keating, 2008). For example a goal in the Griffith University Strategic Plan 2013–2017 is to “prepare work-ready graduates with the capacity to play an influential role in the world” (Griffith University, 2013, p. 5). The target to achieve that goal is “to ensure that all students experience at least one of the following by 2017: work-integrated learning; service learning; a research project/practicum; an international study experience” (Griffith University, 2013, p. 5). As a consequence, WIL programs are becoming more accessible for students in non-traditional WIL disciplines such as business and the arts. An example of this is WIL being embedded within the business curriculum at Griffith University, as part of its strategy to improve the educational experience of students, to attract and retain students and to facilitate graduate success (Griffith Business School, 2013). The universities allied to the university lawyers in this case study are no exception, with WIL activities specified in university learning and

teaching and strategic plans; expressed by senior management as a strategic priority; or specified in the operational plan of the legal office.

Making WIL a specific objective focuses the university lawyers' attention on the importance of WIL for the university (UL1, 3, 4, 8, 11). The catalyst for UL3's participation in a formal WIL group was the university strategic plan. When UL3 was a law student at university, "you just did your exams and buzzed off", and the WIL program was an elective available to a small number of students. UL3 now appreciated the importance of WIL today to the university through the strategic plan, in that WIL is "almost becoming compulsory" for students. At the time the WIL group was formed, WIL disciplines did not have appropriate WIL resources pertaining to risk management, and as UL3 acknowledged, "we needed to because WIL is so important now". Collaboration by UL3 in the WIL group led to the production of WIL resources and an agreement template. UL4's risk management practices are guided by the operational plan for the legal office, which refers to the delivery of legal services with respect to WIL programs, as a goal designed to achieve the strategic objectives of the university. For UL8, the strategic objectives of the university influence how work is prioritised in the legal office. With limited staff and high demand for legal services, the legal office may not handle matters that are not a strategic priority. Given that WIL is a strategic priority of the university, the legal office will deliver legal services such as the risk management practices that UL8 described in Chapter Six. The experiences of UL3, UL4 and UL8 are clear examples of the dual perspective on risk and strategic focus of risk management associated with ERM. Universities that articulate the opportunity of WIL in strategic or operational plans (strategic risk) can provide university lawyers with a strategic focus on risk management and can direct their attention and resources to managing the legal hazards of WIL (legal risk).

The impact of WIL as a specific university objective for UL1 and UL11 is on risk management strategy, in particular the facilitation of WIL placements for students. UL1 explained that the reason why UL1 does not want to place any roadblocks on WIL programs is that "it's in line with [the university's] strategic plan. It's also beneficial for [the university's] students as well". UL11 was privy to formal discussions with senior management in which WIL was a prominent theme. As a consequence, the university objective of providing students with work experience opportunities became a part of

UL11's risk management framework, in terms of facilitating the WIL placement (strategy) and assessing legal risk when advising WIL staff (practice). UL11 described this chain of events:

Internships just kept coming up, so I know that's a real focus of the University... there's been a lot of discussion about the student experience, so that just gives me the parameters – I know this is something we need to do our best to facilitate. Not that we would ever not do our best to facilitate any activity that we know that there's a focus...

...

And so it [WIL as a university objective] helps again contextualise what we're seeing you know the on paper risks, and then you think, 'well... what's our ultimate objective? Is this thing that we've picked up going to impact... what's the impact on the University strategic objective to get students you know, give students as many opportunities for real life work experience as possible?'

WIL as a specific objective provided UL11 with the necessary context to assess legal risk, and an understanding of the need for university lawyers to facilitate the WIL placement. Such an understanding ensures that university lawyers appreciate the strategic importance (or risk) of WIL when managing the legal risks.

A theme underpinning the responses of university lawyers is how WIL as a specific objective aligned particular risk management methods, practices and/or strategy to the objectives of the university. UL1 and UL11 adopted a strategy of facilitating WIL placements, UL3 participated in a formal WIL group and produced WIL resources and UL4 and UL8 engaged in risk management practices because WIL was a specific objective of the legal office and university respectively. The university objective of providing students with opportunities to participate in WIL programs creates a university demand for WIL placements. This factor is discussed in the section which follows.

8.2.2 University demand for WIL placements

The university demand for WIL placements has been driven by stakeholder demand for authentic learning experiences that can improve student generic skills as

well as career and professional awareness. In Chapter One it was argued that WIL makes good business sense for the university, in an increasingly competitive higher education environment, with various benefits to the university, students and employers (section 1.2). Clearly the demand for WIL placements has an impact on university operations, in the sense that the university must secure sufficient WIL placements to satisfy the demand. However, does this demand influence the risk management framework of university lawyers? University lawyers appear divided on this question.

University demand for WIL placements is reflected in the pragmatic approach adopted by some university lawyers to reviewing WIL agreements (UL2, 3, 10). These university lawyers acknowledge three practical truths: (i) the university may have to accept contract risks, (ii) which may be unavoidable, (iii) because the university needs the WIL placements. UL10 noted that, in an ideal world, the university would have the perfect indemnity clause and require the host organisation to have the highest level of insurance. However the reality is that the “business needs this to happen” so that compromises must be made, particularly with respect to maximum caps on insurance coverage, the inclusion of insurance provisions in the WIL agreement, and indemnities. Following a risk assessment, UL10 in collaboration with insurance-risk may advise that a contract risk associated with insurance or indemnities can be accepted because otherwise the university does not have a placement. Consequently, the WIL discipline may accept one or more contract risks because, on balance, the university demand for WIL placements outweighs the legal risks.

University demand for WIL placements has also impacted UL10, in terms of finding solutions to facilitate the WIL placement in collaboration with insurance-risk, whereas previously there was little or no movement on a particular position. Insurance-risk may not have been prepared to accept particular contract risks due to the lack of insurance coverage or an indemnity in favour of the university: UL10’s subsequent advice to the client was not to proceed with the WIL placement. With increasing university demand for WIL placements (“the business wants this to happen from the Vice Chancellor down”), as well as competition from other universities, UL10 in conjunction with insurance-risk became more focused on finding solutions. For example, UL10 and insurance-risk drafted an agreement provision which made the host organisation liable under its workers compensation insurance policy if the student was deemed an

employee on WIL placement. Some host organisations did not accept the agreement provision, on the basis of their potential liability to pay increased insurance premiums arising from a student claim. A solution was devised which facilitated the WIL placement – an additional agreement provision that if the student made a successful claim against the host organisation under workers compensation insurance, the university would cover any increase in the insurance premium for a specified period.

UL2's pragmatic approach to WIL agreements, as well as the strategy to facilitate the delivery of WIL placements for students, is also influenced by university demand for WIL placements – “what I try to do, is I try to help facilitate, because they need these placements”. In terms of ERM, the university demand for WIL placements instils a strategic focus on risk management. UL2 recognises that the deal to secure the WIL placement needs to be done. UL2 will facilitate the WIL placement, provided there are no agreement provisions assessed as high risk, which would form the basis of advice not to sign the WIL agreement. UL2 explained the relationship between facilitation, pragmatism and university demand in the context of nursing placements:

But thinking overall, the commercial arrangements, we do need these placements, so as long as there's no real deal breakers in terms of the relationship, in terms of the actual arrangement that we just couldn't actually go and do it, we generally find that we'll facilitate it, and I'll do my best just to get it across the line, but as long as we can manage the risk, because I, unless it was an absolute deal breaker ... I'd be slammed for it if I said 'we can't go to [hospital name], or we can't go to [hospital name]', unless there was something really intolerable, and then I would speak up about it. But I would think that would be so unlikely, because we just have to do it, we have to do it...

Note how UL2 emphasised the particularly high level of risk required to stop the WIL placement from proceeding as an “absolute deal breaker”, “real deal breaker” or “something really intolerable”, and the perceived backlash from senior management that would ensue if the WIL placement did not proceed. Similarly, UL3 takes a pragmatic approach to WIL agreements because “we need these students to go on placements, and they're few and far between, and the quotas are getting lower and lower, particularly in certain areas of health”. UL3's advice is that the university sign the WIL agreement, which may include accepting contract risks, provided that the agreement provisions

pertaining to student and university responsibilities are not “totally outrageous” or “outrageously unacceptable”. As with UL2, UL3 accentuated the exceptional circumstances which would deny the university a WIL placement. In this way, contract risk can be envisaged as a spectrum of risks; university lawyers may advise WIL disciplines to avoid a contract risk only if the contract risk falls at the far end of the spectrum.

For some university lawyers the influence of university demand for WIL placements is on institutional risk management; that is, the risk management framework of the university as a whole, and not necessarily their own risk management framework. UL12 identified university demand for WIL placements as one element of a tension with institutional risk management, which according to UL12 represented the greatest challenge for universities in the WIL environment:

The greatest emerging challenge we face in the WIL environment is the tension between protecting the University from significant contractual and other legal risk, when we traditionally have a very low appetite for risk, and ensuring that we obtain the adequate number of placements with suitable providers who are becoming increasingly risk averse and profit driven.

The “we” referred to by UL12 is the university, not the university lawyer. The distinction is significant. UL12 argued that the role of the university lawyer is to provide advice about the legal risks, which is then measured by the *university* against the commercial need to obtain WIL placements. In other words the legal advice of UL12 is detached from strategic and business considerations such as university demand for WIL placements. It is the responsibility of university management, with appropriate authority, to measure legal risk against the commercial need and to decide whether to proceed with the WIL placement. As UL12 argued:

It’s not our role to make that decision. So we provide the legal advice about the risk, and provide the business with the necessary information to be able to measure that against their needs, but it’s not our decision. It’s not our role to provide strategic or business advice.

UL12 provided an example to demonstrate this point. The university pays some health organisations a placement fee to host students and may accept “harsh commercial

terms” in a WIL agreement regarding cancellation of placements, indemnities and warranties. Whilst UL12 is conscious that the university accepts legal risks in order to obtain WIL placements, it is not UL12’s role to provide strategic or business advice which would incorporate considerations of legal risk as well as the university demand for WIL placements. Instead, UL12’s role is to provide advice so that disciplines are in a position to make a fully informed decision about the WIL activity.

Like UL12, other university lawyers acknowledged that university demand for WIL placements may influence institutional risk management, in that the university is more prepared to accept legal risk, but did not acknowledge its impact on their own risk management framework. For instance UL13 provided advice about a host organisation WIL agreement in which the university would be liable for a breach of broad student obligations regarding confidentiality. UL13 was not particularly happy with the agreement provision, but the university still signed off on the agreement because “we needed that relationship”. This illustrates the university lawyers’ role as a fearless and frank advisor, detached from strategic considerations that could inhibit their independent legal judgment. UL5 explained that university demand for WIL placements is one of the challenges with managing legal risks in WIL programs, because it “leads to both the students and the university waiving our objections aside”. UL5 provides advice which identifies contract risks and suggests that the risk be avoided, but the university may reject the advice in order to secure a WIL placement. For both UL5 and UL13, university demand for WIL placements does not influence the university lawyer’s advice but rather it influences the university’s response to the advice and the method selected by the university to address the legal risk, being risk acceptance. For UL7, demand for WIL placements has no impact on their role as a university lawyer. UL7 provides legal advice and the university representative with the appropriate delegation can accept or reject the legal advice. For example in the medical discipline, “the Dean of the Medical School has the delegation to fold on some things that I might think could cause a risk to the university”. UL7 agreed with the assertion that their advisory role is to provide fearless and frank advice that the university can choose to accept or reject. Overall, whilst university lawyers acknowledge the influence of university demand for WIL placements on institutional risk management, they are divided about this influence on the risk management framework of university lawyers.

8.2.3 Managing the host organisation relationship

Managing the host organisation relationship is another strategic factor that may influence risk management by university lawyers. The university's relationship with the host organisation is critical to the success of WIL programs. The host organisation is a strategic factor, in the sense that, without the host organisation, there is no WIL placement. The failure to attract and retain host organisations therefore undermines the university's ability to achieve its goals pertaining to WIL programs. As UL8 explained:

We need hosts. We can't have these programs without hosts, so if we make it so difficult to attract a host, then that kills the program... and that's not what we're trying to do either, because if we kill the program, the students don't get the benefit.

Relationship management involves formalising new relationships and maintaining existing relationships with host organisations. Relationship management is a factor for both UL3 and UL8 when drafting university WIL agreements. A lengthy complex document may "scare the bejesus" out of the host organisation (UL8) and host organisations "would run a mile" (UL3). UL3 and UL8 acknowledged that the end product must still protect university and student interests, but the process requires the university lawyer to be mindful of the host organisation relationship. Similarly relationship management will be part of the balance with risk management when the legal office of UL12 begins preparing agreement templates for WIL placements geared to small businesses (section 7.3.2). The challenge for the legal office will be drafting a WIL agreement template that manages legal risk to a satisfactory level, whilst not "scaring off" the host organisation from providing a WIL placement. UL8 has already experienced this same challenge when designing risk management frameworks for WIL disciplines. As UL8 discussed in Chapter Seven, an appropriate balance must be struck between minimising risk and "not spooking hosts". UL3, UL8 and UL12 all acknowledge that their risk management practices can impact on the relationship between the university and the host organisation. As such, the WIL instruments prepared by university lawyers can assist with relationship building.

UL11 considers the host organisation relationship when assessing the legal risks and value of the WIL experience for the students (sections 7.2.1 and 7.3.2). UL11 may be

more prepared to suggest that a risk be accepted in an advice if the host organisation relationship is an important one in terms of number of students placed with the host organisation and/or number of WIL disciplines associated with the host organisation. Nevertheless UL11 stressed that the final decision to accept or reject the risk remains with the client. Relationship management is also a factor when UL11 is asked to make an exception, with regard to a particular WIL placement: that is, a change proposed by the host organisation to the WIL agreement that may pose a legal risk. In these circumstances, UL11 must decide whether to refer a WIL agreement to a higher level of university management for consideration. That decision depends on whether the relevant WIL discipline or other academic disciplines intend to place students with the same host organisation in the future. The potential for a continuing relationship means that the WIL agreement may set a precedent for future WIL placements, in the sense that the host organisation expects the same terms in the WIL agreement to apply. Due to this legacy, UL11 is more likely to refer the matter to a higher level (section 6.2.3).

The university relationship with host organisations is a paramount concern when UL2 is providing legal advice and reviewing WIL agreements: “I generally try to work through the parameters thinking about the relationship and what the real risk is”. The “real risk” that UL2 refers to is a circumstance or an agreement provision that poses an unacceptable risk to the university. According to UL2, the easiest thing to do is to mark up a document and pick up on every single issue which is not a real risk to the university, but this may compromise the host organisation relationship and not allow the business to get done. UL2 explained the importance of not undermining relationships when delivering legal services, because of the university demand for WIL placements:

So we need these placements and that's part of the academic program. So if we go around and start ... stuffing relationships up, then there needs to be a reason for it. And generally what you find is you've just got to be really mindful of it, because you'll find the powers that be go down a certain path and the relationship is paramount. So you've got to bear that all into account... but if you find something that poses an unacceptable risk to the University, I would definitely speak up.

The association between university demand for WIL placements and relationship management is clear. UL2 will not interfere with the relationship unless UL2 has a good

reason to do so, being an unacceptable risk, because the university needs WIL placements. This is a clear example of the dual perspective on risk articulated by ERM. UL2 appreciates the importance of the host organisation relationship to the university in its pursuit of the strategic risk (or opportunity) associated with WIL placements.

UL2 and UL10 noted that the nature of the host organisation relationship will determine how hard they will “push” the university’s position when reviewing and providing advice on a proposed WIL agreement. UL2 explained that the relationship at times extends beyond the WIL discipline and operates at a more senior level of academic management. For example, the last thing that UL2 wants to do is to suggest a number of amendments to the WIL agreement, only for the Dean to say “no, we’re not doing that, we’re just going to have to sign it”. UL2 is conscious of not getting caught in a “turf warfare situation” between university management and the host organisation. Relationship awareness means UL2’s role is restricted to drawing the decision-maker’s attention to the risks before proceeding with the WIL agreement. UL2 argued that “your hands are tied sometimes in terms of relationships” as a challenge to managing legal risk with respect to WIL programs, but more specifically “this is the real test of your role as a lawyer, as an independent legal advisor...” Although the risk management strategy of UL2 is to facilitate the delivery of WIL placements for students, the university lawyer must still be prepared to expose situations of high risk and say “sorry, I don’t think that’s the right thing to do”. Fortunately UL2 has not had any such instances to date.

Not all university lawyers agree that relationship management influences their risk management framework. UL7 and UL13 are aware that host organisation relationships are important to the university, in the context of WIL programs, such that the university may negotiate or may fold on some contractual issues. However as with university demand for WIL placements, managing host organisation relationships is a concern for risk management at a discipline level. For example UL13 has reviewed WIL agreements and suggested to WIL staff that “this isn’t exactly a fair deal, is it?” knowing that the WIL discipline needs the host organisation. According to UL13, relationship management does not affect their role because UL13 has no contact with the host organisation and the responsibility for relationship management lies with the WIL discipline dealing with the host organisation. In terms of ERM, UL7 and UL13

acknowledge relationship management as an issue (or risk) that may affect the ability of the university to achieve its goals in relation to WIL, but they make clear that the WIL discipline is responsible for managing the host organisation relationship.

8.2.4 Preserving university reputation

The final strategic factor that may influence risk management by university lawyers is preserving university reputation. Most university lawyers were conscious of the university's reputation in the context of WIL programs (UL1, 6, 7, 8, 9, 10 and 11). UL10 referred to university reputation when advising WIL staff on how to address student allegations of sexual assault; UL6 acknowledged that placing students with an exploitative host organisation would undermine the university's reputation; and UL7 described the reputational impact if the university took legal action against a student for breach of a Deed as not a good look in the local newspaper. However the influence of university reputation on risk management by university lawyers with respect to WIL programs was limited to the contract risk of a host organisation being an inadvertent employer of the student (section 5.4.2). UL1 acknowledged the legal *and* reputational risks associated with a WIL placement that did not meet the vocational placement exemption under the *Fair Work Act*. The consequence for the university is that the host organisation may not participate in future WIL programs, effectively terminating their relationship with the university. As UL1 argued:

... we could be complicit in any finding of unpaid work, but otherwise, you know, it would just look bad anyway on the University's side if we were trying to encourage host organisations to host students, and not actually working through how to appropriately structure it. So they might end up on the wrong side of the law, and you know, won't want to host students next time.

UL1 asks staff questions about the nature of the work-based activity to ascertain whether it meets the vocational placement exemption and then provides advice about the appropriate structuring of the WIL placement to manage the legal and reputational risk (section 7.2.1). According to UL1, this is "just the right thing to do". The reputational consequences of not doing the right thing by the host organisation and the students were described by UL11 in the context of paid WIL placements. As UL11 explained:

... so it wouldn't be the university that would be tapped on the shoulder to pay the tax, it would be the student and then if it's classed as income the host... why haven't they paid superannuation, payroll tax, all of the other payments, Work Cover, that go with being an employee? and so, we were managing... wanting to make sure that it was right, because it would be huge reputational damage if something like that came out and we hadn't done the right thing... by the students or by the law.

Whilst the university may not be exposed to legal risk, the potential reputational damage from a finding that the host organisation is an employer of the student is real for the university. UL11 provides advice to WIL staff which ensures that paid WIL placements comply with tax and labour laws so as to minimise reputational damage to the university. In this way, university lawyers consider legal consequences beyond the university (its client) but also to students and the host organisation. This extended consideration of risk is seen as important to protect the university's reputation.

UL8 acknowledged that a WIL program in breach of labour law does not necessarily pose a legal risk to the university. Nevertheless, there exists a reputational risk which UL8 posed as a question: "who wants to be a host if they could be subject to a claim?" UL8 also described the reputational risk as a "loss of confidence from others who want to enter into the same arrangement". The point made by UL8 about reputational risk is similar to UL1 – the university may lose the support of existing and potential host organisations, and therefore lead to a reduction in the supply of WIL placements, if the host organisation is deemed an employer. UL8 recalled a proposed WIL arrangement which involved an indirect payment of scholarship funds by the host organisation to the student (host→university→student) as an example of reputational risk. Consistent with UL9's concerns about tripartite scholarship arrangements (section 5.4.2), UL8's advice incorporated the reputational impact of the university's involvement in an arrangement which may be viewed as a "back door way of employing somebody" without paying payroll tax, superannuation and meeting other legal obligations of an employer. It is apparent that reputational risk and not legal risk is the primary concern of UL1, UL8 and UL11.

The preceding discussion provides key insights about the strategic factors which may influence risk management by university lawyers. WIL, as a specific objective of the

university, may focus the university lawyers' attention on the importance of WIL to the university and may align elements of their risk management framework to the goals and objectives of the university. University lawyers are however divided about the impact of university demand for WIL placements and managing the host organisation relationship on risk management. For some university lawyers, the two strategic factors are associated with their pragmatic approach and when drafting, reviewing and providing legal advice in relation to WIL agreements, whereas other university lawyers argue that the primary responsibility for strategic considerations rests with university management. The final strategic factor – preserving university reputation – was acknowledged by university lawyers, but its influence on their risk management framework in a WIL context was limited to the host organisation being an inadvertent employer of the student. The next part of this chapter describes and analyses the organisational factors which may impact risk management by university lawyers.

8.3 Organisational factors

Organisational factors are associated with the day-to-day operation of the legal office. Unlike strategic factors, the organisational factors apply to all higher education activities including WIL programs. University lawyers discussed their personal workload and the available resources of the legal office, the delegation practices of the legal office, the experience of university lawyers within the legal office and its history, as well as university policies and procedures, as organisational factors which may impact on their risk management framework. Each factor will be discussed in turn.

8.3.1 The workload of the legal office

The workload of the legal office can influence *and* be influenced by the risk management practices of university lawyers. For example the WIL resources pertaining to risk management prepared by one university lawyer in collaboration with WIL staff (section 6.2.9) has reduced their involvement in WIL-related matters, and means that if the university lawyer is involved, time is not wasted rehashing information because it is already available to WIL staff. From a demographic perspective, it is significant but perhaps not surprising that university lawyers from the four smallest legal offices (in terms of number of university lawyers employed) all described workload as a challenge to managing legal risk with respect to WIL programs. The workload of the legal office

may influence risk management by university lawyers in two respects – the proactivity of university lawyers in managing legal risk and the risk management framework of university lawyers.

The workload of the legal office can prevent the university lawyer from being more proactive in managing legal risk. UL12 compared the legal office with other university legal offices in terms of university lawyers per student. UL12 asserted that “comparatively to other universities, we’re running a very tight and overworked little team”. University lawyer numbers gleaned from university websites and from the university lawyers studied, combined with student enrolment statistics from the 2013–2014 year (Australian Government Department of Education, 2014), supported UL12’s assertion. Given the lack of human resources in the legal office, UL12 is much more reactive than proactive in managing legal risk. By this, UL12 means that WIL staff are approaching UL12 for legal services rather than UL12 seeking out the WIL disciplines about issues that require legal services. As UL12 explained:

Look in an ideal world I would love to go to all my clients, and tell them, ‘these are the sorts of issues that are out there, give me everything you’ve got about that’, but we’re already overwhelmed, so we can’t go fishing for work.

On the flipside, UL13 acknowledged that the lack of proactivity by some WIL disciplines to seek legal services is in a way a blessing for the overburdened legal office, but is also a curse for the university because the legal office does not have the resources to meet any additional need. There is a noticeable tension in UL12 and UL13’s comments between workload, proactivity and risk management. The university lawyer wants to be proactive in managing legal risk, but to do so would lead to further requests for legal services on an already overwhelmed and overworked legal office.

The workload of the legal office may influence various risk management practices, methods and strategies of the university lawyer. UL7 aspires to draft better WIL agreement templates but the day-to-day grind of legal tasks means that this is not possible:

I’d love to be an amazing drafter, and I’d love to have more time to sit down and just create the most perfectly drafted agreement... but at the end of the day we

have a list of 20 things to do every day, so I just do the best I can in a short period of time, get it out, and then get onto my next job.

Workload also affects the review of university policies relevant to WIL programs. UL12 did not have the opportunity to review a particular university policy for two years because policy review was not a high priority amongst UL12's substantial workload. Delay in policy review was an experience shared by UL13, who lamented that the legal office does not have time to review the university's risk policy, albeit it is a specific role of the legal office.

The workload of the legal office can impact on university lawyers' capacity to collaborate with lawyers from other universities (UL12) and be accessible in legal service delivery (UL2). UL12 explained that the influence of university lawyers at other universities (through the SOUL discussion list) has been limited to education, in terms of being updated on case law developments. University lawyers in UL12's legal office have raised questions on the SOUL discussion list. Nevertheless UL12 noted that "if we were a big team and we had the time, we would use them more". Workload may also undermine accessibility of legal services. According to UL2, one of the challenges of risk management with respect to WIL programs is turning around legal work quickly enough for WIL staff due to workload issues. The provision of timely legal services is important because "you want people to use you". UL2 also explained the importance of being accessible at length in Chapter Seven (section 7.2.6). To meet this challenge UL2 has developed strong relationships with WIL staff, who understand UL2's workload and will demand UL2's immediate attention to a legal matter only if it is truly urgent. Further, UL2 has developed a "sixth" sense for legal matters which are and are not urgent.

Workload influences the risk management strategy of UL8. As UL8 previously explained, a challenge for university lawyers is to develop a risk management framework for WIL staff that manages legal risk but does not deter host organisations from offering a WIL placement (section 7.3.1). UL8 facilitates but does not supervise or oversee the framework because "we don't have the resources to look over people's shoulders all the time. We don't have the resources to manage those programs". According to UL8, the framework needs to be set up in such a way "so that people can implement it without coming back to the legal team every 5 minutes, because our job is

not to hand-hold. We don't have the resources to hand-hold". UL8 facilitates the risk management framework of WIL disciplines that have the primary responsibility to ensure the risk management framework is executed.

8.3.2 Delegation practices of the legal office

The delegation practices of the legal office may also influence risk management by university lawyers. Legal work, particularly in larger legal offices, is generally funnelled to a central contact point in the legal office and then delegated. The responsibility for delegation may be with the manager, a 2IC within the legal office or an administrative staff member such as a legal office secretary or practice manager in association with a 2IC or manager. University lawyers described the delegation of legal work as triage. The delegation practices determine who manages legal risk in relation to WIL programs. Organisational factors which influence delegation practices are the capacity of university lawyers to undertake the legal work (UL4, 5, 8), the experience of university lawyers generally, and in WIL-related matters specifically, as well as the philosophy of the legal office, each of which is explored below.

Legal work can be delegated on the basis of experience. A delegation practice of UL6, UL10 and UL11 (all managers or 2IC) is that more experienced lawyers are delegated legal work of greater complexity and/or legal risk. University lawyers described various circumstances, related to WIL agreements, which varied by complexity and legal risk. UL10 distinguished university and host organisation WIL agreements, asserting that the terms and conditions of WIL agreements prepared by a host organisation commanded closer scrutiny. UL10 conducts a quick review of the host organisation WIL agreement to determine whether it is straight forward. If there are any potential issues associated with the agreement, UL10 delegates the legal work to a person with more legal experience in WIL agreements. UL6 and UL11, both experienced lawyers, will undertake the legal work themselves if the matter being reviewed is considered complex and/or high risk. One example provided by UL11 is if the host organisation does not accept a university WIL agreement and proposes unusual agreement provisions which may expose the university to legal risk. Conversely, if a quick assessment by UL8 reveals that the matter is straightforward, for instance when the WIL discipline is using a university WIL agreement template, the legal work will likely be delegated to a more junior lawyer.

Managers and 2IC in larger legal offices are mindful, when delegating legal work, of building the experience of university lawyers in a range of legal areas which impact on university operations. For example some of the laws which underpin the program and contract risks in WIL programs (just one university activity) include contract, consumer protection, intellectual property, administrative, discrimination, labour, workplace health and safety and the law of torts. UL10 described this awareness as the philosophy of the legal office, which explained why a recognised WIL lawyer was not present in the legal office: “there isn’t a dedicated person, because the philosophy in our office is that everybody in our office gets a chance to do different types of work”. The philosophy was shared by the legal offices of UL6, UL7 and UL8. Notwithstanding the philosophy, UL6 and UL10 do not discourage university lawyers from developing expertise in particular legal areas. More legal work can be delegated to the university lawyer’s “pocket of interest” (UL6). In the context of WIL, UL10 explained that a university lawyer may have reviewed more WIL agreements, so invariably more WIL agreement work will be delegated to this university lawyer because of their experience, particularly more complex matters.

The rationale for the philosophy is what UL8 described as “business continuity”. If one university lawyer is on leave or leaves the legal office permanently, other university lawyers have the competency to take over the legal matter. UL6 explained that a university lawyer may have 50 or more open files, with information relevant to the file being received at various times, including when a university lawyer is away on leave. A competent university lawyer can pick up the file, understand the current status of the matter and deliver legal services without feeling “completely lost”. The manager of the legal office of UL7 has a saying which encapsulates the philosophy’s rationale: “if everyone is away and you’re the only one left, you should be able to pick up any matter”. In a WIL context, this means that it is necessary to have university lawyers with some experience and appreciation of the issues and law surrounding WIL.

8.3.3 Experience within and history of the legal office

The experience of the university lawyer in higher education generally, and WIL matters specifically, can impact on their own risk management practices, as well as the practices of their colleagues. Experience was a prominent factor for university lawyers in smaller legal offices. Five of the six university lawyers employed in a legal office of

two to five university lawyers discussed experience, whereas only one of the remaining seven university lawyers in legal offices of more than five university lawyers identified this factor.

UL13 compared the generalist role of the university lawyer with WIL staff possessing specialist knowledge of WIL programs. With specialist knowledge, UL13 would have greater impact in terms of educating WIL disciplines, identifying legal risks and making changes to existing practices of the WIL discipline that can minimise legal risk. As UL13 explained:

Being a generalist makes all the work challenging from not having day in/day out exposures and opportunities to learn/consider in a narrow field. It can be a feeling of surface skimming in that you attempt to apply core basic knowledge/considerations to managing legal risks whatever the area but in doing this may miss something peculiar to this activity. If you were a specialist, solely dedicated to this area like the operational people, there may be closer links and hence greater opportunity to educate and effect change as and when necessary.

UL4 referred to experience as “corporate knowledge” and “corporate memory”, drawing on previous experiences with WIL agreements to address present matters that may involve the same host organisation or similar issues. UL8, one of four university lawyers with more than nine years’ experience in the study, also referred to having a “really good memory” on legal matters, including WIL. When legal work is delegated to other university lawyers, UL8 provides insight into previous experiences with similar legal matters, and guidance as to which former files university lawyers should consult to assist them when advising on current matters.

Some university lawyers associated their relative inexperience with the history of the legal office. UL1, UL2 and UL12 discussed the recent establishment of the legal office or growth of the legal office from a single university lawyer to three or more university lawyers. A new legal office will typically have university lawyers with no experience in WIL matters. For example UL12 is part of a “fairly young team”. The legal office is in the process of understanding and identifying gaps in university policies and procedures and the risks associated with university operations. UL12 acknowledges that “we’re fairly immature in terms of our legal risk management processes ... we’re reactive,

we're not proactive". It is clear that the priority of this legal office, with its limited resources and relative youth, has been gaining experience with university governance and treating legal risks as they materialise. In the future UL12 would like the legal office to be more proactive in identifying legal risks.

The recent establishment of the legal office, relative to the history of the university, has prompted collaboration between UL1 and insurance-risk as well as risk management practices in relation to new WIL programs. In Chapter Seven, UL1 described how insurance-risk share intelligence about new WIL programs with UL1, who is then proactive in approaching the WIL discipline and conducting a review of the WIL program to ensure legal compliance (section 7.2.5). UL1 suggested that the culture of academic staff approaching insurance-risk for advice, and not the legal office, may be attributable to insurance-risk being more established than the legal office. For UL2, the "infancy" of the legal office has necessitated a focus on developing relationships with academic staff. In a WIL context, relationship development has involved UL2 being accessible to WIL staff by providing formal and informal methods of contact (section 7.2.6) and educating WIL staff about the role of the university lawyer with respect to WIL programs, "so that they know when to come and see me, and they feel comfortable picking up the phone if there's something they don't know about".

8.3.4 University policies and procedures

University policies and procedures are intended to regulate the risk management obligations of academic disciplines, which in turns impacts on whether university lawyers engage in risk management practices pertaining to a WIL program. There are two categories of policies and procedures relevant to WIL programs: legal services and contract (referred to by five university lawyers) and risk management (referred to by four university lawyers). Legal services and contract policies generally require the WIL discipline to seek legal advice on all contracts other than WIL agreement templates previously approved by the legal office. Thus the WIL discipline is obligated to produce host organisation WIL agreements, as well as any amendments to university WIL agreement templates, for review and legal advice by university lawyers. However the effectiveness of the policy is dependent on compliance by the WIL discipline. Two university lawyers referred to non-compliance by different disciplines. One of the university lawyers remarked that instances of non-compliance were becoming less

frequent over time because the university lawyer had developed a relationship with WIL disciplines built on trust. WIL disciplines now appreciate that the university lawyer is there to assist, not hinder, their pursuit of higher education activities. From an ERM perspective, such compliance is essential so that risk management in relation to WIL programs is not restricted to the silo of the WIL discipline. University lawyers are able to share responsibility for risk management by delivering services to WIL disciplines that facilitate their risk management responsibilities.

University risk management policies and procedures articulate the risk management responsibilities of the WIL discipline. They confirm that management associated with the WIL discipline is responsible for identifying and addressing legal risk, as well as documenting risk management processes. There are also procedures for staff within WIL disciplines to record incidents during the WIL program, and instances of non-compliance with internal and external regulations (“incidents”). The repository for recording incidents may be in a central system or a risk register for each discipline, the latter option potentially having an impact on the risk management practices of university lawyers. One central system can be easily accessed by the university lawyer, whereas a series of registers housed in each discipline makes access more difficult for the university lawyer and effectively requires the discipline to notify the legal office of the incident if the university lawyer is to engage in any risk management practices. For instance, at one university, management is not required to notify the university lawyer of incidents recorded on the discipline risk register. This means that unless the legal office is requested by the WIL discipline to assist with treating the incident (being the materialisation of a legal risk), information is not received by the legal office about the incident until a formal audit of university operations is conducted at the end of each year. Further, the relevance of the incident may not be limited to the discipline in which the incident took place. One university lawyer argued that information disclosed in a timely manner could be used by the legal office to educate and advise other academic disciplines that may encounter similar legal risks in their operations. In this way, the lessons learned from the materialisation of a legal risk from one discipline can be used by the university lawyer in a timely manner to strengthen the risk management framework of multiple academic disciplines.

The preceding discussion provides key insights about the organisational factors which may influence risk management by university lawyers. The workload of a legal office may prevent the university lawyer from being proactive in risk management, and may adversely affect their capacity to review university policies relevant to WIL programs. Delegation practices determine who manages legal risk and are dictated by the experience and workload of university lawyers, as well as the philosophy of the legal office, in terms of exposing all university lawyers to WIL-related matters. University lawyers draw on their experience to address similar issues in present matters, whereas the relative infancy of some legal offices has prompted its inexperienced lawyers to focus on particular risk management methods. University policies and procedures make WIL disciplines responsible for requesting legal services, managing legal risk and reporting incidents. However, non-compliance and flaws in university policies and procedures suggest that university lawyers may not be managing legal risks with respect to some WIL programs and placements.

The next part of this chapter is a discussion which situates the strategic and organisational factors in the literature addressed in Chapter Two and the survey in Chapter Four, as well as examining these factors from an ERM perspective. In particular, ERM provides a basis upon which the alternative perspectives of university lawyers with respect to strategic factors can be articulated.

8.4 Discussion

8.4.1 Strategic factors

The strategic factors discussed in this chapter are interrelated and can impact on the goals and objectives of the university. From an ERM perspective, making WIL a specific university objective may strengthen the strategic focus of risk management by university lawyers, by aligning elements of their risk management framework to the goals and objectives of the university. The fact that some university lawyers are influenced by this strategic factor is not surprising, given that the primary role of the university lawyer is to support the institutional goals and objectives of the university, as they relate to teaching, research and service (Daane, 1985; Orentlicher, 1975). Preserving university reputation was a strategic factor of more limited application, with three university lawyers discussing reputation in relation to the host organisation being

deemed an employer of the student on WIL placement. The most frequently cited strategic factor influencing risk management by university lawyers was managing the host organisation relationship. Based on relationship coding (section 3.4.7), this factor had a strong association with university demand for WIL placements, which is understandable because the attraction and retention of host organisations increases the supply of WIL placements to meet university demand.

The most contentious strategic factor amongst university lawyers was the university demand for WIL placements. The three university lawyers who described the influence of university demand for WIL placements on their risk management framework all adopt a pragmatic approach (method) and facilitate the delivery of WIL placements for students (strategy). These university lawyers acknowledge that the university needs WIL placements (whether it is a specific university objective or not) and that facilitating WIL placements assists the university in meeting this need. Conversely, three of the four university lawyers who were not influenced by university demand for WIL placements did not describe pragmatism and facilitation of WIL placements as part of their risk management framework. This is not to say that the three university lawyers do not want the WIL placement to proceed. What is apparent from the comments of these university lawyers, particularly UL7, is the notion of independence in their role as advisors. Their advice is focused on legal factors associated with the WIL placement, and is detached from strategic factors such as managing the host organisation relationship and university demand for WIL placements, which the ultimate decision-maker may be obliged to consider in conjunction with the university lawyer's advice.

The division between university lawyers concerning university demand for WIL placements, and to a lesser extent, managing the host organisation relationship, raises an interesting question about strategic factors and the role of the university lawyer. Should the risk management framework of university lawyers be influenced by strategic factors, given that the delivery of WIL programs is a university goal? The case study suggests that university lawyers would say "yes", "no" or "yes" and "no", with the responses of each university lawyer potentially varying according to the strategic factor and element of the risk management framework. For instance, UL12 will be influenced by managing relationships with small host organisations when it comes time to draft WIL agreement templates, but university demand for WIL placements has no impact on UL12's advice

to WIL staff. How can this apparent dichotomy amongst university lawyers be reconciled? The principles of ERM may provide an answer to this dichotomy.

Recall that in Chapter One, the challenge for universities is to maximise the strategic value of WIL but to minimise its legal risks. Both concepts can be considered goals of the university. As the research problem demonstrates, there is an inherent tension between these goals (section 1.4). WIL is a strategic opportunity that benefits students, universities and future employers because it delivers a contextualised learning experience in the workplace (positive), but exposes the university to different legal hazards compared to traditional study programs (negative). A balancing act between strategic and legal risk is therefore required to achieve both goals. The balancing act can be analogised as a see-saw with *minimise legal risk* and *maximise strategic value* as goals at each end of the plank and *WIL* being the pivot point, known as the fulcrum. Figure 8.1 illustrates the balance between maximising the strategic value and minimising the legal risks associated with WIL. The strategic factors discussed in this chapter are conceptualised as strategic risks, being circumstances that affect (positively or negatively) the university's ability to achieve its goals with respect to WIL programs. For the purpose of this exercise, the influence of strategic factors on risk management by university lawyers is conceptualised as “responsibility for risk management”.

Figure 8.1: The balance between legal and strategic risk in WIL

The balancing act between strategic and legal risks is characteristic of ERM. University lawyers, WIL staff, senior university management and other university elements, such as insurance-risk and student equity and disability services, share responsibility for managing the strategic and legal risks on the “WIL see-saw”. University lawyers in Chapters Six and Seven provided a clear message about the respective responsibilities of WIL disciplines and university lawyers in relation to managing program and contract risks. University lawyers are responsible for delivering legal services to WIL disciplines designed to manage legal risk, but it is the responsibility of the WIL discipline for implementing risk management into their WIL programs. Whilst all parts of the institution are involved in achieving the goals of WIL specified in university policy and strategic plans, the sharing of responsibility for host organisation relationships and the university demand for WIL placements varies across universities. Some university lawyers do not have responsibility for strategic risks associated with managing host organisation relationships or for meeting the university demand for WIL placement. Rather, this responsibility is with the WIL discipline dealing with the host organisation and/or university management attached to the WIL discipline, as a matter of institutional risk management.

Regardless of the university lawyer’s position with the strategic risks, university management is responsible for determining an appropriate balance between the returns from WIL as a strategic activity (strategic risk) and the unavoidable legal risks of student participation in a workplace (legal risk). Finding the right balance represents risk management at an institutional level. University management is responsible for determining the weight accorded to minimising legal risk and maximising strategic value, in conjunction with the WIL discipline and with the support of university lawyers.

The various positions occupied by university lawyers concerning the responsibility for managing strategic risks all support the goals of the university, and no one position is considered more or less effective in terms of risk management than the other. A university lawyer is not providing poor advice by failing to consider the university demand for WIL placements or managing the host organisation relationship. Rather, the focus of the university lawyer is on providing fearless and frank advice on legal risk, with other university elements responsible for strategic matters associated with WIL.

Similarly the university lawyer who considers strategic risk in their risk management framework does not undermine their independence or expose the university to unacceptable risk in the pursuit of securing WIL placements. University lawyers who discussed the impact of strategic factors on their risk management framework also adopt an exception-based approach to WIL agreements, refer matters to a higher level of university management for consideration in circumstances assessed by the university lawyer as high risk, and provide legal advice that particular contract and program risks should be avoided (sections 6.2.1, 6.2.3 and 7.2.7). Overall, there are variations in how university lawyers approach the university goals of maximising the strategic value of WIL and minimising its legal risks, by virtue of the strategic risks that they may encounter and manage as part of their risk management framework.

8.4.2 Organisational factors

The organisational factors which may influence risk management by university lawyers address a number of issues raised in the Chapter Four survey concerning the experience of university lawyers, the articulation and allocation of risk management responsibilities, the delegation of legal work, the appointment of a recognised WIL lawyer and the resourcing of the legal office. Unlike the strategic factors, the organisational factors apply to all legal services delivered in higher education, including WIL. From a demographic perspective, the relative inexperience of university lawyers in the survey (section 4.2.1) can be partly explained by the recent establishment and/or growth of legal offices, which was alluded to by the experiences of Fleming (1999) and described by university lawyers in the case study.

The survey results suggested that the boundaries of responsibility for managing legal risk may not be clear to university lawyers or to WIL staff (section 4.4). The risk management framework made clear the risk management responsibilities of the university lawyer. University lawyers are primarily concerned with agreement-based work and have a strategy of facilitating risk management by the WIL discipline. University lawyers are responsible for delivering services that are designed to manage legal risk in relation to WIL programs. However, the responsibility for implementing risk management is with the WIL discipline (section 7.3.1). University policy relating to legal services and risk management articulates, and reduces any doubt about, the responsibilities of the university lawyer and the WIL discipline. Legal services and

contract policies state that the WIL discipline must approach the legal office to review and provide advice on WIL agreements, other than WIL agreement templates that do not require any changes, whereas risk management policy provides that the WIL discipline has overall responsibility for identifying and addressing risk. Authors in the university lawyer literature suggested that university policies may place unreasonable restrictions on how and which staff can access legal services (Hustoles, 2012; Ruger, 2007; Schimmel & Nolan, 2005). In a WIL context, this would mean that university lawyers are not delivering legal services needed by the WIL discipline to execute their risk management responsibilities. However, the university policies reviewed for this case study do not appear to unreasonably limit the ability of WIL staff to access legal services. In fact many university lawyers promote accessibility of legal services to WIL staff as a risk management method (section 7.2.6). However, WIL staff may be unaware of this accessibility, and may be unaware of the university lawyers themselves.

The delegation practices of managers and 2IC reveal one of the roles of the university lawyer identified in Chapter Two – as a manager (section 2.2.2). General counsel recruits and manages professional and administrative staff within the legal office and makes decisions about resource allocation (Corbally, 1974, Daane, 1985). Corbally (1974) argues that in this role, general counsel must “make judicious use of his own staff in both the preventive and the ‘treatment’ phases” of the legal work (p. 4). In Chapter Four it was suggested that a recognised WIL lawyer may facilitate better risk management (section 4.2.2); the non-appointment of a recognised WIL lawyer was identified as an area of interest for consideration in the case study (section 4.6.2), and the delegation practices of legal offices where there was no recognised WIL lawyer raised this question: “how is legal work related to WIL being delegated and undertaken and does it facilitate or impede risk management?” (section 4.3). The philosophy and size of the legal office explains why there are few recognised WIL lawyers. Some legal offices did not have a sufficient number of university lawyers to specialise, whereas the philosophy of other legal offices is to delegate legal work in a way that all university lawyers are exposed to a range of legal areas impacting university operations.

The rationale for the philosophy also explains why not having a recognised WIL lawyer is a judicious use of university lawyers. Whilst higher education is a specialist area of legal practice, it is not a specific legal area, such as contract or property law. UL8

provided an apt categorisation of university lawyers as “generalist specialists” – “we’re generalists because we take it as it comes, but we are in a specialist field”. Legal practice in higher education requires generalists who have knowledge in several legal areas that impact on university operations. The generalist specialist has the competency to step up and handle any legal matter when their colleagues do not have the capacity to undertake the legal work, are on leave or depart the legal office permanently.

University lawyers in the survey and case study referred to the workload of the legal office preventing them from taking a more proactive role in managing legal risk with respect to WIL programs (section 4.5). One of three university lawyers in the study by Block (2014) also lamented that the legal office did not have sufficient time to educate staff about potential legal issues and to personally focus on proactive policy (section 2.2.4). Workload pressure on university lawyers is an issue also ventilated in the university lawyer literature (Bickel & Ruger, 2004, Ruger, 2007). Ruger (2007) suggests that workload may undermine the duty of the university lawyer to provide competent and timely advice. The case study extends the literature by describing the various ways in which the workload of the legal office can impact the risk management framework of university lawyers, including collaboration with lawyers at other universities, facilitation of WIL placements and accessibility in legal service delivery. In particular, workload may affect the university lawyer’s capacity to review university policies relevant to WIL programs.

Overall, this chapter makes an original and significant contribution to knowledge by identifying and describing a series of strategic and organisational factors which may influence risk management by university lawyers with respect to WIL programs. It is also argued that the factors can further advance understanding about risk management by university lawyers, and can have greater practical application if they are conceptualised as risks that university lawyers may encounter and manage in association with legal risks. The conceptualisation of strategic and organisational factors as strategic, reputational and operational risks is discussed in the next section.

8.5 Conceptualising the factors as strategic, reputational and operational risks

The strategic and organisational factors which may influence the risk management framework of university lawyers also represent strategic, reputational and

operational risks that university lawyers may encounter and manage as part of their risk management framework. Table 8.1 classifies the risks, according to type, and outlines the risks derived from the factors discussed in this chapter.

Table 8.1: Conceptualisation of strategic and organisational factors as risks in WIL programs

Type of risk	Description	Factor
Strategic	The university does not meet the specific objectives associated with WIL	Work integrated learning as a specific university objective
Strategic	The demand for WIL placements by the university exceeds the supply of WIL placements to the university	University demand for WIL placements
Strategic	A potential or current host organisation does not offer a WIL placement(s)	Managing the host organisation relationship
Reputational	The host organisation is an inadvertent employer of the student	Preserving university reputation
Operational	The legal office does not have sufficient resources to deliver legal services to WIL disciplines and other university divisions that require it	The workload of the legal office
Operational	A university lawyer with carriage of a legal matter related to WIL goes on leave, resigns or is terminated	Delegation practices of the legal office
Operational	The university lawyer does not have sufficient experience to deliver legal services with respect to WIL programs	Experience within and history of the legal office
Operational	WIL staff breach university policy by failing to have the legal office review and advise on a WIL agreement	University policies and procedures
Operational	The legal office is not promptly informed of incidents during a WIL program	University policies and procedures

The classification of risks draws on the ERM literature in higher education discussed in Chapter One (sections 1.8.3 to 1.8.5), in which the university manages operational, reputational, strategic, financial and legal risks that may impact on the ability to meet its objectives. Strategic risk is similar to the strategic factors which were defined earlier in this chapter (section 8.2) and examined in the context of a WIL see-saw (section 8.4.1). A strategic risk is an event or circumstance that affects the university's ability to achieve its goals with respect to WIL programs. Operational risks are events or

circumstances that affect the day-to-day operation of the legal office, whereas reputational risks are events or circumstances that affect the university's prestige, standing, or brand. The loss of physical assets and financial resources associated with financial risk is not a risk encountered or managed by the university lawyer in the specific context of WIL programs, and therefore is not addressed in this thesis. The strategic, reputational and operational risks, along with the legal risks described by university lawyers in Chapter Five, may impact on the university's ability to meet the goals of maximising the strategic value of WIL and minimising its legal risks.

The conceptualisation of factors as risks deepens the understanding about risk management by university lawyers in five ways. First, it reveals that university lawyers may encounter and manage non-legal risks associated with WIL programs. University lawyers manage operational, strategic and reputational risks to varying degrees and by employing various elements of their risk management framework. For instance, some university lawyers manage the strategic risks associated with university demand for WIL placements, and the host organisation relationship, through pragmatism and facilitation. Second, the translation of factors into risks explains how non-legal risks may influence the risk management framework of university lawyers *and how* university lawyers apply elements of the framework to manage non-legal risks. Third, conceptualisation can explain how the responsibility for non-legal risks is shared across the university in a manner consistent with ERM. As explained by the WIL see-saw in section 8.4.1, university lawyers may not share the responsibility for managing particular strategic risks with university management and WIL disciplines, such as “a potential or current host organisation does not offer a WIL placement(s)” (Table 8.1).

Fourth, conceptualisation demonstrates relationships between and among legal and non-legal risks. For example, the supply of WIL placements by host organisations must at least meet the demand for WIL placements by the university in order for the university to achieve its specific objectives associated with WIL. That supply can be affected by issues which impact university reputation as well as undermining the relationship with the host organisation. If the university demand for WIL placements exceeds supply, this may also raise a legal risk not addressed in Chapter Five. A student who enrolls in a WIL program but does not receive a WIL placement may have a cause of action against the university under contract and consumer protection law. A clear example of the

relationship between legal and non-legal risks relates to university policy. WIL staff who breach university policy pose a legal risk (section 5.4.7) and an operational risk to the university (section 8.3.4). Fifth, the delegation practices of the legal office represent an addition to the risk management framework of university lawyers, who are managers or 2IC. Delegation is a risk management practice which can manage operational risks associated with the workload and inexperience of university lawyers.

The conceptualisation of factors as risks in this chapter and the chapter which follows is also of practical application for WIL disciplines, university lawyers and university management. The types of risk described throughout this thesis and summarised in Appendix A (program), Table 5.1 (contract), and Table 8.1 (operational, reputational and strategic), provide a consistent measure for analysing and evaluating risk management frameworks. For example, does the existing risk management framework of WIL disciplines, university lawyers and the institution incorporate these risks? Who is responsible for and what is being done to manage the risks and is the present risk management framework effective? In particular, university lawyers can refer back to the description of factors aligned with the risks in Table 8.1, as well as to the risk management framework in Chapters Six and Seven, to analyse whether, why and how university lawyers manage these non-legal risks. For instance, what elements of the framework can be used to manage the legal and non-legal risks? The university lawyer can identify elements of the risk management framework they currently use to manage strategic, reputational and operational risks, and can identify whether their risk management framework can be improved by drawing on the experiences of university lawyers in the study.

8.6 Conclusion

This chapter offers insights about strategic factors associated with the delivery of WIL programs, and organisational factors associated with the day-to-day operation of the legal office, that may influence whether, which and how university lawyers manage legal risk in relation to WIL programs. WIL as a specific objective of the university may align elements of the risk management framework of university lawyers to the goals and objectives of the university, whereas university lawyers were divided about the impact of university demand for WIL placements and managing the host organisation relationship on risk management. University lawyers were conscious of the university's

reputation in relation to WIL programs, but its influence on their risk management framework may be limited to the host organisation being deemed an employer of the student. In terms of organisational factors, the workload of a legal office and the experience of university lawyers may curtail their capacity to be proactive in managing legal risk and to engage in particular risk management practices and methods. This is notwithstanding that delegation practices are designed to spread the workload and equip all university lawyers with the competency to handle WIL-related matters. University policies and procedures place the onus on WIL disciplines to utilise the university lawyer with respect to particular WIL agreements, to manage legal risk and to report incidents. However, non-compliance by WIL disciplines and the lack of timely access to incident reports can stymie the risk management practices of university lawyers.

The translation of strategic and organisational factors into risks in the final part of this chapter provides a consistent language and reveals practical significance for university management, WIL disciplines and university lawyers, in terms of evaluating and improving their respective risk management frameworks. This chapter demonstrates that university lawyers may manage strategic, operational and reputational risks in various ways and to various degrees in relation to WIL programs. These non-legal risks, along with the legal risks discussed in Chapter Five, affect the goals of the university to maximise the strategic value of WIL and to minimise its legal risks. The next chapter completes the answer to the final research question by describing and analysing the internal (WIL discipline) and external (host organisation) stakeholder factors which may influence risk management by university lawyers in WIL programs. As with this chapter, the stakeholder factors are then conceptualised as risks which are encountered and managed by university lawyers.

Chapter Nine: Stakeholder influences on risk management

9.1 Introduction

This chapter describes and analyses the stakeholder factors which influence the risk management framework of university lawyers. Stakeholder factors are associated with the participation of the two main stakeholders in the WIL program – the host organisation (external) and the WIL discipline on behalf of the university (internal). The existing literature refers to the importance of timely communication and collaboration between university lawyers and WIL staff, but no empirical study exists which explores the issues underpinning that relationship from a university lawyer's perspective. Similarly, characteristics of the host organisation have not previously been studied in the context of risk management by university lawyers. The stakeholder factors described in this chapter address the third research question: *what factors may influence risk management by university lawyers with respect to work integrated learning programs?* The central argument of this chapter is that there are factors associated with the WIL discipline and the host organisation which may influence risk management by university lawyers. The factors can be conceptualised as operational risks that university lawyers may encounter and manage which, in addition to the legal risks described in Chapter Five and the non-legal risks described in Chapter Eight, affect the ability of the university to achieve its goals in relation to WIL.

The first part of this chapter describes and analyses how the bargaining strength and the sophistication of the host organisation may influence risk management by university lawyers (host organisation factors). The second part of this chapter describes and analyses four WIL discipline factors which may influence risk management by university lawyers: the legal awareness of WIL staff; the perception of legal services by WIL staff; the communication by WIL staff; and the WIL discipline–university lawyer relationship. The third part of this chapter is a discussion which situates the stakeholder factors in the literature (Chapter Two) and the survey (Chapter Four), and examines these factors from an ERM perspective. The final section conceptualises the factors as risks that university lawyers may encounter, and need to manage using risk management practices, methods and strategies. The operational risks translated from the stakeholder factors provide three important points about risk management by university lawyers.

9.2 The host organisation

The involvement of a host organisation as the third party in a tripartite relationship with the student and the university is what distinguishes WIL programs from traditional study programs. The distinguishing feature of risk management in WIL programs is that the university generally has no physical control over the risks attached to the operations of a host organisation. University lawyers acknowledged that students are sent off-campus to a workplace environment the university cannot directly control (UL7, 8, 9, 12). This lack of direct control was described by UL13 as “the unknown factor” associated with WIL programs. The student is not under the direct and constant supervision of a university employee in the workplace (UL2, 9, 11) and the university has no control over student exposure to host organisation staff and entrants to the workplace (UL6, 8). Further, the university does not have the resources to assess every aspect of the workplace to ensure its safety for students prior to a WIL placement, such as compliance with the law (UL12), the ownership of suitable equipment (UL10) and due diligence of host organisation staff, including criminal checks (UL8). Whilst the university relies on the host organisation to provide appropriate supervision, positive learning experiences and a safe workplace environment, it also takes some steps to manage the legal risks associated with student participation in the workplace.

Contract is a regulatory tool by which the university can exercise a degree of risk control and risk transfer. The principal contract is a WIL agreement that may prescribe the responsibilities of the host organisation during the WIL program, require the host organisation to maintain insurance as well as indemnify the university with respect to the conduct of clients and staff (refer Appendix I). Nevertheless there are characteristics of the host organisation which may impact the university lawyer’s ability to manage contract and program risks through the WIL agreement. In particular, the bargaining power and sophistication of the host organisation may influence the risk management framework of university lawyers, both of which are described and analysed in the sections which follow.

9.2.1 Bargaining power of the host organisation

The host organisation may have superior bargaining strength to the university when negotiating the WIL agreement. University lawyers described the bargaining

power of the host organisation in a language akin to economics. The economic variables raised by university lawyers include the university demand for WIL placements, host organisation demand for students, the supply of WIL placements, competition for WIL placements amongst universities and the number of WIL placements taken by host organisations.

The bargaining strength of the host organisation originates from the university demand for WIL placements, which was examined in Chapter Eight (section 8.2.2). This sometimes places the host organisation in a “very strong bargaining position” (UL4) and leaves the university in a “pretty weak” position when negotiating the WIL agreement (UL7). The university demand for WIL placements is generally greater than the host organisation demand for students in the workplace. Both UL2 and UL9 described this indicator of bargaining strength in the same terms – “we need them more than they need us”. The greater the demand for WIL placements by the university and its competitors in a particular discipline, the more limited the supply of WIL placements in a particular discipline, and the more students that a host organisation can take, the greater the bargaining power of the host organisation. For instance UL2 argued that the university is a “deal taker, rather than a deal maker” with respect to the nursing discipline, because of the competition from other universities, the large number of nursing students who must complete a WIL placement, and the limited number of hospitals that students can access for a WIL placement. The university is likely to be a “deal maker” when proposing a university WIL agreement and a “deal taker” when presented with a host organisation WIL agreement, due to the host organisation’s bargaining power. As UL4 put it, sometimes if the university wants the WIL placements they are going to have to accept the terms of the host organisation, including any attendant contract risks.

A host organisation with bargaining power can prepare a WIL agreement that they insist the university sign (UL3, 4, 8 and 9). Such an agreement typically shifts risk from the host organisation to the university. Three risk shifting mechanisms identified by university lawyers in Chapter Five were university warranties about the competency and conduct of students, insurance, and indemnity (sections 5.4.4 to 5.4.6). The WIL agreement signed by the parties may be a product, not of negotiation but of imposition. This bargaining power limits the impact of the university lawyers’ advice to negotiate

amendments to the host organisation WIL agreement, whether through direct communication with the host organisation or indirectly through advice to the WIL discipline. Host organisations also have the bargaining power to reject amendments to the host organisation WIL agreement proposed by the university lawyer. For instance UL4 and UL9 noted that they have experienced limited success in negotiating amendments to agreement provisions. In terms of ERM, the bargaining power of host organisations has important implications for the balancing act between strategic risk (opportunity) and legal risk (hazard) associated with WIL, as illustrated in Chapter Eight by the WIL see-saw (Figure 8.1). Universities cannot satisfy their demand for WIL placements, and thereby maximise the strategic value of WIL, without a host organisation that accepts students into the workplace. A consequence of the host organisation's bargaining power is that the university may have to accept legal risks identified by the university lawyer in order to retain the host organisation (UL2, 3, 4, 7).

The bargaining power of the host organisation also influences the types of risk management practices engaged in by the university lawyer. When the university is a deal maker, the university lawyer drafts university WIL agreements for the host organisation to review. With the university likely to be a deal taker in situations of bargaining weakness, the agreement-based work of the university lawyer will involve reviewing host organisation WIL agreements and providing advice to WIL disciplines which identifies and assesses legal risk, and suggests risk management methods, in particular amendments to the agreement. When reviewing host organisation WIL agreements, a focus of UL4 is on host organisation responsibilities that can minimise legal risk to the university. In particular, UL4 is conscious of ensuring that the host organisation produces policies and procedures to the student and university prior to the WIL placement, and has an induction process for the student, as well as appropriate workplace health and safety and risk management systems. In UL4's experience, the host organisations with bargaining strength also tend to possess strength in risk management, which is of benefit to the university, by having a comprehensive system for identifying hazards and a student induction program. A comprehensive risk management system can reduce legal risk to the university and is also a characteristic of "sophisticated" host organisations.

9.2.2 Sophistication of the host organisation

University lawyers discussed a series of characteristics of the host organisation other than bargaining power, including its understanding of the WIL agreement and the purpose of the WIL 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 (UL3, 4, 8), 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 (UL3, 12) and spends more time reviewing host organisation WIL agreements in relation to large organisations (UL3, 4, 8). Further, a small host organisation may not have comprehensive systems in place for the identification, assessment, treatment, evaluation and reporting of risks, detailed workplace policies and procedures or an induction process for the student. UL3 and UL13 stressed that host organisations with a less sophisticated risk management framework represent a challenge for the WIL discipline, in that more due diligence activities by the university must be undertaken to ensure the safety of students in the workplace. The impact on UL3's risk management practice relates to the university WIL agreement template. UL3 may delete particular risk management obligations of the host organisation prescribed in the template, provided that the WIL discipline is comfortable with accepting the changes after undertaking due diligence.

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. The experience of UL5 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. UL5 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 their normal business operations. UL5 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 the experience of UL13 concerning a definition of intellectual property (IP) in a host organisation 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 (section 5.4.1) because it meant that the agency would have retained the IP in the thesis the student was writing outside the WIL placement. UL13 advised the WIL discipline that the agreement provision was unacceptable. It was apparent to UL13 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 (section 6.2.2). UL6 negotiated a previously "not negotiable" WIL agreement with an overzealous contract manager "who seemed to miss the point of the internship". UL8 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 UL8 designed to minimise the legal risk to

the host organisation of being an inadvertent employer of the student (section 5.4.2). UL7 recalled a circumstance when 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. This contract risk was described further by UL7 in Chapter Five (section 5.4.6). Whilst an employer can control the actions of an employee by requiring the employee to comply with reasonable directions, the university does not possess the same control of students in the workplace. UL7'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. UL7'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.

Amongst the university lawyers' criticisms of legal representatives in contract negotiations was one positive experience where legal representatives facilitated a WIL agreement. UL5 recalled negotiating directly with legal representatives to finalise a WIL agreement with a large host organisation which for many years had been an informal arrangement only. Previous attempts at negotiating an agreement failed because the host organisation proposed broad indemnities in their favour, which had the effect of imposing strict liability on the university. The indemnity was a contract risk (section 5.4.5) that the university was not prepared to accept. UL5 explained that "we just couldn't move until we got to a solicitor on the other side who understood the issues". Overall, the experiences of university lawyers suggest that the sophistication of the host organisation may impact the risk management framework of university lawyers, as well as the balance between the strategic opportunity and the legal hazards of WIL, which is characteristic of ERM. A WIL discipline may, in order to secure the WIL placement (strategic risk), accept more legal risks where the host organisation possesses a lower level of sophistication pertaining to risk management and WIL agreements. The next part of this chapter describes and analyses the WIL discipline factors which may influence risk management by university lawyers.

9.3 The WIL discipline

The WIL discipline is the academic discipline responsible for delivering the WIL program. University lawyers engage with various members of the WIL discipline in delivering legal services, including convenors of the WIL program, university supervisors, WIL liaison officers and placement co-ordinators and management (WIL staff). University lawyers described the influence of the following factors on their risk management framework: WIL staff legal awareness, perception of legal services, communication, and the relationship between WIL staff and university lawyers. Each factor will be discussed in turn.

9.3.1 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 is responsible for implementing risk management in their WIL programs. WIL staff with legal awareness appear to be less reliant on the university lawyer for advice and support (UL1, 2, 5, 8). They are, in UL2’s words “a sophisticated client”. They understand the clinical or professional environment in which the student is placed, as well as the program requirements, based on their own experience as clinicians and professionals (UL2); they know where to find answers to questions within their own discipline (UL5) and can draw on the experience of colleagues such as WIL placement coordinators (UL8). The questions that university lawyers ask legally aware WIL staff are fewer, and targeted at particular matters associated with the WIL agreement which are a source of contract risk, such as supervisory arrangements, and the responsibilities of the host organisation and the student during the WIL placement (UL2). Conversely, university lawyers may ask more questions of WIL staff and spend more time advising and educating WIL staff who do not possess legal awareness pertaining to university policy, WIL program design and the WIL agreement. For example the university lawyer may ask WIL staff a series of general questions about the WIL program, aimed at gauging the legal awareness of WIL staff, and eliciting the information necessary to provide advice and deal with WIL agreements which manage legal risk to the

university. Strategic and legal advice, education and questioning of WIL staff are three risk management mechanisms evident in the discussion which follows.

WIL staff may not be aware of legal considerations when designing WIL programs. UL4 and UL5 suggested that legal awareness may be associated with the experience (or lack thereof) of WIL staff. In the absence of university policy, UL1 explained that WIL staff, 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 the *Fair Work Act* (vocational placement exemption), IP and confidentiality. UL5'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. UL5 asks the WIL staff member a series of questions concerning the requirements of the WIL program (as outlined in WIL policy), which gauges their legal awareness – “You say, ‘well don’t you understand that this has to have this, this’ [and they may say] ‘no... what’s that?’”

WIL staff may be oblivious to university policy or, as in the experience of UL10, 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. The emotive WIL staff member can make decisions quickly without proper thought to due process. An emotional impulse by WIL staff to resolve a program risk such as bullying or sexual assault, without consulting university policy, may itself generate an additional legal risk – a breach of university policy (refer Appendix A). A focus of UL10's advice when treating program 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. An example is how to put the allegations to the host organisation (section 6.2.1).

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 UL5, two typical requests for legal advice sought by WIL staff are the requirement for the host organisation to maintain insurance and the indemnification of the university by the host organisation.

The questions, which would appear to be borne 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 ask “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, UL4 explained that the WIL staff member 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 is already 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 have documented. UL6 diagnosed the enthusiasm of WIL staff to secure the WIL placement, and their accompanying lack of awareness about IP, as “tunnel vision”. From an ERM perspective, this tunnel vision suggests that WIL staff can be too focused on the strategic value of WIL, without due consideration or appreciation of the legal risks. The risk management framework of university lawyers is therefore important in attempting to remedy the tunnel vision. For example, UL4 and UL6 ask questions which are designed to focus WIL staff attention on the legal consequences of students assigning to the host organisation the IP they generate during the WIL placement. The questions asked by UL4 and UL6, as part of their risk management framework, are described further in Chapter Seven (section 7.2.1).

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 the WIL staff member fails to discuss the “nuts and bolts” of the WIL placement with the host organisation (UL4), or appreciate contract risk in general (UL6). There may be agreement on the student selected, the student’s responsibilities on placement, the benefits for the student and host organisation, as well as the duration of the placement, but no thought is given to a number of other important matters typically contained in a WIL agreement. In relation to new host organisation relationships, UL4

often conducts a verbal due diligence of the WIL placement by asking a series of questions designed to elicit the nuts and bolts of the WIL placement, such as how student assessment will work, the ownership of IP, the student's workspace and access to facilities. The degree of WIL staff awareness of legal risk is revealed by WIL staff, who often query UL6 with "can't we have a one pager?" UL6's response is that a one-page document does not provide the university with as much protection as a multi-page agreement. UL6 then explains the common provisions of a WIL agreement to WIL staff. The process of going through the agreement with WIL staff raises their consciousness of legal concepts relevant to the WIL agreement:

I think the process of going through that and discussing that with them is as useful as the agreement itself, because it puts the concepts in their head that they might not have thought about you know, 'do I have background IP?', well you do...

Having those concepts in the "heads" of the WIL staff is critical, given their responsibility for implementing risk management. UL6 recalled a recent training session on contracts during which one academic said "well why do we have to have so much detail? We never need it!" Before UL6 could respond, one of their academic colleagues said, "I'm sick of all this talk of trying to have legal to make smaller agreements, they're trying to help us do our job and protect us". This exchange demonstrated the difference in legal awareness between the two academics. UL6 acknowledged that resistance by some WIL disciplines, based on the perception that a detailed agreement is unnecessary, represents a challenge to managing legal risk. UL6 addresses the challenge by explaining the key provisions of a WIL agreement to WIL staff and educating WIL staff about the importance of having detailed agreements to manage legal risk. UL6's use of war stories to educate is described further in Chapter Six (section 6.2.6). Overall, the risk management methods and practices by university lawyers can improve WIL staff legal awareness. In terms of ERM, WIL staff who do not possess this legal literacy can compromise the balance between managing the strategic opportunities and minimising the legal hazards of WIL.

9.3.2 Perception of legal services by WIL staff

The perception of legal services by WIL staff may influence whether university lawyers are engaged to manage legal risk, as well as various elements of the risk management framework of university lawyers. In particular, the risk management framework is employed by university lawyers to address any negative perceptions which may otherwise discourage WIL staff from requesting legal services, and may expose the university to legal risk. University lawyers discussed three negative perceptions held by WIL staff – legal services obstruct, are unnecessary and complicate matters. Each negative perception is discussed below.

The university lawyer may be perceived by WIL staff to obstruct the delivery of WIL programs. Both UL4 and UL10 make explicit their risk management strategy of facilitating WIL placements to address this negative perception (section 7.3.2). For UL10, there was a perception in the past that the legal office was “a stumbling block” to the pursuit of university activities. UL10 has tried to change that perception over time by developing relationships with academic disciplines, built on trust, during which UL10 has spread a message that the legal office is there to assist the discipline with university activities. As a result, UL10 explained that “people don’t see us as an obstacle, they see us as helping them, and I think the message has got through to them”. UL4 also acknowledged the risk of staff perceiving the university lawyer to be a “negative force” or a “road block”, which discourages them from seeking legal services in the future. Like UL10, UL4 responds to the negative perceptions about the legal office by making clear that the legal office is trying to enhance and build upon, rather than knock down and criticise, existing university activities. For UL4, it is about getting staff to see that the university lawyer is a help not a hindrance.

The notion of the university lawyer “trying to fix something that isn’t broke” underpins the perception by WIL staff that obtaining legal services is unnecessary in relation to WIL agreements. UL4 explained that WIL staff may be reluctant for university lawyers to intervene and make substantial changes to documents that they are familiar with and have been used for many years without incident. According to UL6, academics think that “we’re over the top” by preparing detailed agreements which were not previously required. UL13 noted that WIL staff may not engage with university lawyers, based on the belief that “if they’ve got a practice and it’s working, why change it?” WIL staff

members have even openly questioned the intervention of UL2 in these terms: “well we’ve signed these for 20 years, so what’s the issue?” In these circumstances both UL2 and UL13 stressed that the university lawyer must be seen by WIL staff as “adding value”. The failure to do so would discourage WIL staff from requesting legal services and thereby expose the university to contract risks. UL2, UL4, UL6 and UL13 add value to the WIL program by employing their risk management practices, methods and strategies, as described in Chapters Six and Seven. For instance, UL4 placates the concerns of WIL staff around “throwing the baby out with the bathwater” by amending rather than replacing existing WIL agreements and program documentation, and UL6 educates staff about the importance of having detailed agreements to address risk (section 6.2.6).

A potential fear and a perception of WIL staff is that university lawyers will complicate their work. Fear was evident in the initial reaction by WIL staff to the introduction of WIL agreements at the university associated with UL11:

Initially because it was a big change, people thought, ‘it’s going to be so much more work, it’s going to make our jobs harder, hosts won’t want to take our students, they’ll take them from other Universities where they don’t have an agreement’.

UL11 was responsible for drafting the agreement templates, in consultation with a formal WIL group (section 7.2.2). UL11’s approach to agreement-making was to make the WIL agreement templates as short and simple as possible. The fear of WIL staff has been replaced with “a realisation that it is a good way of protecting the students”. For UL6, the reluctance of staff (including WIL staff) to access legal services may be borne out of fear that the university lawyer will complicate their work. The legal office has attempted to change these perceptions by being proactive in educating staff. As UL6 explained:

I know years ago there was this perception, ‘oh, don’t go to legal and make it complicated, or don’t go to legal because they’re hard to talk to’, so we’ve made a concerted effort in the last few years to get out there and change that model of going to someone else’s territory... and not being so scary.

In particular, UL6 described how training sessions conducted on the “home turf” of the academic discipline represents a concerted effort to relieve the fear factor of university lawyers, serving as a platform for the university lawyer to advocate their accessibility and to demonstrate their value to WIL staff in dealing with WIL agreements (sections 6.2.6 and 7.2.6). From an ERM perspective, a positive perception of legal services can promote the involvement of the university lawyer in risk management, which also provides university lawyers with the opportunity to improve the legal awareness of WIL staff (section 9.3.1). Consequently, this positive perception can assist universities with striking an appropriate balance between the strategic risks and the legal risks associated with WIL.

9.3.3 Relationship with the university lawyer

A related concept to the perception of legal services by WIL staff is the relationship between the university lawyer and the WIL discipline, or particular staff within the discipline. This relationship may determine which university lawyer within the legal office manages legal risk, and may positively influence accessibility in legal service delivery, a risk management method of university lawyers (section 7.2.6). A good relationship can promote access to university lawyers, as they become the “go-to” person within the legal office for WIL staff and disciplines (UL1, 2, 7, 5, 12). Being the go-to person in an established relationship assists the university lawyer with managing legal risk, because WIL staff are more willing to pick up the phone or approach the university lawyer and ask questions (UL1, 2, 13). The relationship with the health discipline is such that UL13 is used as a sounding board for addressing program risks before they materialise during a WIL placement. Being able to address risks at an early stage can be effective preventive lawyering. For instance UL13 recalled WIL staff seeking advice about a nursing student who, because of other commitments, felt compelled to work back-to-back shifts during a WIL placement in order to satisfy the requirements of the WIL program. UL10 described the relationship in terms of trust. UL10 has built relationships by being proactive, visiting senior management within academic disciplines and university divisions, and being collaborative in the drafting of documents. Staff trust the legal office to deliver legal services that facilitate, not obstruct, the pursuit of university activities. Without a relationship built on trust, staff

may not access legal services. As UL10 put it “people don’t trust you if they don’t come to you”.

The relationship may dictate that WIL staff request legal services directly from their go-to lawyer. Chapter Seven addressed the delegation practices of the legal office. Legal work is generally funnelled to a central contact point in the legal office and then delegated by a manager, 2IC or an administrative staff member in association with the manager or 2IC (section 8.3.2). An exception to the rule for UL1, UL2 and UL7 is if the university lawyer has an established relationship with WIL staff and/or the WIL discipline. UL7 explained that “once you’ve built a relationship with a particular person or area, they will come direct to you, and give you matters direct”. WIL staff will bypass the formal process for requesting legal services, which serves as the funnel for legal work, and make direct contact with the university lawyer. The university lawyer will accept the new matter unless there is another university lawyer with more relevant experience (UL1) or the existing workload of the university lawyer precludes it (UL7). A good relationship trumps the formal procedures for seeking legal advice. The legal office encourages this informal practice because it provides another point of access to legal services. As UL2 intimated in Chapter Seven, some staff may be more prepared to access legal services if they are able to make direct contact with the university lawyer (section 7.2.6).

9.3.4 Communication by WIL staff

Communication by WIL staff with university lawyers and with other WIL staff in their discipline or faculty may influence the risk management framework of university lawyers. WIL staff who communicate effectively with the university lawyer assists the university lawyer when dealing with agreements and providing advice. The provision of clear instructions about proposed student activities during a WIL placement enables the university lawyer to assess “whether the agreement reflects what is going to be happening on the ground” (UL11). UL2 and UL4 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 (UL2, UL4). The WIL conduit is aware of all matters received by the legal office, which prevents duplication (UL2, UL4) and minimises the contract 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 (UL4) (section 5.4.7). 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 (UL5), or lack of awareness by WIL staff of WIL agreements and WIL program documents already in use by the WIL discipline (UL8). In both circumstances, the university lawyer plays the part of matchmaker, referring WIL staff to colleagues, such as WIL placement coordinators, who can provide information and guidance about setting up WIL placements and associated documentation. As a consequence the next request for legal services should be to review, not prepare WIL documentation (UL5, UL8). UL8 described communication issues of WIL staff and the matchmaking role of the university lawyer in these terms:

... they don't talk to anyone else in their faculty, 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 pollinisation 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-pollinisation within the WIL discipline or faculty promotes legal awareness by WIL staff (section 9.3.1), which in turn can reduce the workload of the university lawyer (UL5, UL8). According to UL8, 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. WIL staff also use a consistent WIL agreement that has been the product of collaboration and they understand the rationale for provisions in the agreement before approaching the university lawyer for advice and review (UL5).

The timing of WIL staff requests for legal services was one specific communication factor, identified by university lawyers, which influenced their risk management framework. 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 (e.g. signed or published); and
3. After the documentation is completed.

The timing of a request for legal services may influence the type, substance and likely impact of the university lawyers' risk management practices. 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, irrespective of the bargaining power of the host organisation. The university lawyer can provide advice about the terms of a WIL agreement to negotiate with the host organisation (UL4). Further, the university lawyer has the time to rectify any issues concerning the legal awareness of WIL staff before they become legal risks (section 9.3.1), 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 UL11's risk management practice is some WIL staff who, having finalised the arrangement, want the review of a host organisation WIL agreement by UL11 to be conducted on an urgent basis, and pay little attention to UL11's process of identifying, assessing and suggesting strategies to manage the contract risks. As UL11 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. UL11 understands that saying “no” to the host organisation may compromise the relationship. In these circumstances, UL11’s advice is to make WIL staff aware of the risks that the university can control, and possible risk management methods, but restrict the advice on risk avoidance to contract risks that the university has no control over. UL11 described these as “the real risks”, such as agreement provisions which would cause the university to break the law or expose the student to risk in some way. Nevertheless whether the recipient takes on the advice and negotiates the offending agreement provisions is not a decision for UL11.

UL4 identified the misuse of WIL agreement templates by the WIL discipline as a contract risk in Chapter Five (section 5.4.7), 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 using clinical WIL agreement templates for non-clinical WIL placements. If legal advice had been requested earlier, UL4 would have drafted an appropriate WIL agreement in collaboration with the WIL discipline, provided strategic advice to WIL staff about negotiating with the host organisation (section 6.2.1), 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. UL2 acknowledged that it was “pretty standard” for WIL staff to approach UL2 for legal advice on a WIL agreement after the deal between the university and host organisation had been done. As with UL4, UL2 acknowledged that “there are deals that I probably would’ve looked at differently”. However this circumstance does not impact UL2’s exception-based (pragmatic) approach to reviewing the WIL agreement and the overall risk management strategy to facilitate the WIL placement. Like UL11, UL2 referred to the importance of identifying the “real risk” in the WIL agreement, which would prompt UL2 to advise WIL staff, “look, we can’t do that”.

UL1 acknowledged the “reality” of receiving instructions after the documents have been completed as a challenge to risk management. Although UL1 has insurance-risk as a source of intelligence about new WIL programs (section 7.2.5), UL1 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” (a program risk described by UL1 in Chapter Five) were already published by the WIL discipline, along with three other items that constituted a mix of WIL agreements, WIL resources and WIL program documents. UL1 amended the promotional documents by removing the connotations of free labour which posed a legal risk (section 6.2.8) and inserted provisions in a WIL agreement template which clarified the responsibilities of the university and host organisation.

The preceding sections revealed factors associated with the host organisation and the WIL discipline which may influence risk management by university lawyers with respect to WIL programs. The next section is a discussion which situates the host organisation and WIL discipline factors in the literature (Chapter Two) and the survey (Chapter Four), and examines these factors from an ERM perspective. In particular, the discussion of the host organisation factors below focuses on the implications of a host organisation’s bargaining power on meeting the university challenge of maximising the strategic value of WIL programs but minimising its legal risks.

9.4 Discussion

9.4.1 Host organisation factors

The impact of the host organisation on risk management by university lawyers is a novel concept to the literature. This is perhaps not surprising, given that the participation of the host organisation distinguishes the delivery of legal services in relation to WIL programs from other university activities that involve a bipartite (university-student; university-third party) relationship only. The bargaining power of the host organisation is closely related to the strategic factor of university demand for WIL placements (section 8.2.2). In economic terms the host organisation may possess bargaining strength based on university demand for, limited supply of and competition for WIL placements. A large organisation willing to take on multiple students in one or more WIL disciplines has added bargaining power. The bargaining power and the

sophistication of the host organisation are likely to change the type of university lawyers' risk management practices, as the university may become a deal taker rather than a deal maker. University lawyers are more likely to review host organisation WIL agreements and provide advice on amendments designed to minimise contract risk, rather than draft university WIL agreements and review amendments proposed by the host organisation (if any). Bargaining power also limits the impact of the university lawyers' advice to negotiate amendments to the WIL agreement, as the amendments are unlikely to be accepted by the host organisation.

There are important implications of bargaining power for risk management in relation to WIL programs. From an ERM perspective, these implications relate to the responsibility of WIL disciplines for managing legal risk, and the balance between the strategic opportunity and legal hazards of WIL to the university. All six legal risks associated with contract terms in Chapter Five have been identified by university lawyers on a review of host organisation WIL agreements. The bargaining power of the host organisation dictates that WIL disciplines may be more prepared to accept one or more contract risks contained in a host organisation WIL agreement, on a perceived or actual "take it or leave it" basis, notwithstanding the university lawyer's advice. Risk acceptance raises a critical question posed throughout this thesis to the university lawyers, but which equally applies to WIL disciplines because they are responsible for implementing risk management in WIL programs: is the WIL discipline supporting the university goals of maximising the strategic value *and* minimising the legal risks of WIL programs? WIL staff may ignore or fail to understand the significant legal risks associated with WIL placements in the pursuit of securing a host organisation. The WIL see-saw in Figure 8.1 also illustrates this point. WIL staff may be so focused on managing the strategic risks in relation to the WIL program that they do not appreciate or understand the nature and extent of their responsibility for managing the attendant legal risks. As a consequence, the university may not be achieving an appropriate balance between maximising the strategic value and minimising the legal risks in relation to WIL. This tunnel vision of WIL staff (as described by UL6) is also evident by WIL staff with insufficient legal awareness and who fail to request, or delay in requesting, legal services. These WIL discipline factors are analysed in the next section.

9.4.2 WIL discipline factors

The existing literature emphasises the importance of communication and collaboration in the relationship between the university lawyer and members of the WIL discipline (sections 2.2.2 and 2.3.2). The WIL discipline is not only responsible for approaching the university lawyer for legal services to support their risk management responsibilities, but also ensuring that the approach is made in a timely manner. The timing of requests for legal services is frequently cited by university lawyers in the WIL and university lawyer literature. University lawyers stress that university management engage the university lawyer early to address legal problems as a matter of good risk management practice (Hustoles, 2012). The academic administrator should request the assistance of the university lawyer before any legal crisis occurs (Bickel & Ruger, 2004) and before decisions are made by the academic administrator (Epstein, 1974). In a WIL context, timely communication dictates that WIL staff disclose any issues while the university lawyer is preparing the WIL agreement (Broughton & Overby, 1993). An impediment to the role of university lawyers is when legal advice is requested after action is taken (Epstein, 1974; Schimmel & Nolan, 2005).

The case study substantiates the literature and the survey, which intimated that the timing of the request for legal services has a significant influence on risk management by university lawyers. WIL staff who request legal services after an arrangement is finalised or after the documentation is completed influence the type and likely impact of university lawyers' risk management practices. WIL staff may have already exposed the university to legal risk through the existing use and publication of WIL agreements and documents, 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 the contract risks described in Chapter Five. 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 experiences of university lawyers in the case study were shared by their colleagues in the survey. "Passivity or lack of collaboration by WIL staff", which are characteristics of poor communication, was the most prominent theme impacting the role of university lawyers in the survey (section 4.5). Two university

lawyers were particularly concerned with the timing of WIL staff requests for legal services, being a specific communication factor identified in the case study which influenced their risk management framework. As in the case study, advice was sought by WIL staff on legal issues after the WIL agreement was signed, or a draft WIL agreement was presented to the university lawyer after the parties had finalised the arrangement, which meant that the university lawyer would “rarely have an opportunity to guide the process” (section 4.5).

The case study advances the WIL literature addressing the relationship between WIL staff and university lawyers by providing empirical evidence of communication issues with university lawyers *and* with WIL staff, as well as two communication methods which can have a positive impact on risk management by university lawyers – a go-to university lawyer and a WIL conduit. Poor communication within the WIL discipline or faculty is evidenced by WIL staff who request legal advice about formalising the WIL program framework (e.g. agreements and program documents) when colleagues within the WIL discipline have the experience and templates to guide them through the process. The university lawyer’s initial advisory role is as matchmaker, referring WIL staff to the colleague for collaboration before returning to the university lawyer for more targeted legal services. As a central contact point for receiving and forwarding legal work, the WIL conduit may minimise the operational risk of communication breakdown and some of the legal risks associated with contract practices (section 5.4.7). The one clear line of communication with the legal office may also facilitate relationship building. According to university lawyers, the key ingredient to a good relationship with WIL staff is accessibility in the delivery of legal services. This is demonstrated by WIL staff, a discipline or a faculty having a go-to lawyer that they can turn to in their time of legal need.

The negative perceptions of some WIL staff to legal services in the case study are reflected in the literature. Corbally (1974) conceded that academic administrators may perceive university lawyers to be obstructive. WIL staff in the social work discipline have also been critical of university lawyers’ perceived lack of knowledge about WIL programs, and the making of legalistic (or complicated) agreements (Cobb, 1994; Gelman, 1990; Madden & Cobb, 2000; Reeser & Wertkin, 1997). University lawyers in the case study experienced and were conscious of three negative perceptions held by

WIL staff about legal services – they obstruct, are unnecessary and complicate matters. This means that one of the negative perceptions in the literature (university lawyers lack knowledge about WIL programs) was not referred to in the case study, and one of the negative perceptions in the case study (legal services are unnecessary) is an addition to the existing literature. It is perhaps not surprising that WIL staff referred to in the case study did not perceive the university lawyers to lack knowledge about their WIL programs – the university lawyers for the case study were selected on the basis of their experience in delivering legal services to WIL programs (section 3.4.5). From an ERM perspective, the negative perceptions held by some WIL staff towards legal services can undermine the shared responsibility for risk management between university lawyers and WIL disciplines. WIL staff may not request legal services if they perceive university lawyers to be obstructive, unnecessary or likely to complicate the delivery of WIL placements. Consequently, WIL disciplines are more likely to manage legal risk in relation to WIL programs within the silo of their discipline.

The primary risk management strategy of university lawyers to change the negative perceptions is to facilitate the delivery of WIL placements for students and risk management by WIL disciplines. Based on relationship coding of the data (section 3.4.7), the strongest relationship between categories identified in this thesis (by number of university lawyers) was between facilitation and the perception of legal services by WIL staff. University lawyers acknowledge that being obstructive, unnecessary or complicating WIL matters may discourage WIL staff from accessing legal services, and may thereby undermine risk management. This appreciation can mean that they are pragmatic when reviewing WIL agreements, conscious of minimising their “legal footprint” on existing practices of the WIL discipline by amending rather than replacing documents and drafting short and simple WIL agreement templates. The university lawyer can also be an ally to WIL staff in achieving the university goals of maximising the strategic value of WIL programs and minimising its legal risks. Both parties want to facilitate the delivery of WIL placements for students (maximise the strategic value of WIL programs), and the university lawyer’s role in the relationship is to facilitate risk management by the WIL discipline (minimise legal risk). University lawyers should not be seen as “us” vs “them” from the perspective of WIL staff; instead the perception should be one of collaboration or “we”. The concept of the university lawyer and WIL staff as allies pursuing the same university goals reflects a strong relationship (a

stakeholder factor) which promotes the involvement of the university lawyer in risk management. This relationship is consistent with the concepts of strategic focus, as well as the shared responsibility for risk management articulated by ERM. The university lawyer is responsible for delivering services that support the responsibility of WIL disciplines to implement risk management in their WIL programs. Both parties have a strategic focus on delivering WIL placements for students.

The legal awareness by WIL staff of university policy, the WIL agreement and the WIL program design is a new contribution to the WIL literature addressing the relationship with university lawyers (section 2.3.2), and to the university lawyer literature concerning the issues attached to the role of university lawyers (section 2.2.3). The WIL literature refers to the university lawyer's perceived lack of knowledge about WIL programs but not the actual lack of knowledge by WIL staff about legal rights and obligations relating to the WIL program. Hammond (personal communication, January 13, 2014) alluded to legal awareness by WIL staff as a potential cause of university management failing to disclose material facts to the university lawyer. Nevertheless, legal awareness has not previously been explored as an issue associated with the role of the university lawyer. The case study reveals that legal awareness by WIL staff primarily influences the questions that university lawyers ask in the delivery of legal services. Asking WIL staff questions is a method employed by university lawyers to manage legal risk. Legal awareness may also be influenced by the experience of the academic discipline and its staff in WIL programs.

From an ERM perspective, legal awareness (or literacy) of WIL staff may be viewed as a proxy for awareness of risk management responsibility. WIL staff who do not understand university policy as it applies to WIL, WIL program design or terms in a WIL agreement are either unaware of the nature and extent of their responsibility for risk management (Newhook, 2013), or they are not assuming responsibility for risk management. As a consequence, university lawyers must spend more time delivering legal services that facilitate management of legal risk by WIL disciplines. The emotive WIL staff member discussed in section 9.3.1 is a case in point. An emotional impulse by WIL staff to resolve a bullying or sexual assault complaint by a student, without consulting university policy, may require the university lawyer to provide strategic advice about the steps required to comply with university policy. The legal illiteracy of

WIL staff can also compromise the balance between managing the returns from WIL as a strategic activity (strategic risk) and the unavoidable legal risks of WIL. The strategic focus of WIL staff on securing the WIL placement, without due consideration or appreciation of the legal risks, may expose the university to legal risks which would be considered unacceptable by university lawyers.

The next section seeks to deepen understanding about the risk management framework of university lawyers by conceptualising the stakeholder factors as operational risks. It should be read in conjunction with the operational, strategic and reputational risks described in Chapter Eight, in which the definition of risks and rationale for conceptualising the factors as risks equally applies to this chapter. In addition to a table of operational risks, the next section will provide three key points which emerged from the translation of stakeholder factors into operational risks.

9.5 Conceptualising the stakeholder factors as operational risks

The stakeholder factors, which may influence risk management by university lawyers, also represent operational risks that university lawyers may encounter and manage using elements of their risk management framework. Factors associated with the WIL discipline and the host organisation are operational risks because they are events or circumstances which affect the day-to-day operation of the legal office. Table 9.1 classifies the operational risks derived from the factors discussed in this chapter.

Table 9.1: Conceptualisation of stakeholder factors as risks in WIL programs

Type of risk	Description	Factor
Operational	The host organisation or the WIL discipline rejects amendments to the WIL agreement suggested by the university lawyer	Bargaining power of the host organisation; communication by WIL staff
Operational	The host organisation does not understand the purpose of the WIL program	Sophistication of the host organisation
Operational	The host organisation does not understand the legal obligations and consequences of provisions it proposes in the WIL agreement	Sophistication of the host organisation
Operational	WIL staff do not possess sufficient legal awareness of university policy, WIL program design or provisions in the WIL agreement	Legal awareness of WIL staff
Operational	WIL staff do not approach the legal office for legal services which support risk management in WIL programs	Perception of legal services by WIL staff; relationship with the university lawyer; communication by WIL staff
Operational	WIL staff do not collaborate with experienced colleagues in the WIL discipline or faculty with respect to the WIL program	Communication by WIL staff
Operational	WIL staff do not request legal services until after the terms of a WIL arrangement are finalised or the document is completed	Communication by WIL staff

Three important points about risk management by university lawyers emerge from the conceptualisation of stakeholder factors as operational risks. First, there may be a relationship between the operational risks attributable to WIL staff and the contract risks described in Chapter Five. WIL staff members who do not request legal services in a timely manner or at all, who do not collaborate with experienced colleagues or who do not have sufficient legal awareness (operational risks) may be more likely to maintain the status quo in a WIL program, mismanage WIL agreements, not have the WIL agreement reviewed by a university lawyer, and expose the university to contract risks related to the contract terms (legal risks). Further research that measures and proves the relationship between contract and operational risks would offer a practical truth about risk management by university lawyers. The same practices, methods and strategies employed by university lawyers, as described in the WIL discipline factors, can manage both the operational risks attributable to WIL staff and the contract risks. A university

lawyer would be managing contract risks by virtue of addressing the operational risks that undermine their risk management framework.

The second point is the potential relationships *among* operational risks. For example, WIL staff may not possess legal awareness because they have not requested legal services or collaborated with experienced colleagues, or the delay in a WIL staff request for legal services may be a cause of the host organisation rejecting amendments to the WIL agreement. The existence of a relationship would mean that the university can minimise multiple operational risks by identifying and addressing the operational risk which is the effective cause.

The final important point relates to the WIL discipline–university lawyer relationship. The cultivation of good relationships with WIL staff and disciplines is a theme which underpins the risk management framework of university lawyers. The relationship influences *and is influenced by* the accessibility to university lawyers. As WIL disciplines cultivate external relationships with host organisations, the university lawyer cultivates internal relationships which are designed to encourage WIL staff to access legal services. Being accessible, being the go-to lawyer, and conveying a message of facilitation are relationship-building methods and strategies of university lawyers. In fact, a good relationship may address many of the operational risks derived from the WIL discipline factors.

9.6 Conclusion

This chapter offers insight about the stakeholder factors that may influence the application and impact of risk management practices, methods and strategy of university lawyers. A host organisation with bargaining power limits the impact of the university lawyers' risk management framework on the agreement-making process and a sophisticated host organisation limits the time spent by university lawyers engaging in risk management practices such as advising WIL staff and communicating directly with representatives of the host organisation. In terms of WIL discipline factors, the legal awareness of WIL staff may influence the questions that university lawyers ask in the process of advising WIL staff and dealing with WIL agreements. Further, the perceptions of university lawyers by WIL staff raised in the literature are the lived experience of university lawyers. University lawyers attempt to change the perceptions,

which may otherwise discourage WIL staff from requesting legal services, by conveying their strategy of facilitation, educating WIL staff and minimising their impact on the existing practices and processes of the WIL discipline. These activities, along with being accessible, enable university lawyers to cultivate relationships with 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. In the concluding section of the chapter the conceptualisation of stakeholder factors as operational risks provided three important points that deepen understanding about risk management by university lawyers: the potential relationship between operational risks and contract risks, the potential relationships among operational risks and the importance of strong WIL discipline-university lawyer relationships.

The next chapter concludes this thesis. The major findings raised in each chapter of the case study are drawn together to formulate a central argument about risk management by university lawyers. The key insights from the mixed methods study are then summarised, before addressing the applications and implications of the research and outlining a series of considerations for improving risk management in relation to WIL programs. The thesis concludes with a discussion of possible future research topics.

Chapter Ten: Conclusion

10.1 Introduction

The central argument of this thesis is that risk management by university lawyers represents a framework of practices, methods and strategies which address program and contract risks in WIL programs and which support the university goals of maximising the strategic value and minimising the legal risks of WIL. The risk management practices and methods of university lawyers are intended to facilitate the delivery of WIL placements for students and to facilitate risk management by WIL disciplines. Strategic, organisational and stakeholder factors which may influence the risk management framework of university lawyers also generate strategic, operational and reputational risks that university lawyers may encounter and manage. These risks, in addition to the legal risks, affect the ability of the university to achieve its goals in relation to WIL.

This chapter draws together the cross-case analysis and findings of the case study to support the central argument of the thesis. It commences with an overview of the prior chapters, followed by the key insights from the case study that make an original and significant contribution to knowledge and understanding of risk management in the specific context of WIL programs. The broader applications and implications of the research which demonstrates its significance is then considered. A number of considerations for improving risk management are also drawn from the mixed methods study findings and the recommendations of university lawyers. The chapter concludes by suggesting future topics for research.

10.2 Chapter overview

Chapter One described the risky business of WIL programs. WIL is a strategic risk that supports the goals of the university but it also presents distinct and unavoidable legal risks. University lawyers are involved with meeting the university challenge of maximising the strategic value of WIL but minimising its legal risks. However the review of the university lawyer and WIL literature in Chapter Two, combined with the study of legal risks tabled in Chapter One, revealed that there was no systematic study of risk management by university lawyers in the specific context of WIL programs.

Chapter Three described the mixed methods research design used to address the gap in the literature identified in Chapter Two.

The first phase of the mixed methods study was a survey of 41 Australian university lawyers in Chapter Four. The survey findings provided an initial understanding about role, legal risk and risk management by university lawyers, which informed the case study. Chapters Five to Nine described the case study findings. Chapter Five identified, described and analysed two categories of legal risk that Australian university lawyers manage – program risks and contract risks. Chapters Six and Seven presented the risk management framework of university lawyers, being the practices, methods and strategies that university lawyers employ to manage contract and program risks. Chapters Eight and Nine described the strategic, organisational and stakeholder factors which may influence risk management by university lawyers in relation to WIL programs. These factors were subsequently conceptualised as strategic, reputational and operational risks that may affect the university goals of maximising the strategic value of WIL and minimising its legal risks.

The key insights from the case study which support the central argument of this thesis (as illustrated in Figure 10.1) will be covered in the next section.

Figure 10.1: Risk management by university lawyers in relation to WIL programs

10.3 Key insights from the case study

This thesis represents the first known systematic research addressing risk management with respect to WIL programs from the perspective of university lawyers. Given the dearth of previous studies, the initial survey of legal risk, risk management and role in Chapter Four provided a foundation for exploring the experiences of university lawyers in the case study. The key insights drawn from the cross-case analysis in the case study, as they apply to each of the three thesis research questions, are outlined in the sections which follow.

10.3.1 What legal risks do university lawyers manage with respect to WIL programs (RQ1)?

This research demonstrates that university lawyers manage predominantly contract risks, as well as program risks in relation to WIL programs. The three types of program risk that university lawyers may manage are student disability and medical conditions; hazards in the workplace; and student misuse of social media. University lawyers expanded the range of hazards in the workplace considered to be legal risks in the empirical studies and revealed student misuse of social media as a new type of program risk in WIL programs. In particular, the actions of WIL staff and host organisation attitudes to WIL programs were identified as potential workplace hazards. Emotive WIL staff may not comply with university policy when investigating a student complaint of harassment or bullying in the workplace, whereas a host organisation attitude that students represent free labour may expose students to an exploitative workplace environment with attendant legal and reputational consequences for the university. The misuse of social media by students during the WIL placement may also be a significant future legal risk, given the functionality, growth and popularity of web-enabled technologies and social media applications that disseminate text and images.

Contract is a central mechanism used by university lawyers to manage legal risks associated with WIL, but it can also be a source of legal risk for universities. The terms of a WIL agreement and the contract practices of WIL disciplines are the sources of contract risk which have not previously been subject to empirical study. These new contract risks are summarised at Table 5.1. Three themes underpin contract risks: student exploitation; risk transference; and flaws in contract practices. Student rights to

intellectual property (IP), employment and procedural fairness in disciplinary action can be undermined or exploited by WIL agreements. In particular, students may not understand the legal implications of assigning their IP rights to the host organisation or may feel compelled to assign their IP rights to complete the WIL program or their degree. A WIL placement that creates an employer–employee relationship between the student and the host organisation may be an exploitative arrangement that can expose the university to legal and reputational risk. Finally, a host organisation’s contractual right, or the university’s contractual obligation to terminate the WIL placement without procedural fairness being afforded to students, can undermine student rights.

The second theme underpinning contract risk is risk transference from the host organisation to the university. Risk transference can occur by indemnities that are weighted heavily in favour of the host organisation, by risks that are not insured or are underinsured by the host organisation and university, as well as assurances by the university to the host organisation about the competence, character and conduct of students on WIL placement. These student characteristics cannot be foreseen or controlled by the university. The third theme is flaws in contract practices of the WIL discipline. WIL disciplines are responsible for implementing risk management in WIL programs, but the actions of WIL staff can contribute to contract risks associated with student exploitation and risk transference. WIL staff may replicate WIL agreement templates without tailoring the agreement to their discipline and may insert the wrong legal entity for the host organisation in WIL agreements. WIL agreements have been prepared by WIL staff that bind other WIL disciplines without their input or knowledge, are not properly executed, or are not reviewed by university lawyers in breach of university policy. WIL disciplines may also maintain the status quo with WIL agreements; that is, they fail to consider changes to the WIL agreement designed to manage contract risks or they do not request the services of a university lawyer to review the WIL agreement.

10.3.2 How do university lawyers manage legal risk with respect to WIL programs (RQ2)?

The research demonstrates that risk management by university lawyers is not limited to the services they deliver to manage legal risk but represents an intricate framework of practices, methods and strategies with respect to WIL programs. The risk

management framework represents the first comprehensive explanation of risk management by university lawyers with respect to WIL programs. In particular, the framework explains how university lawyers support the university goals of maximising the strategic value of WIL and minimising the legal risks associated with WIL.

In terms of risk management practices, university lawyers advise and educate WIL staff and draft and review WIL agreements, resources, policies and program documents to support the activities of WIL disciplines. A significant part of the university lawyer's advisory practice involves strategic advice or coaching WIL staff about how to deal with students and host organisations in relation to program and contract risks. In particular, the cross-case analysis is unique because it collates and describes the WIL agreement template provisions drafted by university lawyers (Appendix I), as well as the strategic and legal advice of university lawyers which manage each of the six legal risks pertaining to contract terms (Table 5.1). University lawyers also engaged in three risk management practices not previously identified in the literature: the preparation of WIL resources related to WIL agreements and risk management; direct communication with the host organisation on behalf of the WIL discipline; and the referral of a legal matter to a higher level of university management in circumstances assessed by the university lawyer as high risk.

The risk management methods of university lawyers are relationship-based. University lawyers collaborate with insurance and risk personnel, WIL staff and formal WIL groups, as well as receiving support by lawyers at other universities and by external parties. The importance of building relationships with WIL staff and WIL disciplines to minimise legal risk in WIL programs is reflected by the pragmatism and accessibility of university lawyers when delivering legal services. A pragmatic approach to risk management is required by university lawyers to facilitate the WIL placement and thereby support the university goal of maximising the strategic value of WIL. Being accessible, being the go-to lawyer and conveying the message of facilitation to WIL staff are the relationship-building methods and strategies of university lawyers.

The risk management strategy of university lawyers is to facilitate the delivery of WIL placements for students and to facilitate risk management by WIL disciplines. Both aspects of facilitation are aligned to the university goals associated with WIL (Figure 7.1). The university goals associated with WIL represent a challenge for universities

because of the inherent tension between strategic risk and legal risk. Risk management requires a balance between maximising the returns from WIL as a strategic activity and minimising the unavoidable legal risks of students participating in a workplace. University lawyers address this challenge by employing a risk management framework of practices and methods, and a strategy of facilitation. Facilitation of WIL placements for students is a strategy of the university lawyer which supports the university goal of maximising the returns from WIL as a strategic activity. University lawyers support the risk management responsibilities of the WIL discipline by their risk management practices and methods which are geared towards the university goal of minimising the legal risks attached to WIL programs.

Strategic focus and responsibility for risk management were prominent themes which emerged from the risk management framework of university lawyers. Both themes are also consistent with ERM, a contemporary risk management model presently being implemented by universities in the USA and Australia. The risk management practices of university lawyers reflect traditional concepts of risk management which are integrated with ERM. Traditional risk management by university lawyers, as described in the literature, focuses on what university lawyers do to manage legal risks (practices) and not *how* they approach legal risk (methods) or *why* they engage in the risk management practices and methods (strategy). The risk management methods and the strategy of facilitation is indicative of the dual perspective on risk, the strategic focus of risk management by university lawyers, and also explains the nature of shared responsibility for risk management involving the university lawyer, WIL disciplines, insurance-risk and university management. In particular, university lawyers are responsible for delivering services that are designed to support the responsibility of WIL disciplines to implement risk management in their WIL programs. However, this support is conditional upon the WIL discipline collaborating with the legal office. University lawyers encourage collaboration by being accessible and pragmatic and in the process deliver a variety of risk management tools for the WIL discipline.

10.3.3 What factors may influence risk management by university lawyers with respect to WIL programs (RQ3)?

The research demonstrates that strategic, organisational and stakeholder factors may influence risk management by university lawyers in relation to WIL programs. The

strategic, organisational and stakeholder factors also generate operational, strategic and reputational risks that university lawyers have encountered and managed in WIL programs which affect the ability of the university to achieve its goals in relation to WIL. In particular, the conceptualisation of factors as risks demonstrates how operational, reputational and strategic risks (non-legal risks) may influence risk management by university lawyers; how the risk management framework of university lawyers may manage non-legal risks; and the relationships between legal risks that university lawyers manage and non-legal risks. These relationships suggest that the same practices, methods and strategy of university lawyers can address both legal and non-legal risks.

In terms of strategic factors, universities that make WIL a specific university objective may influence risk management by university lawyers by focusing their attention on the strategic importance of WIL. However, there was division between university lawyers about the influence of university demand for WIL placements and managing the host organisation relationship on their risk management framework. Balance and responsibility are two risk management themes related to ERM which emerge from the debate about the influence of these strategic factors on risk management by university lawyers. WIL is a strategic risk and a legal risk for universities. All three strategic factors can be conceptualised as strategic risks, being circumstances that affect (positively or negatively) the university's ability to achieve its goals with respect to WIL programs. As illustrated by the WIL see-saw (Figure 8.1), risk management involves a balancing act between the strategic risks and the legal risks to achieve the university goals of maximising the strategic value and minimising the legal risks of WIL.

University lawyers, WIL disciplines, senior university management and other university elements share responsibility for managing strategic and legal risks. In particular, university lawyers are responsible for delivering legal services to WIL disciplines designed to manage legal risk, and the WIL discipline is responsible for implementing risk management in their WIL programs. University management is responsible for determining an appropriate balance between the returns from WIL as a strategic activity (strategic risk) and the unavoidable legal risks of student participation in a workplace (legal risk) in conjunction with the WIL discipline and with the support of university

lawyers. However, the sharing of responsibility for managing host organisation relationships and the university demand for WIL placements, being two strategic risks, varies across universities, as university lawyers may not have responsibility for managing these strategic risks.

In terms of organisational factors, university policy and the delegation practices of the legal office may influence whether and which university lawyers engage in risk management. The risk management and legal services policies examined in the case study make it clear that the responsibility for risk management is normally with the WIL discipline. Delegation determines which university lawyer manages legal risk and forms part of the risk management framework of managers and 2IC. Delegation is dictated by the experience and workload of university lawyers, as well as the philosophy of the legal office. Legal work can be delegated in such a way that all university lawyers are exposed to a range of legal areas that impact university operations as a matter of business continuity. This exposure enables university lawyers to have the competency to handle a legal matter involving WIL when their colleagues are unable to undertake the legal work. The philosophy is insightful because it is a judicious use of university lawyers and explains why there are few recognised WIL lawyers at Australian universities.

The bargaining power and the sophistication of the host organisation are two external stakeholder factors that may influence risk management by university lawyers. In particular, the university demand for WIL placements (a strategic factor), combined with the limited supply and competition amongst universities for WIL placements, can give host organisations leverage. This bargaining power has important implications for risk management with respect to WIL programs. First, all six legal risks associated with contract terms (Table 5.1) have been identified by university lawyers on a review of host organisation WIL agreements. Second, the host organisation is more likely to impose its WIL agreement on the university and reject amendments proposed by the university lawyer designed to manage legal risk. Third, WIL disciplines may be more prepared to accept, notwithstanding the university lawyer's advice, one or more contract risks contained in a WIL agreement presented to the WIL discipline by the host organisation on a perceived or actual take it or leave it basis. From an ERM perspective, risk acceptance by the WIL discipline raises questions about the responsibility of WIL

disciplines for managing legal risk, as well as the balance between the strategic risks and the legal risks associated with WIL. In particular, is the WIL discipline supporting the university goals of maximising the strategic value *and* minimising the legal risks of WIL programs? WIL staff may ignore or fail to fully understand the significant legal risks of WIL programs in the pursuit of securing a host organisation. As illustrated by the WIL see-saw (Figure 8.1), WIL staff may be so focused on managing the strategic risks in relation to the WIL program, such as managing host organisation relationships and meeting the university demand for WIL placements, that they do not appreciate or understand the nature and extent of their responsibility for managing the attendant legal risks. As a consequence, the university may not be achieving an appropriate balance between maximising the strategic value and minimising the legal risk in relation to WIL.

A key insight from the WIL discipline as an internal stakeholder factor is the nature of the relationship between university lawyers and WIL staff and its impact on risk management in relation to WIL programs. The relationship enables the university lawyer to deliver legal services that facilitate risk management by WIL disciplines and that enable the WIL discipline to execute their risk management responsibilities. From an ERM perspective, the legal awareness of WIL staff and any negative perceptions towards legal services can undermine this shared responsibility for risk management between university lawyers and WIL disciplines. WIL staff may not request, or delay in requesting, legal services if they perceive university lawyers to be obstructive, unnecessary or complicating the delivery of WIL placements. WIL staff who do not understand WIL program design, relevant university policy or the terms in a WIL agreement can be unaware of their responsibility, or do not assume responsibility for, risk management. This failure by WIL staff to appreciate the nature and extent of their responsibilities can be a major source of legal and operational risk, requiring the university lawyer to spend more time engaging in risk management practices and in methods intended to facilitate risk management by WIL disciplines. The relationship between university lawyers and WIL staff is therefore critical to fulfilling their respective responsibilities for managing risk.

An effective relationship for risk management in relation to WIL programs is defined by university lawyers who are accessible to WIL staff; can change negative perceptions

amongst WIL staff about legal services; educate WIL staff to improve their legal awareness; minimise their impact on existing practices of the WIL discipline; and minimise legalese when dealing with new WIL instruments. The relationship is two-way. WIL staff must also contribute to the relationship by requesting legal services in a timely manner. A go-to university lawyer for the WIL discipline and a WIL conduit are positions which appear to facilitate relationship building. Overall, the key message should be that university lawyers and WIL disciplines are allies supporting the same university goals of maximising the strategic value of WIL programs and minimising its legal risks. There needs to be clear and effective communication between the legal office and the WIL discipline for this to occur.

The research in this thesis is also significant by virtue of its practical applications and implications for university lawyers, WIL staff and university management, which are discussed in the section which follows.

10.4 Applications and implications of the research

The findings of this research have the potential to be applied by university lawyers, WIL staff and university management to evaluate and improve existing risk management frameworks, as well as educating themselves and their colleagues about risk management in WIL programs. The research also reveals a number of issues that may undermine risk management, not only in WIL programs, but in relation to all university activities. These issues should be of particular concern to university management, who are ultimately responsible for risk management at an institutional, faculty and discipline level, and who can make decisions which impact the activities of the legal office and WIL discipline. Each topic is addressed in the sections which follow.

10.4.1 A resource for educating staff on risk management

This thesis can educate university lawyers, WIL staff and university management about legal and non-legal risks in WIL programs, risk management by university lawyers, and the factors which influence their risk management framework. The method of converting all or part of this thesis into an education resource is not covered here, but the mode of delivering the education may be a combination of hard copy, online and in-person by the WIL discipline or the legal office. The risk

management framework of university lawyers described in this thesis may educate university management about how legal risks, and to a lesser extent non-legal risks, can be managed by the legal office at their institution in relation to WIL programs. University lawyers with little or no prior experience in WIL matters may find the thesis to be a useful reference which advances their understanding of the legal risks attached to WIL, and how other university lawyers manage the legal risks, as well as the factors (and associated risks) that may impact the risk management framework of the inexperienced university lawyer. In fact the survey in Chapter Four reported that a fair proportion of university lawyers in Australia are likely to have less than five years' experience (Table 4.1). For lawyers unfamiliar with, entering, or contemplating the practice of higher education law, the thesis may be used as part of their orientation to the work and issues of university lawyers. Whilst WIL is the activity that is the subject of this thesis, many of the risk management practices, methods, strategies and the factors which influence the risk management framework of university lawyers could have a broader application to other university activities. For example, the organisational and WIL discipline factors may influence the delivery of legal services to university personnel in non-WIL legal matters.

As an education resource, the thesis may foster greater legal awareness amongst WIL staff, may promote better communication with university lawyers and may be a catalyst for changing any negative perceptions of legal services. This negative perception of university lawyers appears in the WIL literature (section 2.3.2) and the case study (section 9.3.2). The program and contract risks described by university lawyers and tabled in the thesis could be an educational tool for WIL staff about legal risks they should be alert to, and manage, when designing the WIL program, dealing with WIL agreements and operating a WIL program. Further, there are lessons for WIL staff about the importance of making timely requests for legal services, derived from university lawyers' experiences of poor communication by WIL staff. The risk management framework of university lawyers also sends a key message to WIL staff – that the risk management practices and methods of university lawyers are designed to facilitate the delivery of WIL placements for students, as well as support WIL disciplines with their risk management responsibilities. With university lawyers being considered a help and not a hindrance, WIL staff may be more likely to access legal services and thereby address issues in a timely manner.

10.4.2 A tool for evaluating and improving risk management

The thesis may be used as a tool for university lawyers, WIL disciplines and university management to evaluate and improve risk management at their own institutions. Members of university management oversee risk management at the operating levels of the legal office and WIL discipline, but are also responsible for balancing the strategic and legal risks associated with WIL which impact on achieving the university goals of maximising the strategic value and minimising the legal risks of WIL (section 8.4.1). The risk management framework of university lawyers supports the risk management responsibilities of the WIL discipline and university management. Risk management by university lawyers, WIL disciplines, and university management with respect to WIL programs form part of the overall institutional risk management framework governing university operations, which is mandatory for receiving Australian government funding and maintaining registration as a higher education provider (section 1.4).

University lawyers can evaluate both legal risk and their current risk management framework of practices, methods and strategies, using this case study as a foundation. In fact university lawyers during and after their interviews acknowledged the potential value of the thesis as a source for comparing and validating their existing risk management practices. UL1 noted that “... it would be interesting to find out what you compile at the end, to see what other universities do” and UL5 remarked “it’s nice to get some insight about what happens with other people, because you tend to think, ‘it’s just your university’”. In the process of evaluation, university lawyers may ask questions such as:

- Are there legal risks that I have not considered as part of my risk management framework?
- Are there operational, strategic and reputational risks that I need to be alert to and to consider as part of my risk management framework?
- What risk management practices, methods and strategies of other university lawyers do I employ which validate my risk management framework, and could I adopt to strengthen my risk management framework?

University lawyers can identify elements of the risk management framework they currently use to manage the legal, strategic, reputational and operational risks, and can identify whether their risk management framework can be improved by drawing on the experiences of university lawyers in the study. Elements of the risk management framework not specific to WIL programs could also be applied by university lawyers to other higher education activities.

The experiences of university lawyers about the legal risks they manage and the factors associated with the non-legal risks can be utilised by university management to assess risk management at an institutional and discipline level, and by WIL disciplines as a form of self-assessment. It should be recalled that WIL disciplines are responsible for managing the legal risks and many of the operational risks identified in this thesis; whereas university management has an oversight function as well as the responsibility for balancing the strategic and legal risks associated with WIL that have broader implications for the university. University management and WIL disciplines may address the following questions during such an evaluation:

- What are the contract and program risks (Chapter Five) and operational risks (Chapter Nine) of the WIL discipline?
- How does the WIL discipline manage the program and contract risks in relation to WIL programs; as well as the operational risks attributable to the WIL discipline?
- What practices, methods and strategies do university management have in place for achieving the institutional objectives associated with WIL, meeting the university demand for WIL placements, attracting and retaining host organisations, facilitating relationships between the legal office and WIL disciplines, preventing WIL staff from breaching university policy and ensuring that the legal office has sufficient resources to deliver legal services?
- Are the present WIL discipline and institutional risk management frameworks satisfactory and how can they be improved?

The operational risks are of particular importance for WIL disciplines as a basis for evaluating and improving risk management. WIL disciplines are responsible for managing the operational risks because they affect the day-to-day operation of the legal office *and* the WIL program. For instance, a WIL discipline can evaluate the legal

awareness, perception of legal services and communication of WIL staff as well as their relationship with university lawyers. The WIL discipline can then utilise the experiences of university lawyers in the case study to educate their staff about the consequences of each factor in the context of risk management, with the aim of addressing each operational risk.

The thesis does provide some answers to these questions by offering considerations to improve risk management (section 10.5) and by displaying issues throughout the case study that may undermine risk management. In particular, the contract risks associated with contract practices of the WIL discipline and the operational risks derived from the stakeholder factors raise a number of issues that extend to risk management in higher education. These issues are covered in the section which follows.

10.4.3 Risk management issues for WIL disciplines

This thesis revealed a series of risks associated with the contract practices of particular WIL disciplines, as well as operational risks that highlight issues with the risk management framework of some WIL disciplines. 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, in possible breach of university policy. The potential causes of the operational risks are many and varied. WIL staff may have a negative perception of university lawyers, may have insufficient legal literacy to know how to identify potential legal risks, may not know that university lawyers exist, may not appreciate that they are responsible for risk management; or the actual or perceived pressure on WIL staff to place students with host organisations may override considerations of legal risk. These operational risks are not only a cause of contract risks in WIL programs, but may also extend to other activities in which academic disciplines are responsible for risk management, such as traditional study programs.

The case study also revealed that host organisations may not have a sophisticated understanding of the WIL program or WIL agreement, and their bargaining power may expose the university to unacceptable legal risks. The bargaining power of the host organisation dictates that WIL disciplines may be prepared to accept, notwithstanding the university lawyer's advice, one or more contract risks contained in a draft host

organisation WIL agreement. It is the prerogative of the WIL discipline to pursue a course of action which may not accord with the legal advice received. Nevertheless, a concern is that WIL disciplines may be maximising the strategic value of WIL by securing host organisations but not paying sufficient attention to minimising the legal risks of WIL programs.

Fortunately, university management, who can identify and address the operational risks, may effectively remove or at least minimise the contract risks due to the cause and effect relationship between operational and contract risks (section 9.5). The next part of this chapter outlines a series of considerations which are aimed at improving risk management with respect to WIL programs. The considerations are directed at university management because they have the authority to make decisions which support risk management by WIL disciplines and university lawyers. It is suggested that these recommendations could improve the management of legal risks associated with WIL. The penultimate part of this chapter provides ideas for future research that emerged in the course of the thesis.

10.5 Considerations for improving risk management in WIL programs

The research findings, as well as the recommendations of university lawyers to improve risk management during the interviews, were used to outline considerations for improving risk management. Recommendations by university lawyers are worthy of consideration because they have experienced and managed the legal and non-legal risks associated with WIL programs. The considerations are designed to improve management of the legal, operational, reputational and strategic risks at a legal office, discipline and institutional level. Some universities are already engaging in these risk management practices and as such, the considerations still serve to validate existing risk management frameworks. The considerations are organised into the eight sub-sections which follow.

10.5.1 Judicial scrutiny of the Fair Work Act

There remains uncertainty as to whether all unpaid WIL programs meet the vocational placement exemption under the *Fair Work Act* (section 5.4.2). The *Fair Work Act* can be used to remove the uncertainty and thereby minimise the legal and reputational risk of a host organisation being an inadvertent employer of the student.

Section 608 of the *Fair Work Act* enables an applicant to write to the President of the Fair Work Commission and have a matter referred to the Full Court of the Federal Court for determination. University management, in collaboration with the two peak bodies representing WIL staff and university lawyers, being the Australian Cooperative Education Network Limited (ACEN) and the Society of University Lawyers (SOUL) respectively, could lobby the Fair Work Ombudsman (FWO) to use section 608 in a series of “test cases” brought by FWO. The author’s experience with ACEN and university lawyers’ positive experiences in working with FWO (section 7.2.3) suggests that the cooperation of FWO is a real possibility. The test cases could be different types of paid and unpaid WIL programs of a university or universities, with particular details de-identified to protect anonymity. The determination of the test cases together by the Federal Court, and any associated discussion that distinguishes WIL from work experience and other forms of work-based learning, could then become a precedent for universities and FWO to follow. In fact, the *Fair Work Act* itself states that Fair Work Commissioners must follow the precedent set by the Federal Court (s 608(4)). Such clarity can facilitate risk management by universities in relation to WIL programs.

10.5.2 Articulate risk management responsibilities and relationships

There were two important findings pertaining to risk management. First, the responsibility for implementing risk management is with the WIL discipline. Second is the significance of relationships to achieve the university goals of maximising the strategic value and minimising the legal risks of WIL. The three relationships of importance are between the WIL discipline and host organisation (strategic value); between WIL disciplines; and between the WIL discipline and legal office (legal risk). University lawyer participants recognised the importance of cultivating relationships with WIL staff to manage both operational and legal risks. Putting the two findings together, the WIL discipline has the day-to-day responsibility to manage legal risk, and its relationship with the legal office is an integral part of fulfilling that responsibility. It is incumbent on WIL disciplines to be proactive in building relationships that can support risk management, not only with university lawyers but among WIL staff at a discipline, faculty and institutional level. This would also include insurance and risk personnel and staff from other university divisions that support the welfare of students.

University management need to articulate the message that WIL staff are responsible for managing legal risks and that various university personnel support their risk management responsibilities. Methods to convey this message could include education by WIL disciplines and university lawyers, WIL resources, and university policies in the form of WIL policy, risk management policy and legal services policy. Policy is a formal delegation of risk management responsibility by the university, with education and WIL resources used to assist WIL staff as to how that responsibility is executed. Nevertheless as some university lawyers acknowledged in the case study, it is one thing to promulgate a policy but another to monitor and enforce it. University management should provide resources to monitor or audit the activities of WIL disciplines and must be prepared to enforce university policy.

10.5.3 WIL resources and program documentation

WIL resources and program documentation which address risk management issues in the design and delivery of WIL programs can promote legal awareness of WIL staff and improve host organisation understanding of WIL agreements and WIL programs. This can all lead to a reduced workload for the legal office. The legal office, insurance-risk and WIL disciplines 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 (section 6.2.8). 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 (section 6.2.9). 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 UL10, 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. UL10 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. UL12 suggested online WIL resources that would provide information about legal risks in WIL programs and suggested risk management practices. UL1 and UL6 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.

A centralised incident reporting system is a WIL resource that could assist risk management by university lawyers. University lawyers identified procedures for reporting incidents and instances of non-compliance with internal and external regulations during the WIL program (section 8.3.4). The operational risk of not having a central incident reporting system is that university lawyers may not be promptly informed of incidents during a WIL program, thereby undermining their capacity to manage the risk and disseminate lessons from the incident to other WIL disciplines that may encounter similar legal risks. One university lawyer recommended a central system that can be accessed by university lawyers, but which is also supported by processes that require WIL disciplines to report and action incidents in a timely manner.

10.5.4 Risk management education for WIL staff

University lawyers can educate WIL staff about their role, WIL agreements and risk management (section 6.2.6). Many university lawyers expressed their desire to spend more time educating WIL staff about the program and contract risks in WIL programs. For instance, UL4 wants 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. UL4 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. UL4's comments suggest that education can also be a relationship-building exercise between the WIL discipline and the legal office. Such relationship building could greatly enhance risk management. UL13 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 all the issues that have arisen in UL13's experience when reviewing WIL agreements. UL12 recommended formal risk management training of WIL staff on risk issues which are specific to their discipline, similar to workplace health and safety training.

The research findings reveal 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 (section 6.2.1). 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.

The aspirations of UL4 to educate WIL staff reveals the operational risk that limits the capacity of university lawyers to deliver risk management education in the specific context of WIL programs – the workload of the legal office (section 8.3.1). Any considerations to expand education of WIL staff by university lawyers, or in fact any element of the risk management framework of university lawyers discussed in Chapters Six and Seven, must involve an assessment by university management of the existing capacity of the legal office and the likely provision of additional financial resources. This includes consideration of the resources of WIL disciplines to be able to undertake such education.

10.5.5 Work integrated learning policy

WIL policies regulate the design of WIL programs across the university and are the subject of consultation with university lawyers in their development (section 6.2.7). UL8 and UL11 in fact recommended 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. UL11 argued that the policy gives WIL staff and the university lawyer boundaries to assess what WIL placements are and are not acceptable to the university:

It [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'.

The 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. UL11 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 UL11, this would reduce the number of inquiries to the legal office about the preparation and execution of WIL agreements. Finally, UL5 recommended that WIL policy require WIL disciplines to conduct due diligence before accepting a host organisation, which includes ensuring the host organisation understands their 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.

10.5.6 Timely communication with university lawyers

The case study demonstrated that the timing of the request for legal services by WIL staff has a significant influence on the risk management framework of university lawyers (section 9.3.4). University management should consider education initiatives and legal services policy that requires WIL staff to involve university lawyers at an early stage of the agreement-making process, specifically with respect to WIL agreements proposed by the host organisation and amendments proposed by the host organisation to university WIL agreements. Timely communication with university lawyers can improve the prospects of successfully negotiating agreement provisions with the host organisation which are designed to manage contract risks. The appointment of a WIL conduit in each faculty of the university is one communication method worthy of consideration by university management (section 9.3.4). A WIL conduit is a WIL staff member responsible for receiving all requests for legal services

and instructing the legal office. UL2 and UL4 claimed that the WIL conduit assisted them with risk management and UL10 recommended its implementation. Such initiatives that encourage relationship building and communication between university lawyers and WIL staff are critical in effectively managing the risks associated with WIL.

10.5.7 Collaboration among WIL disciplines and faculties

University management should consider implementing structures which support collaboration by WIL staff within the WIL discipline and with WIL staff in other WIL disciplines and faculties. The experience of university lawyers is that WIL colleagues can assist one another with risk management and can answer many of the initial questions posed to university lawyers about setting up WIL placements, thereby increasing legal awareness and decreasing the workload of the legal office. Collaboration may be in the form of a WIL community of practice, or other formal WIL group, with membership including a representative from each of the WIL disciplines plus a representative from the legal office (section 7.2.2). UL4 argued that regular meetings among representatives of WIL disciplines could be a forum for sharing intelligence about organisations that host students in multiple disciplines, particularly the level of difficulty in dealing with the host organisation in negotiations to set up the WIL placement. According to UL4, it would also minimise the contract risk that a WIL agreement applies to multiple disciplines without each of those disciplines being consulted on the WIL agreement and would give the university lawyer the ability to undertake forward planning to determine whether to have one WIL agreement covering all disciplines or multiple agreements. UL8 suggested that a network of WIL staff can develop a consistent approach to WIL placements, including risk management practices, across WIL disciplines that place students with the same host organisation. This consistency is an effective method of managing the host organisation relationship, in the sense that the host organisation has to deal with only one process for managing WIL placements.

10.5.8 Collaboration amongst universities

The bargaining power of the host organisation may leave a single university in a weak negotiating position in relation to the WIL agreement. As a consequence the WIL

discipline may accept legal risk, despite legal advice to the contrary, in order to secure the WIL placement (section 9.2.1). UL12 suggested that collaboration amongst universities through groups such as SOUL, the Vice Chancellors Committee and Universities Australia may be able to redress the power imbalance so that the collective has a greater say over acceptable and unacceptable agreement provisions. It is envisaged that collaboration amongst universities may lead to one single pro forma WIL agreement, negotiated between one host organisation and multiple universities, which would cover WIL placements in one or more States and Territories, or nationwide. Collaboration amongst universities would have the same advantages as collaboration by university lawyers with their colleagues at other universities – it prevents the host organisation from “bluffing” in contract negotiations about the agreement provisions allegedly signed off by other universities and forms a collective voice that may strengthen the bargaining power of universities in contract negotiations (section 7.2.4).

10.6 Further research

This thesis represents the first known systematic research of Australian university lawyers, as well as of risk management by university lawyers in the specific context of WIL programs. As such, there is fertile ground for future research related to the four key subject areas of the thesis: legal risk; WIL; risk management; and university lawyers. Each area is addressed in the sub-sections below.

10.6.1 Legal risk

An initial purpose of the thesis was to construct, through doctrinal research, an Australian legal framework governing the liability of universities in WIL (section 3.3.6). A study of the law underpinning the contract and program risks described in this thesis would provide greater understanding about the university’s potential liability to the various parties associated with WIL programs. There was also one question relevant to legal risk, raised in the survey, but remaining unanswered by the case study: What are the events or circumstances that prompted WIL staff to seek legal services about the host organisation policy? (section 4.6.1). Twenty-four percent of participants in the survey undertook legal work in relation to host organisation policy, but this was rarely mentioned during interviews. The answer to this question may identify legal risks not

raised in Chapter Five and may assist WIL staff with common issues associated with host organisation policy to be aware of and seek legal advice when appropriate.

10.6.2 Risk management

All or part of the research methodology in this thesis 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 in this thesis 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? Future research may also involve a study of WIL staff to construct a risk management framework(s) of the WIL discipline(s), identify any factors which influence the risk management framework and compare with the factors described by university lawyers. One significant theme that could be further explored in an Australian context is the responsibility of WIL staff for risk management.

Further research could also build on the thesis findings by evaluating the risk management practices of university lawyers. There are factors that may influence the effectiveness of risk management by university lawyers (Chapters Eight and Nine) and recommendations of university lawyers in this chapter which validate particular risk management practices. However, it was outside the scope of the thesis 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 in Chapter Six revealed common terms of a WIL agreement and the provisions which specifically addressed the contract risks identified in Chapter Five (Appendix I). Future research could evaluate the risk management practices of university lawyers in this study through legal (black letter law), theoretical (ERM) and/or empirical (university lawyers, university management, WIL staff) lenses.

10.6.3 Work integrated learning

International WIL programs was a topic outside the scope of the thesis, but these were nevertheless referred to by some university lawyers during interviews. University

lawyers discussed some of the challenges with risk management including handling student allegations of sexual assault, students with depression and suicidal students (UL10); international WIL agreements (UL12) and insurance coverage (UL2, 4, 5, 6). Therefore future research could consider a study of legal risk and risk management by university lawyers with respect to international WIL programs, as well as a comparative analysis with the domestic WIL programs studied in this thesis.

Two developments attached to WIL programs which may be of research interest are university payments to host organisations and third party providers of WIL placements. It emerged from the interviews that universities in the health discipline were paying some organisations a fee to host students on a per student basis (“host payments”). The greater university demand for WIL placements, the competition, and the costs for host organisations to supervise a student and provide the agreed learning experiences may see a rise in the number of host payments across all WIL disciplines. Future research could analyse the impact of host payments on legal risk, insurance coverage and liability of the host organisation and university. Universities are also using third party providers to source placements for students. Future research could explore legal risk and risk management associated with third party providers.

University lawyers also referred to the challenges of risk management with work-based learning activities of students outside the definition of WIL, including the promotion of volunteer opportunities by the university (UL8, 11), the application of the *Fair Work Act* to volunteering and work experience (UL6, 8, 11), and university insurance coverage of students for genuine work experience arrangements (UL8). A legal analysis of volunteering and work experience under the *Fair Work Act*, and suggestions for legal reform, have been raised in previous research (Cameron, 2013). Nevertheless, the existing literature would be enhanced by an empirical study of university lawyers and/or WIL staff in terms of work experience, volunteering and other work-based learning programs.

10.6.4 University lawyers

University lawyers themselves are a source of future research topics. There appears to be a high ratio of female to male university lawyers based on the 12 legal offices attended during interviews, as well as the legal office contact details gleaned

from university websites. A study of female practitioners may reveal the reasons for entering the university sector and may incorporate a demographic comparison with other types of in-house counsel and external counsel. Future research may also compare the role of university lawyers with other types of in-house counsel, as well as the recruiting practices of universities, and particularly the skills and personal characteristics valued by universities when recruiting applicants who wish to practice higher education law. This may be particularly useful for university management, given the relative infancy and recent growth of university legal offices in Australia (section 4.2.1). University lawyers in Australia may also be part of a historical study. A history of university lawyers in Australia could be mapped by way of interviews with retired and current general counsel, including the two Australian university lawyers discussed in this thesis – Helen Fleming and Celia Hammond. This future research could address whether history has had any influence on the role of university lawyers in Australia.

10.7 Conclusion

In the last millennium Helen Fleming, the only Australian university lawyer who appears in the university lawyer literature, concluded that:

The university lawyer, who can initiate sensible risk management strategies within his or her institution will, in the longer term, prove invaluable to its success. (Fleming, 1999, p. 20)

These words could be considered prophetic in the context of WIL programs. The formal recognition by universities of WIL as a strategic risk, the stakeholder demand for WIL and an increasingly competitive higher education environment are factors which suggest that universities will expand the delivery of WIL programs, notwithstanding their exposure to distinct, and at times, unavoidable legal risks. This thesis demonstrates that university lawyers have a risk management framework of practices, methods and strategies which support the long-term university goals of maximising the strategic value and minimising the legal risks of WIL.

Appendix

Appendix A - Legal risks in WIL programs

Legal Risk	Selected references	WIL only	Case study	UL#
Conduct of university prior to WIL placement				
WIL staff allow, or refuse the student with a criminal record to commence, the WIL program	Apaitia-Vague, Pitt, and Younger (2011); Brodersen, Swick, and Richman (2009); King (2013); Turcotte, Nichols, and Philipps (2016)	Yes	No	-
WIL staff fail to conduct a criminal background check of the student	Farnsworth and Springer (2006)	Yes	No	-
WIL staff discriminate against the student prior to a WIL placement (e.g. asking inappropriate questions during the interview process or a WIL placement is not offered to the student)	Brulle (2006); Hauser, Maxwell-McCaw, Leigh, and Gutman (2000); Reeser (1992); Turcotte et al. (2016)	Yes	Yes	3, 10
WIL staff disclose sensitive student information (e.g. disability) to the host organisation or a colleague	Alperin (1989); Furness and Gilligan (2004); Reeser and Wertkin (1997)	Yes (host)	Yes	8
The university fails to disclose a student disability or a medical condition to the host organisation	Gilbert (1998); Gillis and Lewis (2004)	Yes	Yes	8, 10
The university misrepresents student skills and competency	Peak and O'Hara (1999)	Yes	Yes	8
The university makes misrepresentations when promoting the WIL program	<i>Fennell v Australian National University</i>	No	Yes	1, 6
Student characteristics				
The student has a disability or a medical condition which can affect the performance of their duties and/or expose clients to harm on WIL placement	Gilbert (1998); Gillis and Lewis (2004); Karickhoff and Howley (1997); Morris and Turnbull (2006); Nolan, Gleeson, Treanor, and Madigan (2014); Newhook (2016); Reeser and Wertkin (1997); Walker, Dearnley, Hargreaves, and Walker (2013)	Yes (client harm)	Yes	2, 8
The student has a learning, personal and/or relationship issue which can affect the performance of their duties and/or expose clients to harm on WIL placement	Storrie, Ahern, and Tuckett (2011)	Yes (client harm)	Yes	12

Legal Risk	Selected references	WIL only	Case study	UL#
Conduct of student during WIL placement				
Disclosure of confidential client information	Baird (2011)	Yes	Yes	10
Publication and posting of workplace and client images on social media	Section 5.3.3 of the case study	Yes	Yes	2
Dishonesty (other than passing off and as opposed to academic dishonesty)	Jones, Glynn, and Francis (2012); Moorman (2004); Peak and O'Hara (1998)	Yes	No	-
Being under the influence of prescription or illegal drugs or alcohol (chemical impairment)	Asteriadis, Davis, Masoodi, and Miller (1995); Polk, Glendon, and DeVore (1993)	No	No	-
Failure to undertake mandatory reporting of child abuse	Goldman (2010)	Yes	No	-
Failure to disclose student status to the client / student represents or passes off as a qualified professional	Jones et al. (2012)	Yes	No	-
Unsatisfactory performance	Jones et al. (2012); Rosenblum and Raphael (1987); Storrie et al. (2011)	Yes	Yes	2, 12
Stealing property	Gordon, McBride and Hage (2004); Jones et al. (2012)	No	No	-
Physical or verbal abuse of a client, WIL staff or a related party	Gordon et al. (2004); Kaplan (1986); Storrie et al. (2011); Yates (1982)	Yes (client, related party)	No	-
Unauthorised absence from the workplace or neglect of responsibilities	Jones et al. (2012); Storrie et al. (2011)	Yes	No	-
Failure to disclose a student disability or a medical condition to the host organisation and/or university	Gillis and Lewis (2004); Morris and Turnbull (2006); Mallowney and Santora (2014); Nolan et al. (2014); Rankin, Nayda, Cocks, and Smith (2010); Reeser and Wertkin (1997); Stanley, Ridley, Manthorpe, Harris, and Hurst (2007); Turcotte et al. (2016); Walker et al. (2013)	Yes (host)	Yes	8, 10
Incompetence or error which may cause the client harm (physical injury, property damage or economic loss)	Heiman et al. (2014); Hsiao (2014); Jevitt and Johnson (2007); Keisewetter et al. (2014); Peak and O'Hara (1998, 1999)	Yes	Yes	2, 9

Legal Risk	Selected references	WIL only	Case study	UL#
Conduct of host organisation and/or university during WIL placement				
Sexual harassment and/or sex discrimination of the student by WIL staff, host organisation, host supervisor, client, related party or an outsider	Baldwin, Daugherty, and Rowley (1996); Bronner, Peretz, and Ehrenfeld (2003); Brulle (2006); Emslie (2009b); Fogel, Ellison, and Morrow (2011); Mkono (2010); Nagata-Kobayashi et al. (2006); Newhook (2016); Rademakers, van den Muijsenbergh, Slappendel, Lagro-Janssen, and Borleffs (2008); Richman, Flaherty, Rospenda, and Christensen (1992); Risley-Curtiss and Hudson (1998); Valentine, Gandy, Burry, and Ginsberg (1994); White (2000); Worsfold and McCann (2000); Zireva and Makura (2013)	Yes (all parties except WIL staff)	Yes	3, 11
Verbal abuse (including bullying) or physical abuse of the student by WIL staff, host organisation, host supervisor, client, related party or an outsider	Burch (2010); Burke and Harris (1996); Celik and Bayraktar (2004); Clarke, Kane, Rajacich, and Lafreniere (2012); Criss (2010); Curtis, Bowen, and Reid (2007); Ellison (1996); Elnicki et al. (2002); Ferns and Meerabeau (2008); Foster, Mackie, and Barnett (2004); Gair and Thomas (2008); Hume, Randle, and Stevenson (2006); Knight (1999); Longo (2007); Lubitz and Nguyen (1996); Magnavita and Heponiemi (2011); Maidment (2003); Mama (2001); Nagata-Kobayashi et al. (2006); Newhook (2016); Rosenberg and Silver (1984); Sheehan, Sheehan, White, Leibowitz, and Baldwin (1990); Thomas and Burk (2009); Tully, Kropf, and Price (1993); Waddell, Katz, Lofchy, and Bradley (2005); <i>Simundic v University of Newcastle</i>	Yes (all parties except WIL staff)	Yes	3, 10
The student experiences stress due to the work environment	Burke and Harris (1996); Emslie (1999a) Huber (2011); Maidment (2003); Newhook (2016)	Yes	Yes	6
Failure by the host organisation and/or university to provide reasonable support / adjustments / accommodations for students with a disability	Bial and Lynn (1995); Morris and Turnbull (2006); Nolan et al. (2014); Stanley et al. (2007); Walker et al. (2013); White (2007); <i>Coomaraswamy v University of New South Wales</i> ; <i>Sluggett v Flinders University of South Australia</i> ; <i>W v Flinders University of South Australia</i>	Yes (host)	Yes	2, 5

Legal Risk	Selected references	WIL only	Case study	UL#
The student suffers physical injury arising from the use of equipment by the student, host organisation staff or clients	Collins, Montano, and Pratt (1978); Melis, Abou-Atme, Cottogno, and Pittau (2004); Moorman (2004); Morse et al. (2003); Rising, Bennett, Hursch, and Plesh (2005); Tezel et al. (2005); Thornton et al. (2008)	Yes	Yes	11
The student is exposed to hazardous substances in the workplace (includes needle stick injuries, viruses and bodily fluids)	Gompertz (1990); Koenig and Chu (1995); Leung, Lam and Wong (2007); Jones (1990); O'Neill, Abbott, and Radecki (1992); Schaffer (1997); Shen, Jagger and Pearson (1999); Stotka, Wong, Williams, Stuart, and Markowitz (1991)	Yes	Yes	13
Host organisation attitude to the WIL program – student as free labour	Section 5.3.2 of the case study	Yes	Yes	1, 5
WIL staff do not comply with university policy when investigating a student complaint of harassment or bullying	Section 5.3.2 of the case study	Yes	Yes	10
Poor or no supervision of the student by host supervisors during the WIL placement	Emslie (1999a); Gelman and Wardell (1988); Peak and O'Hara (1999); Reid-Searl, Moxham, Walker, and Happell (2009)	Yes	Yes	5, 6, 13
Homophobic attitudes and behaviours towards LGBT students	Furness and Gilligan (2004); Messinger (2004); Messinger and Topal (1997); Newhook (2016); Paparo and Sweet (2014)	Yes (host)	No	-
Racial discrimination against students	Zuchowski, Savage, Miles, and Gair (2013); <i>Coomaraswamy v University of New South Wales</i> ; <i>Ellis v Southern Cross University</i> ; <i>Simundic v University of Newcastle</i>	Yes (host)	No	-
Age discrimination against students	<i>Coomaraswamy v University of New South Wales</i>	Yes (host)	No	-
Conduct of host organisation and/or university after WIL placement				
The student is excluded from the degree or university and/or receives a failing grade for the WIL program due to academic or disciplinary reasons	Olkin and Gaughen (1991); <i>Jenkins v Charles Sturt University</i> ; <i>Shvetsova v University of New England</i> ; <i>Tadros v Charles Sturt University and 2 Ors</i>	No	No	-
The student is discriminated against arising from a failing grade for the WIL program	<i>Coomaraswamy v University of New South Wales</i> ; <i>Ellis v Southern Cross University</i> ; <i>Sluggett v Flinders University of South Australia</i> ; <i>Williams v Monash University</i>	No	No	-

Legal Risk	Selected references	WIL only	Case study	UL#
The reluctance by WIL staff and/or the host supervisor to fulfil their responsibility to evaluate and/or fail the student	Bial and Lynn (1995); Hughes, Heycox and Eisenberg (1994); Jervis and Tilki (2011); Rosenblum and Raphael (1987); Scott, Pachana, and Sofronoff (2011); Smith, McKoy, and Richardson (2001)	Yes (host)	No	-
The university releases, or fails to release, information concerning the student in the WIL program	<i>BKR v Queensland University of Technology</i> ; <i>Shvetsova v University of New England</i>	No	Yes	13

Appendix B - Survey instrument

Survey Form

This research project is designed to explore legal risk and risk management practices in regard to WIL programs.

Part 1 requests brief demographic details. Part 2 requires you to identify (but not describe) legal risks that you have experienced in WIL programs. Part 3 concerns risk management in WIL programs. Part 4 asks you for comments concerning your role as a university lawyer with respect to WIL programs.

Part One: Demographic Information

Questions
<p>1 The main campus of my university is located in:</p> <p>☐ ACT, NT or TAS ☐ NSW ☐ QLD ☐ SA ☐ VIC ☐ WA</p>
<p>2 The main campus of my university is located in:</p> <p>☐ A capital city or suburb of a capital city</p> <p>☐ Sunshine Coast, Gold Coast, Wollongong, Geelong, Townsville or Newcastle</p> <p>☐ Ballarat, Armidale, Bathurst, Toowoomba, Rockhampton or Lismore</p>
<p>3 The number of university lawyers (full time equivalent) in my department / unit are:</p> <p>☐ 1 ☐ 2 – 3 ☐ 4 – 5 ☐ 6 – 7 ☐ More than 7</p>
<p>4 My department / unit has a dedicated person for handling legal matters concerning WIL programs or a person recognised in my department / unit who handles most of these legal matters:</p> <p>☐ YES, and I am that person ☐ YES, but I am not that person ☐ NO</p>
<p>5 I have been employed as a university lawyer at my current university for (in full time equivalent years):</p> <p>☐ Less than 1 year ☐ 1 – 4 years ☐ 5 – 9 years ☐ More than 9 years</p>

Part Two: Legal Risk

In this part, tick the relevant boxes (Q6) and most appropriate box (Q7+Q8) concerning current and future legal risks. Please note the questions only apply to your current university of employment and not to any of your previous employers.

Questions
<p>6 In the past twelve (12) months I have undertaken legal work (including advice) relating to WIL programs in these areas (tick as many as apply):</p> <p>☐ Contracts ☐ Negligence ☐ Criminal Law ☐ Privacy Law ☐ Intellectual Property</p> <p>☐ Sexual harassment ☐ Confidentiality ☐ Discrimination ☐ Workplace Bullying</p> <p>☐ University Policy ☐ Wages and other payments ☐ Host Organisation Policy</p> <p>☐ Workplace Health & Safety ☐ None ☐ Other (please specify below)</p> <p>.....</p>

7 In the past twelve (12) months the university area (discipline) in which I have received the most inquiries for legal work in regard to WIL programs is:

☐ Business ☐ Health ☐ Law ☐ Arts ☐ Science ☐ Engineering
☐ Information Technology ☐ Other (please specify) ☐ Not applicable

8 In my opinion, the greatest risk to the university with regard to WIL programs in the future will be in the area of:

☐ Contracts ☐ Negligence ☐ Criminal Law ☐ Privacy Law ☐ Intellectual Property
☐ Sexual harassment ☐ Confidentiality ☐ Discrimination ☐ Workplace Bullying
☐ University Policy ☐ Wages and other payments ☐ Host Organisation Policy
☐ Workplace Health & Safety ☐ Other (please specify below)
.....

Part 3: Risk Management Practices

In this part you will be presented with some risk management practices concerning WIL programs. Please indicate the frequency in which you (Q9-Q14) and your legal department (Q15+16) engage in these practices.

These questions are very useful in recommending future risk management practices but only to the extent that they are based on accurate information - it is easy to overstate the frequency. Please note there is no right or wrong answer and your responses are strictly confidential. For the purpose of this part, the following definitions are important:

- **Host organisation:** the entity that hosts the student in the workplace during the WIL program (e.g. company, government department, small business).
- **WIL administration:** personnel that manage WIL programs at an individual course level and may include the course convenor, academic supervisors, WIL support staff and faculty management.

	<i>To what extent do</i>	Never	Very Rarely	Sometimes	Often	Very Often
9	you review university policies with respect to WIL programs	1	2	3	4	5
10	you review contracts involving the host organisation, the university and/or the student with respect to WIL programs	1	2	3	4	5
11	you review the policies of the host organisation in WIL programs	1	2	3	4	5
12	you review the policies and practices of WIL administrators in WIL programs	1	2	3	4	5
13	you educate WIL administrators about legal risks and/or risk management in WIL programs	1	2	3	4	5
14	WIL administrators seek your advice concerning legal risks and/or risk management in their WIL programs	1	2	3	4	5
15	your legal department discuss as a group the legal risks associated with WIL programs	1	2	3	4	5
16	your legal department discuss as a group risk management practices in WIL programs	1	2	3	4	5

(survey continued over page)

Part Four: Comments

Describe your role as a university lawyer in terms of WIL programs

End of Survey - Thank you!!!

Please:

1. Detach the Participant Information and Consent Form and keep for your records; and
2. Place the completed survey form in the box located at the Registration Desk.

Appendix C - Participation information and consent form (survey)

Work Integrated Learning: Legal Risk and Risk Management

Participant Information and Consent

Chief Investigator:

Brett Freudenberg

Ph: (07) 3382 1196

Email: b.freudenberg@griffith.edu.au**Student Researcher:**

Craig Cameron

Ph: (07) 5552 8763

Email: craig.cameron@griffith.edu.au**Introduction:**

This research project explores, from the perspective of university lawyers, the legal risks and risk management practices of Australian universities in regard to Work Integrated Learning (WIL) programs. The research forms part of the student researcher's Doctorate of Education thesis entitled *Work Integrated Learning (WIL): A Study of Legal Risk, Tertiary Liability and Risk Management by University Lawyers*.

For the purposes of this research, WIL is defined as the following:

WIL: A tertiary program in Australia which combines and integrates learning with its workplace application in the workplace

There are three purposes of the project: to identify legal risks for Australian universities in operating WIL programs; to construct an Australian legal framework governing tertiary liability in WIL; and to explore risk management by university lawyers. The results of the survey will assist in achieving these three purposes.

How the survey works:

Your participation in the research will involve completion of a survey form consisting of questions relating to legal risk and risk management practices in regard to WIL as well as your role as a university lawyer. There is also some demographical data required for analytical purposes. However this data does not identify you. The survey will take approximately 10 minutes to complete, depending on your answers. Some questions will require you to indicate the frequency of a risk management practice on a five point scale, some will require you to tick a box or boxes in regard to legal risk and one question will require you to provide a short written response.

When completing the survey, please read all the instructions before selecting your answer. As you complete the survey, be honest and remember that there is no right or wrong answer.

Participation in this research is voluntary, and you can discontinue participation at any stage without penalty or the need to provide an explanation. Your decision will in no way impact upon your relationship with the researcher.

Confidentiality:

The Commonwealth Privacy Commissioner regards your opinions as personal information. The conduct of this research involves collection, access and/or use of your identified personal information. The information collected will remain confidential at all times and will not be disclosed to third parties without your consent, except to meet government, legal and other regulatory authority requirements. A de-identified copy of this data may be used for other research purposes. However, your anonymity will be at all times safeguarded.

For further information consult Griffith University's Privacy Plan at <http://www.griffith.edu.au/about-griffith/plans-publications/griffith-university-privacy-plan> or telephone (07) 3735 4375.

Griffith University conducts research in accordance with the National Statement on Ethical Conduct in Human Research. If you, as a research participant, have any concerns or complaints about the ethical conduct of the research project, you should contact the Manager, Research Ethics, Office for Research, Bray Centre, Nathan Campus, Griffith University on (07) 373 54375 or research-ethics@griffith.edu.au.

The survey data will be stored in password protected files and in a locked filing cabinet. The data will be stored for a period of five years, after which the data will be destroyed. At the completion of the project, you may request access to the findings.

Risk and Benefits:

There are minimal risks with your involvement in this research. Should you have any questions or concerns, please do not hesitate to contact the researcher prior to proceeding.

Your participation is significant because the university lawyer perspective with respect to WIL has not previously been studied. In particular the results will guide future interview research of university lawyers addressing legal risk and risk management practices and assist the researcher in constructing a legal framework governing tertiary liability in WIL. It is envisaged that this legal framework can be used as a reference tool for university lawyers and provide a basis for university lawyers to review legal risk and risk management practices at their university.

Consent to Participate:

By completing the survey form, you are indicating that you:

- Agree to participate in the research project;
- Have read the Participant Information above;
- Understand that you can withdraw from the survey at any time, without comment or penalty;
- Are a university lawyer, namely a qualified solicitor who undertakes legal work within a legal services unit / department at an Australian university; and
- Understand that you can contact the researcher if you have any questions about the research.

*Thank you for your participation,
Brett Freudenberg & Craig Cameron*

Appendix D - University lawyer interview guide

Interview Guide

Details

Interview name:

ID #: UL

Interview date and time:

Interview location:

Introduction

Thank you [insert name] for agreeing to be interviewed for this research project. The purpose of the research is to explore legal risks and risk management by university lawyers in Work Integrated Learning (WIL) programs. My questions are open-ended which gives you the opportunity to describe your experiences with legal risk and risk management. There are no right or wrong answers to the questions I will ask. Please do not hesitate to seek clarification if you are unsure about any of the questions.

As pointed out in the Participant Information and Consent form, this interview will be audio recorded and you can obtain a copy of the transcript. As a practising solicitor, I am acutely aware of your confidentiality obligations. Your name, name of university, any parties referred to in your responses and any other information which may identify same will be de-identified in the case study. You will also have the opportunity to double-check to ensure the information is de-identified to your satisfaction.

There are four key words that I use during the interview. These words have the following meanings:

- **Work integrated learning (WIL):** a curriculum design which combines formal learning with student time spent in a real work, professional or other practice setting in Australia. International WIL programs are not covered in this interview. Other common terms to describe WIL include internships, service learning, placement, cooperative education, sandwich courses, clinical programs, fieldwork and practicum
- **Legal risk:** An event or circumstance that exposes the university to the possibility of liability or non-compliance with external or internal rules.
- **Risk management:** The processes, strategies and methods used to address legal risk
- **University lawyer:** A qualified lawyer employed by the university (in-house) to deliver legal services to the university.

Do you have any questions before we get started?

Interview Questions

Role

1. What is your position at the university?
2. How many university lawyers (total / full time equivalent) are employed at the university?
3. How many years have you been employed as a university lawyer (total / current university)?
4. Can you describe the organisational structure in which legal services are delivered?
[other divisions]
5. Do you have a dedicated person in your office for handling legal work concerning WIL programs?
(If yes) Is that person you? [Don't ask Q6 if answer "yes"].
6. Do you have a person recognised in your office who handles most of the legal work concerning WIL programs? (if yes) Is that person you?
7. How would you describe your current role in relation to WIL programs?
 - a. What/who determines the scope of your role in relation to WIL programs?

Legal risk

8. What are the legal risks that you manage in WIL programs? [How is [X] a legal risk to the university?]
 - a. Can you provide examples of legal risks based on your (or other university lawyers') experiences?

Risk management by university lawyers

9. What do you do to manage the legal risks in WIL programs? Can you provide examples?
 - a. [refer back to LR in last Q if RM not covered]
 - b. [What prompted [RM practice] / what other legal risks are managed by [RM practice]?
10. Does risk management with WIL programs differ from risk management with traditional study programs? If so, how?
11. What are the challenges with managing legal risks in WIL programs? Can you provide examples?
 - a. How have you addressed each challenge?
12. What assists you to effectively manage legal risks in WIL programs? [How?]
 - a. Can you provide examples of the things, conditions, factors, or circumstances that have assisted you?

1. If the challenge can also assist and visa versa, ask Q about providing example
2. What are the challenges with / assists you with [RM practice discussed in previous Q]
3. Does [x potential factor] assist you / represent a challenge with managing legal risk? How?

General

13. What recommendations would you make to the university to improve risk management in the context of WIL programs? [What could uni lawyers do to improve RM with WIL programs?]
 - a. What would be the impact (if any) of each recommendation on your role?
14. Do you have any comments not covered by the interview questions that you feel would contribute to an understanding of your role, legal risk or risk management in the context of WIL programs?

Thank participant; wine blend; describe transcription/follow-up/member-check; further info

PRE AND POST-INTERVIEW CHECKLIST**Pre-Interview**

Action	Done
Precedent e-mail to participant attaching interview questions and consent form 14 days before interview	
Contact (preferably by phone) at least one business day before interview to: 1. Confirm interview location (quiet) 2. Answer any questions 3. Confirm interview questions received	
Bring spare copies of interview questions and consent form	
Bring and review interview guide	
Review: lessons learned re: previous interviews; interview tips; general probes/prompts	
Set up recording equipment: much closer (within 30 cm) to participant than me	
Test recording equipment	
Ensure mobile phones switched off	
Ensure copy of Participant Information and Consent Form is signed	

Post-Interview

Action	Done
Reflexivity as soon as practical after interview – lessons and observations	
Upload recording to transcription service	
Once transcript received: 1. Review transcript against audio and make changes (as necessary) 2. Update questions / probes in interview guide (if applicable) 3. Additional observations and lessons from transcript and audio (reflexivity)	
Send e-mail: <ul style="list-style-type: none"> • Thanking participant; • Attaching transcript (refer Consent Form) and that I have reviewed audio; • Requesting follow up interview and/or further information based on my transcript review (if applicable). For example documents / questions answered by e-mail or recorded over phone, consider offering both options. • Asking participant if they have additional information they wish to share: following interview; and/or after reviewing transcript (if applicable) 	
Response to e-mail received	
E-mail participant with part of case study relevant to participant (refer Consent Form)	
Response to e-mail received (if applicable)	
Send copy of thesis to participant (refer Consent Form)	

Appendix E - Participant information and consent form (case study)

Work Integrated Learning: Legal Risk and Risk Management

Participant Information and Consent

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Student Researcher:

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Introduction:

This research project explores the role of university lawyers, legal risks and risk management practices of Australian university lawyers in Work Integrated Learning (WIL) programs. The research forms part of the student researcher's Doctorate of Education thesis entitled *Risk management by university lawyers in Work Integrated Learning (WIL) programs*. The student researcher will be interviewing university lawyers from a small sample of Australian universities. The interview data from each university lawyer will be analysed, aggregated and presented as a case study. The case study will be used in the thesis, presented at conferences and published in journal articles.

Work Integrated Learning (WIL) is defined as: *A curriculum design which combines formal learning with student time spent in a real work, professional or other practice setting in Australia. Other common terms to describe WIL include internships, service learning, placement, cooperative education, clinical programs, fieldwork and practicum.*

Purposes:

The primary purpose of the project is to provide information for academic administrators and university lawyers about the factors which impact upon, and the practices associated with, the risk management function of university lawyers in WIL programs. The research can be applied to evaluate and improve risk management at universities. An evaluation process may support existing risk management practices or lead to the adoption of one or more risk management practices described in the case study.

A secondary purpose is to identify and describe university lawyers' experiences of legal risk in WIL programs, which may confirm existing literature or identify legal risks that warrant consideration as part of a university's risk management process.

How the interview works:

Your participation in the research will involve an initial face to face interview of 60 to 90 minutes duration at your university campus consisting of questions relating to your role as a university lawyer, legal risk and risk management in WIL programs. Examples of questions on legal risk and risk management include:

1. What are the legal risks in WIL programs that university lawyers manage?
2. What are the processes, strategies and methods you use to address legal risk in WIL programs?

3. What recommendations would you make to improve risk management by university lawyers in the context of WIL programs?

A copy of the interview topics and questions will be sent to you at least 14 days prior to your scheduled interview. The questions are not “set in stone”. They are designed to guide the interview and enable you to prepare for the interview.

There may be a short follow up interview or e-mail communications initiated by the researcher to clarify or expand your responses at the initial interview. Documentation referred to by you during the interviews may also be requested by the researcher during or after the interview. You have no obligation to produce the documentation.

The interviews will be audio recorded and then professionally transcribed. You will have the opportunity to review the transcript to correct any errors and to provide additional information at your discretion (refer to section “Consent to Review”).

The interview data will be analysed, aggregated with interview data from other university lawyers and presented as one case study. You will have the opportunity to review any descriptions, accounts, extracts and quotes attributable to your interview responses in the case study to ensure anonymity and to correct any misinterpretations by the researcher.

Participation in this research is voluntary, and you can discontinue participation at any stage without penalty or the need to provide an explanation. Your decision will in no way impact upon your relationship with the researcher.

Confidentiality and Anonymity:

A number of steps will be undertaken to safeguard your anonymity and maintain confidentiality including:

1. The student researcher and transcription service will be the only parties with access to the interview recording;
2. The interview recording will be uploaded to a secure server and deleted as soon as practicable following transcription;
3. The transcription service will be bound to security, confidentiality and privacy policies and meet any compliance requirements imposed by the Griffith University Ethics Committee;
4. All participants will be allocated a unique identifier code. Correlation between identifier code and participant details will be kept within a secure document restricted by password. The student researcher will be the sole holder of the document password. The unique identifier code will be used to distinguish participant data for the case study;
5. The interview data and any associated documents collected from you will be stored in password protected files and hard copies of transcriptions in a locked filing cabinet. The data will be stored for five years, after which the data will be destroyed;
6. Your name, name of university, any parties referred to in your responses and any other information which may identify same will be de-identified in the case study;
7. A small but diverse range of universities will be selected including: universities with small and large legal offices; regional and metropolitan universities; and universities from multiple states and territories. The location of your university and actual number of lawyers in your legal office will not be identified;
8. The data from your interview and subsequent analysis will not be presented as a separate case study.
9. You will have the opportunity to review any comments, extracts, accounts and descriptions in the case study which are attributable to your interview responses and suggest changes to protect anonymity.

The Commonwealth Privacy Commissioner regards your opinions as personal information. The conduct of this research involves collection, access and/or use of your identified personal information. The information collected will remain confidential at all times and will not be disclosed to third parties without your consent, except to meet government, legal and other regulatory authority requirements. For further information consult Griffith University's Privacy Plan at <http://www.griffith.edu.au/about-griffith/plans-publications/griffith-university-privacy-plan> or telephone (07) 3735 4375.

Griffith University conducts research in accordance with the National Statement on Ethical Conduct in Human Research. If you, as a research participant, have any concerns or complaints about the ethical conduct of the research project, you should contact the Manager, Research Ethics, Office for Research, Bray Centre, Nathan Campus, Griffith University on (07) 373 54375 or research-ethics@griffith.edu.au.

Risk and Benefits:

There is minimal risk associated with your involvement in this research. One potential risk is that your responses may be identified by colleagues at your university if they read the case study. All reasonable steps (including those outlined above) will be taken to safeguard anonymity. Should you have any questions or concerns, please do not hesitate to contact the researcher prior to proceeding.

There are benefits to your participation in the research. Your participation is significant because risk management by university lawyers in WIL programs has not previously been studied. As discussed in the section "Purposes", it is envisaged that this research can be applied by academic administrators and university lawyers to evaluate and improve risk management practices at your own institution.

Consent to Participate:

By signing below, you are indicating that you:

- Agree to participate in the research project;
- Consent to the audio recording of interviews and subsequent use of the recording as outlined in the Participant Information details above;
- Have read the Participant Information details above;
- Understand that you can withdraw from the interview at any time, without comment or penalty;
- Are a university lawyer, namely a qualified solicitor who undertakes legal work within a legal office at an Australian university;
- Have delivered legal services with respect to WIL programs; and
- Understand that you can contact the chief investigators or the student researcher if you have any questions about the research.

Name:

Signature:

Date:

Consent to Review:

Please tick the relevant boxes relating to the interview and case study:

Request	Yes	No
I would like a copy of my interview transcript(s) for the purposes of correcting any errors and providing additional information (if I choose to do so) about my role, legal risk and risk management in WIL programs		
I would like a copy of those parts of the case study which contain the accounts, extracts, descriptions and quotes attributable to my responses during the interview for the purposes of protecting anonymity and to correct any misinterpretations of my responses by the researcher		
At the completion of the project, I would like a copy of the thesis		

Thank you for your participation,

Brett Freudenberg, Jeff Giddings, Christopher Klopper & Craig Cameron

Appendix F - E-mail invitation to participate in the case study

Subject line: Risk management by university lawyers

Dear [insert name],

[insert introductory remarks if researcher known to participant]

My name is Craig Cameron and I would like to invite you to participate in a research project I am undertaking as part of my doctoral studies at Griffith University. My research project explores role, legal risk and risk management in work integrated learning (WIL) programs from the perspective of university lawyers. WIL programs are also commonly known as internships, service learning, placement, cooperative education, sandwich courses, clinical programs, fieldwork and practicum.

The purpose of my research is practical – to provide information to academic administrators and university lawyers about the factors which impact upon, as well as the legal risks and practices associated with, risk management by university lawyers in WIL programs. I envisage that my research can be applied as a tool to evaluate and improve risk management practices.

An important part of the project is interviews with university lawyers who have delivered legal services in WIL programs. This is where you can be involved in what will be the first case study (to my knowledge) of university lawyers with respect to WIL programs. Your participation in the research would involve an initial face to face interview of 60 to 90 minutes at your university campus during which you will have the opportunity to share your experiences and knowledge about legal risk and risk management in WIL programs. There is the possibility of a short follow-up interview and/or e-mail communication to clarify or expand your responses at the initial interview.

Further details about the project, in particular its purposes, the interview process, the types of interview questions that will be asked, confidentiality and anonymity are contained in the **attached** Participant Information and Consent form. You may also contact the Chief Investigators listed in the attached form should you have any queries.

If you are interested in participating, could you please reply to this e-mail with your preferred time and phone number for me to contact you to discuss the research project further, answer any questions you have and arrange a time convenient for you at your campus to conduct an interview. I envisage conducting interviews in January and February next year as I know that December is a particularly busy time for university lawyers.

I really do appreciate your consideration of this e-mail and look forward to hearing from you.

Yours Faithfully,

Craig Cameron

Appendix G - Interview questions and definitions sent to participants

Interview definitions

There are four key words that I will use during the interview:

- **Work integrated learning (WIL):** a curriculum design which combines formal learning with student time spent in a real work, professional or other practice setting in Australia. International WIL programs are not covered in this interview. Other common terms to describe WIL include internships, service learning, placement, cooperative education, sandwich courses, clinical programs, fieldwork and practicum.
- **Legal risk:** An event or circumstance that exposes the university to the possibility of liability or non-compliance with external or internal rules.
- **Risk management:** The processes, strategies and methods used to address legal risk.
- **University lawyer:** A qualified lawyer employed by the university (in-house) to deliver legal services to the university.

Interview question guide

Role

1. What is your position at the university?
2. How many university lawyers (total / full time equivalent) are employed at the university?
3. How many years have you been employed as a university lawyer (total / current university)?
4. Can you describe the organisational structure in which legal services are delivered?

5. Do you have a dedicated person in your office for handling legal work concerning WIL programs? (If yes) Is that person you?
6. Do you have a person recognised in your office who handles most of the legal work concerning WIL programs? (if yes) Is that person you?
7. How would you describe your current role in relation to WIL programs?
 - a. What/who determines the scope of your role in relation to WIL programs?

Legal risk

8. What are the legal risks that you manage in WIL programs? Can you provide examples of legal risks based on your (or other university lawyers') experiences?

Hints: What files (previous or current) have involved WIL programs? For example, what legal matters have academics approached you (or other university lawyers) about in relation to WIL programs?

Risk management by university lawyers

9. What do you do to manage the legal risks in WIL programs? Can you provide examples?
10. Does risk management with WIL programs differ from risk management with traditional study programs? If so, how?
11. What are the challenges with managing legal risks in WIL programs? Can you provide examples?
 - a. How have you addressed each challenge?
12. What assists you to effectively manage legal risks in WIL programs?

- a. Can you provide examples of the things, conditions, factors, or circumstances that have assisted you?

General

13. What recommendations would you make to the university to improve risk management in the context of WIL programs?
 - a. What would be the impact (if any) of each recommendation on your role?
14. Do you have any comments not covered by the interview questions that you feel would contribute to an understanding of your role, legal risk or risk management in the context of WIL programs?

Appendix H - Conceptual models of legal risk, risk management and risk management factors

CONCEPTUAL MODEL: LEGAL RISK

CONCEPTUAL MODEL: RISK MANAGEMENT

CONCEPTUAL MODEL: RISK MANAGEMENT FACTORS

Appendix I - 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
Intellectual property	<ul style="list-style-type: none"> • Ownership of intellectual property created by the student during the WIL placement (developed IP) • Ownership of intellectual property of the university and host organisation (background or pre-existing IP)
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

Subject heading	Description
Issues during WIL placement	<ul style="list-style-type: none"> • The host organisation is to notify the university and visa-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 is 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 (e.g. 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

Subject heading	Description
Responsibilities (student)	<ul style="list-style-type: none"> • 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)	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Student access to the workplace and clients is subject to client consent and the WIL agreement between the university and the host organisation

Subject heading	Description
Student activities	<ul style="list-style-type: none">• The activities the student will undertake during the WIL placement. The activities are typically listed in a Schedule to the WIL agreement.
Student numbers	<ul style="list-style-type: none">• The number of students on WIL placement with the host organisation
Termination of agreement	<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• The workplace address of the WIL placement

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