Future research could determine what level of "business" legal literacy is required for operators, advisers and agencies. A valuable insight could be to survey past business graduates as to the areas of legal literacy that are of greatest importance to current practices. For example, a survey of past business school graduates could be conducted like that of Klayman and Nesser in the US. Such research could also explore possible best practices in terms of teaching law to these business advisers. Further research could consider sources of legal literacy for business advisers, as well as the best communication practices between business advisers and clients, as well as between lawyers and business advisers. Further, a LAX Survey with a specific focus on business legal issues could be conducted to ascertain where people seek advice from, and how effective they find it in addressing their business-related legal problems.

**CONCLUSION**

The world of business is a critical component of modern life, providing many with the opportunities to progress their position and enhance social inclusion. However, it is underpinned and supported by an array of legal principles. In this context legal literacy is an important attribute to ensure that these potential economic benefits can be fully realised. When confronted with legal problems evidence demonstrates that many Australians do nothing, however for those that do seek advice, only a small fraction seek it from an actual lawyer, with many using non-lawyer intermediaries as an initial adviser. In particular, business advisers, such as accountants, are an important first source of advice, even if the advice sought is not technically about the law itself. The preference for advisers from this sector can be attributed to their intimate knowledge of the person, their relationships and business circumstances. Consequently, non-lawyer business advisers can be an important intermediary for assisting people with their legal problems. In this way, these intermediaries lay a role in improving the legal literacy of the population in general.

While there appears to be overall satisfaction with advice from non-lawyer intermediaries, concerns are being raised about the adequacy of their legal literacy. It has been argued that a key issue is awareness of business advisors need to be acutely aware that their clients are likely to call upon them when they are faced with a legal problem. Further, context and the consideration of the commercial relationships likely to be encountered could be an important gestalt in the design and delivery of legal literacy for business advisers, as well as how they seek advice from and communicate with lawyers.

It is only with further research and development that legal literacy will be improved and enhanced within this important component of the legal advice framework. This is not to suggest that the legal literacy of citizens is not important, but it is critical to recognise that many people seek help from on-layers when faced with a legal problem. It is essential that these non-lawyer intermediaries have essential legal literacy to assist them in their role and is reflective of current practices. Addressing the legal literacy of these important intermediaries can assist in ensuring greater civil engagement for all in the future and that legal literacy is not just for lawyers.

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The Contract Risks to Universities of Work-Integrated Learning Programs

Craig Cameron*

Work-integrated learning (WIL) placements are generally contingent upon the host organisation, the student and/or the university entering a written contract, which creates legal rights and binds the parties to legal obligations. Contract is a mechanism used by universities to manage legal risks associated with WIL; however, it can also be a source of risk. A case study involving 13 Australian university lawyers represents the first systematic research of contract risks in relation to WIL programs. The contract risks described by university lawyers were found in contract terms involving intellectual property, employment, disciplinary action, insurance, indemnities and warranties about students, as well as the contract practices of academic disciplines delivering WIL programs. The research findings can be applied by universities to educate stakeholders about contract risks in WIL programs, and to assess and evaluate risk management frameworks.

**INTRODUCTION**

Work-integrated learning (WIL) – a curriculum design that combines formal learning with student exposure to real professional, work or practice settings is a compulsory or elective component of most university degrees. Professional bodies impose WIL as a compulsory requirement in a number of disciplines, including education, nursing, medicine and allied health. Many of these WIL programs involve contracts that bind the entity that hosts the student (the host organisation), the student and/or the university. A written agreement with respect to the student(s) placement with the host organisation (WIL placement) is generally the contract that sets out the rights and obligations of the parties involved with WIL (WIL agreement). The WIL agreement is a mechanism by which the university can manage legal risk in WIL programs. University lawyers, being qualified lawyers employed by the university, support institutional risk management by providing advice about WIL agreements to academic disciplines and staff responsible for the delivery of WIL programs (WIL disciplines and WIL staff, respectively), drafting WIL agreements (university WIL agreements); and reviewing WIL agreements prepared by the host organisation (host WIL agreements). The WIL agreement is a mechanism that manages legal risks associated with WIL, but it can also be a source of legal risk for universities.

The purpose of this article is to describe and analyse university lawyers’ experiences of contract risks in relation to WIL programs. In this article, legal risk is defined as an event or circumstance that exposes the university to the possibility of liability or non-compliance with external or internal rules, whereas contract risk is a legal risk associated with contracts, by agreement or imposed by law, involving the host organisation, student and/or university. There is a substantial body of literature articulating legal risks in WIL. While contract is referred to in empirical studies as a recommended risk management strategy, a feeling that contract risk is under-managed compared to other risks is pervasive across the university sector.

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* Senior Lecturer, Griffith University.


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[Image and content]
practice and a source of legal work for university lawyers, there is no known systematic study of contract risks with respect to WIL programs.

The article is structured as follows. The first section reviews the literature on contract risks in WIL programs, before providing a description of the research design. A case study of contract risks from the perspective of university lawyers is then presented and discussed. In particular, the discussion reveals three themes that underpin the contract risks described by university lawyers: student exploitation; risk transfer; and flaws in contract practices. The article concludes by considering the applications and implications of the findings and recommendations proceeding, it is important to acknowledge that the views on contract risk are the personal views of the university lawyers studied and are not necessarily those of the university by which they are employed.

**CONTRACT RISKS IN WIL PROGRAMS**

Universities are exposed to a broad spectrum of distinctive legal risks in WIL programs. There is a substantial body of literature, including empirical studies and personal author accounts, that have described legal risks that 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. The legal areas that underpin these risks include confidentiality, privacy, negligence, crime (theft and abuse), disability and sex discrimination, misrepresentation, personal injury, workplace health and safety, harassment, labour law, freedom of information and higher education law.

In terms of contract, the literature shows that authors have sought the services of a university lawyer, or have recommended that WIL staff seek the assistance of a university lawyer, in contract-related areas such as WIL agreements, insurance policies and coverage, indemnities and scholarship, stipend and other payments to students.

More recently, Cameron and Kpopover presented the results and discussion of a survey of Australian university lawyers with respect to legal risk in WIL programs. The leading areas of legal work (a proxy for legal risk in the survey) and future legal risk for participants with respect to WIL included contracts, as well as contract-related matters such as intellectual property (IP) and wages and other payments. A study of WIL stakeholders in Ontario, Canada by Turcotte, Nichols and Philipps identified the IP rights of students and host organisations as a legal issue impacting WIL programs. However, there has been no systematic study that has described what events were associated with the WIL agreement, including IP and wages and other payments, that represent a legal risk to the university. It is argued that a case study, during which university lawyers have the opportunity to describe their experiences with legal risk, may provide new insight about contract risks in WIL programs.

**TABLE 1. Case Typology of University Lawyers**

<table>
<thead>
<tr>
<th>State or Territory of main campus in Australia</th>
<th>University type</th>
<th>Legal office size (Number) N</th>
<th>University lawyer experience</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>G08</td>
<td>5</td>
<td>6</td>
<td>2 to 4 years</td>
</tr>
<tr>
<td>Victoria</td>
<td>Technical</td>
<td>2</td>
<td>6</td>
<td>5 to 9 years</td>
</tr>
<tr>
<td>ACT or South Australia</td>
<td>New Generation</td>
<td>2</td>
<td>Greater than 9</td>
<td>1</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Regional</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Queensland</td>
<td>German</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Position</td>
<td>Recognised WIL lawyer</td>
<td>N</td>
<td>Office structure N</td>
<td>University lawyer background N</td>
</tr>
<tr>
<td>University lawyer</td>
<td>9</td>
<td>No</td>
<td>10</td>
<td>Flat</td>
</tr>
<tr>
<td>Manager</td>
<td>4</td>
<td>Yes</td>
<td>3</td>
<td>Hierarchical</td>
</tr>
</tbody>
</table>

**Scope and Future Research**

The scope of WIL programs in the case study was limited to WIL placements in Australia, as there may be distinct risks associated with placements in other countries. Nevertheless, contract risks in international WIL programs were referred to by some university lawyers, most notably international WIL agreements and insurance coverage, and could be the subject of future research. Further, contract risk is studied through the prism of university lawyers’ experiences and not “black letter law”. Readers may identify a number of issues relating to contract law in the case study such as mistake, misrepresentation, unconscionable conduct, duress, consumer guarantees, contract construction, warranties and remedies. A study of the law underpinning the contract risks would advance understanding about the university’s potential liability in relation to WIL programs.

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1. Cooper, Orell and Rowden, n 3; Cameron, n 3.
2. Cameron, n 3.
5. Goldstein, n 2.
7. Cameron and Kpopover, n 2, 351.
Interview Design

The interview design incorporated a mix of semi-structured and structured interview questions. A pilot study of four university lawyers was also conducted in order to validate and strengthen the interview design. The initial demographic questions were structured, requesting specific data from all university lawyers as reported in the case typology. The remaining questions were more open-ended about university lawyers' experiences with legal risk and risk management in relation to WIL programs. A structured question that inspired a series of follow-up questions was: what are the legal risks that you manage in WIL programs? Contract risk emerged as a specific type of legal risk during the interview process. The other legal risks described by university lawyers that were associated with the day-to-day operation of the WIL program will be reported separately.

Data Collection and Analysis

The predominant data collection method was in-person interviews with university lawyers of approximately 60-120 minutes in length. Email communications to expand and clarify participant responses, university policies and multiple WIL agreement templates provided by 11 university lawyers supported the interview data. The interviews were audio recorded and professionally transcribed. University lawyers were also de-identified and assigned an ID number prior to the interviews (UL1-UL13) to protect anonymity. An inductive analytic data technique was employed during which individual perspectives were coded and studied (within-case analysis), compared for different perspectives (cross-case analysis) and then broadened into categories and themes representing the multiple experiences of university lawyers. These experiences are reported in rich description as a cross-case analysis of contract risks in WIL programs. An outline of the types of WIL agreements is first presented in the study findings to provide the necessary context for the cross-case analysis that follows.

RESULTS

WIL Agreements

The university WIL agreement is generally not a "one size fits all" contract. University lawyers have drafted multiple WIL agreement templates, which can be replicated for future WIL placements and may be tailored to a WIL discipline. Alternatively, a "master" WIL agreement template, which can be accessed by all WIL disciplines, may incorporate a series of distinguishing features that can be added to or deleted from the agreement. The distinguishing features of WIL agreements can be classified under four headings:

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

These distinguishing features assist with understanding the contract risks in WIL programs, as different features may pose different contract risks to the university.

Contract Risks

There were two types of contract risk managed by university lawyers: contract terms; and contract practices. Table 2 sets out the contract risks and the university lawyers who described them (as denoted by their ID). University lawyers made 46 references to 12 contract risks. Thirty-three references dealt with contract terms and 13 dealt with contract practices. Ten university lawyers referred to IP rights during the interviews, the most of any legal risk identified in this study. The sections below describe and analyse university lawyers’ experiences with each of these contract risks.

<table>
<thead>
<tr>
<th>TABLE 2. Contract Risks in WIL Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal risk</td>
</tr>
<tr>
<td>Contract terms</td>
</tr>
<tr>
<td>The host organisation retains the rights to intellectual property generated by the student</td>
</tr>
<tr>
<td>A contract of employment which is not intended by the host organisation</td>
</tr>
<tr>
<td>The host organisation takes disciplinary action or requires the university to take disciplinary action against the student</td>
</tr>
<tr>
<td>The risk is not insured or is underinsured by the university or host organisation</td>
</tr>
<tr>
<td>The university indemnifies the host organisation for losses incurred in connection with the student’s involvement during a WIL placement</td>
</tr>
<tr>
<td>The university provides assurances about student competence, character and conduct to the host organisation</td>
</tr>
<tr>
<td>Contract practices of WIL discipline</td>
</tr>
<tr>
<td>The incorrect host organisation entity is a party to the WIL agreement</td>
</tr>
<tr>
<td>More than one WIL agreement applies to the WIL discipline or a WIL agreement applies to multiple disciplines without the knowledge of all disciplines</td>
</tr>
<tr>
<td>The person signing the WIL agreement does not have authority on behalf of the university</td>
</tr>
<tr>
<td>The WIL agreement is not reviewed by a university lawyer</td>
</tr>
<tr>
<td>The WIL discipline maintains the status quo associated with WIL agreements</td>
</tr>
<tr>
<td>The WIL discipline misses a university WIL agreement template</td>
</tr>
</tbody>
</table>

Assignment of IP 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. Secondly, 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 is discussed in turn.

Student Understanding about Assigning IP

University lawyers were generally opposed to students assigning their IP rights. Nevertheless, they 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, except for authorship in published works. The legal position in Australia is that an employer owns the IP generated by employees in the course of their employment unless the parties agree otherwise. 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 may not 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." Hence 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. 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 cases are resolved by the university removing 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 in order to secure the placement, 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”. While it is preferable that students have the option to assign their IP rights or not, 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 come 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 about their IP rights may not be sufficient to mitigate this risk because the student may not have the financial capacity to do so. 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.

The Contract Risks to Universities of Work-Integrated Learning Programs

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 the 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 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 their qualification.

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 that 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 the failure of extensive attempts by UL7 to negotiate the IP terms with the host organisation, 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 the student generated during the time of the 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 fear was that the government agency did not consider or understand the nuances of the proposed definition and its potential impact on the student. The experiences of UL7 and UL13 demonstrate how important it is for university lawyers to review host WIL agreements to identify any legal risks associated with student IP rights.

An Unintended Employment Contract

A contract of employment, imposed by law, between the student and the host organisation may be an unintended consequence of the WIL placement. As an employer, the host organisation has a number of statutory obligations: paying the student remuneration and providing statutory leave entitlements as prescribed by the industrial instrument that applies to the host organisation; paying superannuation; withholding Pay As You Go tax from the remuneration. Any direct or indirect payment by the host organisation to a student raises the issue of whether an employment contract exists. In some WIL

* Fair Work Act 2009 (Cth).
programs, the host organisation wants to create an employment relationship and pay the students as employees. 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 contract, and that classifying the payments as a scholarship may be viewed as an attempt to circumvent the host organisation’s legal obligations. The potential misrepresentation of the employment relationship as a scholarship, and the use of a third party (university) in contracting arrangements, has a similar theme and raises similar concerns to triangular work relationships involving labour hire entities, also known as the “Odco” system of contracting. From a university perspective, the legal risk is the university’s involvement in an arrangement that circumvents the host organisation’s contractual obligations as employer.

An additional contract 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 if a contract of employment is imposed by law (UL8). The wording of the WIL agreement (contract) is crucial as to whether the student, as an employee, is a contract 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 contract 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 contract risk.

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 that 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 may have no contractual right to reverse the host organisation’s decision to terminate the WIL placement.

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 host organisation's...
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 onus is on anything connected with the student’s involvement on WIL placement shifts to the university (UL13). It is clear why the university does not include indemnities as a matter of course beyond the negligence of students and staff. 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. 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.

The University Assures the Competency and Conduct of Students

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 that 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 has received specific information and training as part of an induction prior to the WIL placement. This enables the host organisation to manage adverse incidents in the workplace by delegating work that 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 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 competency 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 placements. 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. UL7 unsuccessfully argued the issue of control during negotiations with a host organisation over terms in a WIL agreement that the university ensure students engage in particular actions, which included to dress and behave in a certain way. Reflecting on this experience, UL7 evoked a powerful image as part of the argument against university warranties about student behaviour. The student is akin to a legal entity with its own rights and obligations separate from the university while on WIL placement. As a separate legal entity, the student decides whether to dress and behave in a certain way. If the university makes assurances about student behaviour, 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.

Specific contract practices of some WIL disciplines represent contract risks and can contribute to the legal risks associated with contract terms. These practices are discussed below.

The Incorrect Host Organisation Entity in the WIL Agreement

University lawyers were mindful of WIL staff inserting the wrong legal entity for the host organisation into the WIL agreement (ULB, 13). There may be legal consequences associated with the WIL agreement and the host organisation insurance policy should WIL staff make such an error. UL13’s experience 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 that 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 that remains with the university.

Multiple WIL Agreements and 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.

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 that identify the persons with authority to sign documents such as WIL agreements, as well as the power to delegate that authority. As UL2 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. As a consequence, university lawyers in negotiation with authorities may be unaware of WIL agreements they would ordinarily send to the legal office for advice and review.

Another legal risk is WIL staff who may bypass, deliberately or inadvertently, the contract approval process enshrined in university policy (UL1, 13). Many universities have a legal services or contract policy that requires staff to obtain legal services with respect to contracts. University contract approval and delegation policies are aimed at managing legal risk, but WIL staff may be exposing the university to legal risk by contravening these policies.

The WIL Discipline Maintains the Status Quo

Maintaining the status quo with respect to WIL agreements represents a legal risk if unacceptable contract terms persist in the WIL agreement (UL1, 2, 5, 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 WIL agreements had been signed on an annual basis in the education faculty 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.

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. 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
The Contract Risks to Universities of Work-Integrated Learning Programs

resources to meet any liability. This was not a risk discussed by university lawyers, possibly because the host organisation had sufficient 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.

Three themes underpin the contract risks described by university lawyers: student exploitation; risk transfer; and flaws in contract practices. Student rights to IP, employment and professional 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 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 transfer from the host organisation to the university. Risk transfer 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 involved with implementing risk management in WIL programs, but the actions of WIL staff can contribute to contract risks associated with student exploitation and risk transfer. 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 hold that 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—ie 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.

CONCLUSION: CONTRACT APPLICATIONS AND IMPLICATIONS FOR UNIVERSITIES

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 research findings can educate university lawyers, WIL disciplines and university management about contract risks with respect to WIL programs, and can support their risk management activities. In particular, university management may apply the research findings to assess and evaluate existing risk management frameworks. For instance, do the existing frameworks cover and appropriately manage the contract risks described by university lawyers?

The research also reveals two important risk management lessons for WIL disciplines when negotiating and finalising WIL agreements on behalf of the university. First, WIL staff should approach the legal office prior to finalising a host WIL agreement, or any proposed amendments to university WIL agreements. All the legal risks concerning contract terms in the case study (Table 2) have been identified by university lawyers following a review of the host WIL agreement. Such non-standard agreements need to be carefully considered by university lawyers, given their attendant contract risks. Collaboration with university lawyers during the agreement-making process is crucial for minimising risks pertaining to contract terms, and can avoid most (if not all) flaws in contract practices of the WIL discipline.

Another important lesson for WIL disciplines relates to insurance coverage. Cooper, Orell and Bowden argued that an understanding of both university and host organisation policies by WIL staff is essential when negotiating the WIL agreement.25 For instance, does the insurance policy cover the student

24 Cameroon and Kopper, n 2; Tuccitto, Nichols and Philippa, n 11.


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. With respect to university insurance policies, university lawyers discussed legal risks associated with WIL disciplines not engaging in appropriate due diligence pertaining to insurance.

University management could also consider education initiatives and policies that encourage WIL staff to involve university lawyers at an early stage of the agreement-making process. This suggestion is not far-fetched – university lawyers in the case study referred to legal services and contract policies that 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 WIL agreements, as well as any proposed amendments to WIL agreement templates, for review and legal advice by university lawyers. Timely communication and collaboration between university lawyers and WIL disciplines may improve the prospects of successfully negotiating agreement provisions with the host organisation that minimise contract risk.