Anne Hewitt and Craig Cameron
Employee or Student Learner? Managing the Risks of Providing Financial Support to Students Undertaking Work Experience
Australian Journal of Labour Law, 2023; 36(3):262-288

Employee or Student Learner?
Managing the Risks of Providing Financial Support to Students Undertaking Work Experience

Anne Hewitt[*] *and Craig Cameron*[#]

There are increasing expectations that Australian tertiary graduates will have developed practical "real-world" skills through participation in work experience, internships or work integrated learning (WIL). Many WIL opportunities are unpaid, often in an attempt to ensure the requirements of the 'vocational placement' exemption from employment status in the Fair Work Act 2009 (Cth) are satisfied, or to try and avoid creating a contract of employment at common law. However, for a range of reasons (for example, altruistic, recruitment, reputational) a variety of stakeholders choose to provide practical and/or monetary support to tertiary students engaging in WIL. This support may be provided through bursaries, scholarships, or stipends (collectively, WIL studentships). However, if improperly designed or implemented, WIL studentships can have inadvertent legal consequences. This can include constituting consideration which contributes to the formation of a contract of employment, or being considered remuneration which means the vocational placement exception in the Fair Work Act will not apply to the WIL placement. Ironically, this may obviate the legal reasons which encourage WIL to be unpaid. This article considers the labour law risks associated with WIL studentships. It then situates these risks in context, by presenting novel empirical research on the design of WIL studentships in Australia, and the extent of awareness among university staff of the legal risks associated with WIL studentships. Together, this analysis provides original insights into the degree of labour law risk associated with WIL studentships in Australia, how that risk is being managed, and strategies that can be used to minimise the chance of unintended legal outcomes.

Introduction

This article draws on a multi-methods empirical study,[1] in addition to doctrinal analysis, to examine the labour law risks associated with providing financial support to students engaged in work-integrated learning (WIL). Courses which engage students in learning in the workplace are becoming increasingly common in the Australia tertiary

[*] Associate Professor, The University of Adelaide Law School, University of Adelaide. The research which informs this article was supported by a 2020 research grant from the Australian Collaborative Education Network. The authors thanks Charlotte Scobie for her assistance with the internet data collection.
[#] Senior Lecturer (Business Law), School of Business and Creative Industries, University of the Sunshine Coast.
[1] J Salmons, 'Conducting Multimethod and Mixed Methods Research Online', in S Hesse-Biber & R Johnson (eds), *The Oxford Handbook of Multimethod and Mixed Methods Research Inquiry*, Oxford University Press, Oxford, 2015, p 522.

education landscape.[2] Often referred to as WIL, these learning opportunities are encouraged by universities and industry;[3] the federal government;[4] and students. For the purposes of this article, WIL is a tertiary curriculum design that: combines formal learning with student time spent in a virtual or real work, professional or other practice setting; involves a student, the university in which the student is enrolled, and an entity that hosts the student for their workplace experience ('host organisation' or 'host'); and is part of an individual course within a program of study (for example, bachelor's degree) or is a requirement of the program of study.

While WIL experiences are unpaid, a variety of stakeholders choose to offer support to students to assist them to undertake WIL, through a grant, allowance, bursary, or scholarship (collectively 'WIL studentships'[5]). Such support may be offered for a variety of reasons, including a university seeking to attract students to study in a particular program or discipline,[6] a host seeking to create relationships with potential graduate employees,[7] or to support under-represented student groups, such as low-income groups and those in educationally disadvantaged geographical areas.[8] WIL studentships could consist of 'in-kind' support (travel or accommodation), reimbursement of student expenses, or a monetary payment. The provider of the support may be the student's tertiary institution, the organisation hosting their WIL experience, corporate or individual donors, an industry association, government bodies or third-party providers of WIL experiences. While empirical studies of WIL studentships have been completed, they have generally been limited to a single discipline or single scholarship program, and they focus on financial opportunities and hazards from a student perspective only. For example, Tran et al examined

[2] The prevalence of WIL in Australia's tertiary sector was confirmed by a national survey conducted by Universities Australia of WIL activities across Australia's comprehensive universities. That survey found that in 2017, more than one-third of enrolled tertiary students (451,263) had undertaken WIL, with some undertaking more than one WIL experience (a total of 555,403 WIL activities were reported): Universities Australia, *Work Integrated Learning in Universities: Final Report,* Universities Australia, Canberra, 2019, at 8.

[3] See, eg, the 2015 national joint statement in support of work-integrated learning by peak bodies representing universities, business and industry in Australia: Universities Australia, Australian Chamber of Commerce and Industry, Ai Group, Business Council of Australia, ACEN, *National Strategy on Work Integrated Learning in University Education,* Universities Australia, Australian Chamber of Commerce and Industry, Ai Group, Business Council of Australia, ACEN, 2015. In 2021 the federal government also demonstrated commitment to WIL in its 'Job-ready Graduates Package'.

[4] Under the 2020 National Priorities and Industry Linkage Fund (NPILF), part of the Job-ready Graduates Package of legislation, universities are supported to develop links with industry and to offer 'work experience in industry' courses. Work experience in industry courses have been lauded on the basis they will "improve graduate employment outcomes": Department of Education, Skills and Employment, *Job-ready Graduates Package,* at <https://www.dese.gov.au/job-ready/faqs> (accessed 30 March 2022).

[5] The term 'studentship' is sometimes used in education literature (particularly in the USA) to describe a short-term placement, typically during a break in the teaching period, which requires the student to complete a research output or participate in a clinical experience, for which students may receive a payment. While this meaning does not precisely correlate with the meaning ascribed in this article, the authors selected 'studentship' as a unifying term for any financial support which is intended to be non-remunerative. The main reasons for this were the fact the term is not commonly used in Australia, and it emphasises the student focus of the support we are considering. See further C Cameron and A Hewitt, *Facilitating Student Engagement with WIL: A Risk Management Framework for Studentships*, The University of Adelaide, Adelaide, 2022, 8, at <https://drive.google.com/file/d/1suBuuFSDVAgJU-14H4JBWJmvNnMM1xHa/view> (accessed 30 March 2022).

[6] T Considine, K Heanue & P Hollingdale 'The Effects of an Exclusionary Bursary Policy on Student Social Workers: An Exploratory Qualitative Study on the Effects of the 2013 Policy to Cap the Allocation of Bursaries in England' (2020)8 *Critical and Radical Social Work* 95.

[7] I Neil-Smith 'Some Difficulties And Dilemmas of a Scholarship-Based Co-Op Program' (2001) 36 *The Journal of Cooperative Education* 37a

[8] T Carson, ' Overcoming Student Hardship at Swinburne University, Australia: An Insight Into The Impact of Equity Scholarships on Financially Disadvantaged University Students' (2010)12 *Widening Participation and Lifelong Learning* 36; H Claridge & M Ussher, 'Does Financial Support for Medical Students From Low Income Families Make a Difference? A Qualitative Evaluation' (2019)19 *BMC Medical Education* 153. This is further discussed in Cameron and Hewitt above n9 21-22.

government New Colombo Plan funding which supported scholars to participate in a WIL placement that they would not have otherwise pursued,[9] and Jacob considered a South African bursary scheme offered to nursing students[10] Lock investigated stipends paid to pre-service teachers in Western Australia,[11] and Reideger examined the nature and implications of a scholarship paid to Canadian students completing a Global and Indigenous Health WIL program.[12]

In contrast, the authors conducted a 2021 research project into the design and risk management of WIL studentships in Australian tertiary education. This was the first known systematic study into legal, reputation, financial, and operational risks of WIL studentships across both multiple universities and academic disciplines.[13] That project included the following multi-method empirical research methodologies:

a) interviews with both Australian university staff associated with WIL studentships and domestic university WIL studentship recipients; and
b) a web-based study of WIL studentships publicly advertised on the internet and accessible to Australian university students.[14]

In another context the authors have examined the design characteristics of WIL studentships identified in the web-based study.[15] This article builds on the foundation of the research project, and examines the labour law risks associated with WIL studentships. Part 1 will introduce the dual labour law hazards associated with the provision of WIL studentships. Part 2 presents the insights gathered from the first strand of the empirical research, the interviews conducted with university employees involved with WIL studentships, regarding their awareness of these dual labour law risks. Part 3 provides a labour law critique of the WIL studentships being designed and delivered in Australia, derived from the second strand of the empirical research, the qualitative study of WIL studentships advertised via the internet. Part 4 explores the labour law risks inherent in the WIL studentship practice revealed through this research. This is done through examination of two cases studies developed from the web-based research. The article concludes at Part 5 by proposing a series of risk management actions which may be utilised to minimise the labour law hazards associated with the provision of WIL studentships.

Part 1 – Labour Law Hazards Associated with WIL Studentships

WIL studentships may expose students, the 'donor' (the organisation or individual providing the financial assistance, also known as the 'sponsor') and the student's university to a variety of risks. Some are strategic and financial; others arise from the

[9] LT Tran et al, 'Building Experience, Opportunities, and the Resume: Motivations of Students Participating in Learning-abroad Programmes through the New Colombo Plan' (2021) 40 *HERD* 416 at 423–24.
[10] E Jacobs, B Scrooby and A Du Preez, 'Experiences of Student Nurses regarding the Bursary System in KwaZulu-Natal Province, South Africa' (2019) 24 *Health SA Gesondheid (Online)* 1 at 4, 6.
[11] G Lock, Preparing Teachers for Rural Appointments: Lessons from Australia' (2008) 29 *The Rural Educator* 24 at 28.
[12] N Riediger, M Cyr and J Mignone, 'An Evaluation of an Experiential Learning Program in Global and Indigenous Health: The University of Manitoba's Queen Elizabeth II Diamond Jubilee Scholarship Program' (2020) 57 *Inquiry* 1 at 7.
[13] That research is funded by a research grant from the Australian Collaborative Education Network (ACEN). The project final report is Cameron and Hewitt, above n 9.
[14] Ethics approval (H-2020-217) The University of Adelaide.
[15] C Cameron and A Hewitt, 'Designing Financial Support for Students in Australian Work-Integrated Learning Programs' (2022) 23 *IJWIL* 359.

operation of labour laws. Before these issues are canvassed, it is important to note that the hazards described here relate to the financial support aspect of the WIL studentship arrangement and not the WIL experience itself.[16] There is a distinction between the level of labour law risk inherent in WIL experiences which are not supported by WIL studentships and those that are, because the small risk that a WIL experience creates an (unintended) employment relationship is exacerbated when the experience is supported by a WIL studentship. At common law, a WIL experience is usually not considered a contract of employment for failure to meet the requirement of mutual legal consideration,[17] and under the FW Act is carved out of the definition of employment by virtue of the vocational placement exception. However, the support offered via a WIL studentship could constitute 'consideration', which is required to establish a contract of employment under the common law. Second, a WIL studentship could constitute 'remuneration' which would obviate the application of the statutory carve out of 'vocational placements' from the scope of employment under the FW Act. This article will consider these two risks below.

WIL studentships as consideration

In almost all Australian contexts the answer to the question 'is a WIL participant an employee?' will be determined by applying common law definitions of employee and employer, including where the WIL host is a 'national system' employer covered by the FW Act.[18] The FW Act creates rights and imposes obligations in respect of arrangements between 'employers' and 'employees' and defines those terms according to their 'ordinary meanings',[19] which is the meanings attributed under common law.[20] Two requirements must be met for a relationship of employment at common law. First, it must involve a *contract* (a legally enforceable agreement) which, secondly, must be for *employment* (which requires the employee to work in a subordinate capacity for the employer).[21] In most situations in which a student is engaged in WIL, their subordinate status within the host organisation is without doubt. Complexities arise, however, in relation to the contractual/non-contractual nature of the agreement between WIL participant and host. If there is no legally binding agreement to perform work, or no 'consideration' (an agreed return or reward for the work to be performed), then there can be no employment contract and the WIL participant will not be considered an employee.[22] This is the context in which WIL studentships complicate an already complex factual analysis. A WIL studentship appears to offer benefits to the WIL participant in return for the work they perform, which may be legally regarded as 'consideration'. This conclusion is intuitive when

[16] For studies of risks attached to the WIL experience, see Hewitt et al, above n 5. See also C Cameron, 'The Strategic and Legal Risks of Work-Integrated Learning: An Enterprise Risk Management Perspective' (2017) 18 *APJCE* 243.
[17] The possibility that supervision and training provided by the WIL host is consideration is further discussed at n 25–28.
[18] Fair Work Act 2009 (Cth) (FW Act) ss 14, 30D, and 30N.
[19] FW Act s 11.
[20] *C v Commonwealth* (2015) 234 FCR 81; 327 ALR 195; [2015] FCAFC 113 at [34]; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; [2022] HCA 1 (*Personnel Contracting*) at [93]–[94] (Gageler and Gleeson JJ).
[21] *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; 76 ALJR 465; [2002] HCA 8. In the context of a WIL placement this requirement is unlikely to be contentious and will not be further considered in this article.
[22] See, eg, *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308.

the WIL studentship provides a monetary payment to the participant, but because the law does not restrict 'consideration' to monetary payments, it is possible to create a legally binding employment contract in which the employee will undertake the work for another benefit. This means non-monetary WIL studentships, such as the provision of rent-free accommodation, may still constitute consideration.[23]

In fact, it is possible that the gaining of work experience in itself may be recognised as sufficient benefit to constitute legal consideration, and therefore to establish an employment contract. This was considered in the UK case of *Edmonds v Lawson,*[24] which concerned an argument that a pupil barrister was entitled to be paid the national minimum wage during her pupillage. One of the factors argued against the application of minimum wage entitlements to Ms Edmond's pupillage was that there was no contract between her and the chambers at which she completed her pupillage. However, the court was very happy to categorise the training provided by chambers as legal consideration, and also concluded that "pupils such as the claimant provide consideration for the offer made by chambers such as the defendant's by agreeing to enter the close, important and potentially very productive relationship which pupillage involves".[25] As a result, a legally binding employment contract, in which both parties provided legally recognised consideration, was created. This contrasts with the position in *Barbour v Memtaz Derbas*[26] which also contemplated an argument that supervision, in the context of work experience undertaken in a small law firm, constituted consideration. In that case Binet DP stated 'I am not satisfied that the training or supervision Mr Barbour received from Derbas Lawyers was in law or in fact sufficient to constitute consideration to support a finding of employment'.[27] However, it should be noted that it was apparent from the facts of that case that little or no active supervision was, in fact, provided to Mr Barbour. The Court's conclusion therefore does not appear to rule out the possibility that (more rigorous) training or supervision could constitute consideration in another case distinguishable on the facts.

The High Court recently examined the distinction between employees and independent contractors in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (*Personnel Contracting*)[28] and *ZG Operations Australia Pty Ltd v Jamsek* (*Jamsek*).[29] These decisions are likely to impact the boundary between employment and other work relationships that rely on the common law test,[30] including the legal categorisation of students completing WIL arrangements.

First, the High Court has confirmed that including a contractual term identifying an arrangement as one of 'work experience' or WIL will not be determinative to ensure a contract of employment is not created.[31] This confirms the position illustrated by

[23] See, eg, *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92.
[24] [2000] 2 WLR 1091; [2000] ICR 567; IRLR 391; EWCA Civ 69; QB 501.
[25] Ibid, at [25].
[26] [2021] FWC 1718 (30 June 2021).
[27] Ibid, at [97].
[28] *Personnel Contracting*, above n 21.
[29] [2022] 96 ALJR 144; HCA 2.
[30] J Riley Munton, 'Boundary Disputes: Employment v Independent Contracting in the High Court' (2022) 35 *AJLL* 79 at 79–80.
[31] *Personnel Contracting,* above n 21, at [63] (Kiefel CJ, Keane and Edelman JJ), at [127] (Gageler and Gleeson JJ), at [184] (Gordon J).

Cossich v G Rossetto & Co Pty Ltd[32] in which a student undertaking a wine marketing course was required to complete 240 hours 'work experience within the wine industry'. At the conclusion of the work experience the student continued to complete an additional 8 months of what the parties described as 'work experience' (for which she was not paid) for one of the organisations that hosted her formal WIL placement. The case concerned a claim for unpaid wages for that 8-month period. The Magistrate who heard the matter concluded that, despite the absence of any agreement that she would be paid, Ms Cossich should legally be regarded as an employee. Consequently, she was entitled to be paid for her work, and the host/employer was required to reimburse her the remuneration she had not received.

Second, the plurality in both cases (Chief Justice Kiefel with Justices Keane and Edelman) held that where the parties have entered a comprehensive written contract, then absent any factors which may impact its validity (eg. sham, estoppel, or variation), the rights and obligations of the parties ('the totality of the relationship')[33] is to be assessed only by reference to the terms of the contract.[34] Therefore, the multi-factor test for determining status as an employee[35] should now be applied solely to the contract terms[36] and not include assessment of the 'manner of performance of the contract',[37] that is the post-contract conduct of the parties). Gordon J agreed with the approach of the plurality in *Personnel Contracting*,[38] and in a joint judgment with Steward J in *Jamsek*,[39] which thereby formed a majority view for determining an employment relationship.[40] The High Court's emphasis on considering the contractual terms to determine whether a contract of employment is created highlights the importance of carefully considering the content of written agreement(s) regarding WIL placements, including contracts regarding WIL studentships. This has recently been confirmed in the context of a university training arrangement incorporating a stipend in *Tracey v Murdoch University* (*Tracey*) where the court stated, in a unanimous judgment:

> It may be accepted, as Dr Tracey submitted, that a person may be undergoing training and performing work in employment simultaneously, as happens with trainees, apprentices, interns and "on-the job" training generally. But the critical point here is that, on an overall analysis of the contractual terms, the annual stipend is paid as consideration for Dr Tracey undergoing an integrated program of study and training, not for the performance of work. On this basis, it cannot be said that the "irreducible minimum of mutual obligation" required for the existence of an employment relationship exists in this case. The contractual

[32] [2001] SAIRC 37 (26 October 2001).
[33] *Personnel Contracting*, above n 21, at [61] citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 60 ALJR 194; [1986] HCA 1 (*Brodribb),* at [20]; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 75 ALJR 1356; [2001] HCA 44 (*Hollis*) at [24].
[34] Ibid, at [59]; see also at [162] (Gordon J), at [203] (Steward J). The same approach was applied by the plurality in *Jamsek*, above n 30, at [8].
[35] Originating from the High Court decision in *Brodribb*, above n 34.
[36] *Personnel Contracting*, above n 21, at [61].
[37] Ibid, at [143] (Gageler and Gleeson JJ).
[38] Ibid, at [162].
[39] *Jamsek*, above n 30, at [95].
[40] Riley Munton, above n 31, at 85.

> arrangements between Dr Tracey and the University in respect of the ECC Program and the Anaesthesia Program were not, in our view, "work-wages" bargains. They had a different character.[41]

Interestingly, the court in *Tracey* stated:

> [T]he "irreducible minimum of mutual obligation" required for a contract to establish an employment relationship is that the putative employer must, under the contract, be obliged to pay *remuneration* to the putative employee as consideration for the services reasonably demanded under it, and the putative employee is obliged to perform such services.[42]

With all due respect to the Fair Work Commission, this requirement for monetary remuneration (wages) is contrary to a significant line of authority. For example, in *Oliveri v Australian Industrial Relations Commission* (*Oliveri*) the Full Court of the Federal Court stated '[I]t is abundantly clear on the authorities that "non-cash" rewards can constitute "remuneration"'.[43] The Full Bench of the Fair Work Commission in *Re Equal Remuneration Decision 2015* (*Equal Remuneration Decision*) accepted that the ordinary meaning of remuneration under the FW Act 'is not confined to wages or salary and includes all other monetary and non-monetary compensation paid as consideration for service under an employment contract',[44] and that this approach was consistent with the interpretation of remuneration in *Oliveri*.[45]

Putting the sole focus on monetary payment (and consequent failure to consider other possible considerations, such as training) to one side, however, *Tracey* leaves open an argument on distinguishable facts that a WIL studentship (possibly in combination with training) could be determinative of the existence of a binding employment contract. This is arguably most likely when the host commits to pay a monetary WIL studentship. However, because of the broad understanding of consideration articulated in cases such as *Oliveri* and the *Equal Remuneration Decision*, WIL studentships providing other forms of support (such as provision of accommodation or travel) could also constitute legal consideration and contribute to the (sometimes unintended) creation of a contract of employment between the WIL participant and host.

While *Personnel Contracting* and *Jamsek* have not significantly altered the legal risk that a WIL studentship could be deemed to be consideration necessary to create an employment contract, and categorise a WIL participant as an employee, the cases do emphasise that the court's analysis will primarily focus on the terms of any contract(s) to establish the nature of the relationship between the parties.

WIL studentships and the FW Act vocational placement exception

[41] *Tracey v Murdoch University* [2022] FWCFB 220 at [45] (Hatcher AP, Clancy DP and Young DP).
[42] Ibid at [35].
[43] *Oliveri v Australian Industrial Relations Commission* (2005) 145 IR 120; [2005] FCAFC 36 (*Oliveri*) at [26] (Nicholson, Weinberg and Selway JJ).
[44] *Re Equal Remuneration Decision 2015* (2015) 256 IR 362; [2015] FWCFB 8200 (*Equal Remuneration Decision*) at [276] (Hatcher VP, Dean DP and Saunders DP).
[45] Ibid.

The second legal complication presented by WIL studentships to employee status arises from the operation of the vocational placement exception in the FW Act. Sections 13, 15(1)(b), 30C(1)(a) and 30M(1)(a) each provide that an individual undertaking a 'vocational placement'[46] is not to be regarded as an employee. If a WIL experience is a vocational placement, it will *not* be regarded as employment, even if it would otherwise fall within the common law conception of an employment relationship. Consequently, the host will not be considered the WIL participant's employer and will not be obliged to offer them the various rights and protections offered by the FW Act to employees.

It is, however, important to note that the exemption can only apply if the host organisation is a 'national system employer', as defined in sections 14, 30D and 30N. Whether this is the case depends on the host's organisation type and structure, the state or territory in which they are located, and whether the state or territory in question has legislated to extend the application of the FW Act.[47] In summary, many of the organisations that might agree to host university students undertaking WIL placements are covered.[48] Where host organisations are not governed by the FW Act they are governed by state labour laws, which do not include exceptions equivalent to the vocational placement exception.[49]

The definition of 'vocational placement' is not as clear as it might be,[50] and to date there is not any significant judicial analysis of how it should be interpreted. The definition is provided in section 12 of the FW Act, which stipulates that to qualify a placement must be:

> (a) undertaken with an employer for which a person is not entitled to be paid any remuneration;
>
> (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.

For the purposes of this article, the most important element within the definition is that the WIL participant 'is not entitled to be paid any remuneration'.

The term 'remuneration' is not defined in the FW Act, but analysis from cases suggests it is to be understood broadly and is not limited to money paid as wages or salary.[51] For example, remuneration could include 'non-cash benefits',[52] such as provision of

[46] FW Act s 12.
[47] See A Stewart et al, *Creighton & Stewart's Labour Law,* 6th edn, Federation Press, Sydney, 2016, chap 6.
[48] The FW Act covers the following hosts: in Victoria, the ACT and the Northern Territory – all host organisations; in Tasmania – all hosts that are not state government agencies; in New South Wales, Queensland and South Australia – all hosts that are not state or local government agencies; in Western Australia – all host organisations that are Commonwealth government agencies, and trading, financial or foreign corporations (including companies and most not-for-profit associations, but not individuals or partnerships).
[49] Hewitt et al, above n 5, at 9.
[50] A Stewart and R Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia,* Fair Work Ombudsman (FWO), Melbourne, 2013, at 75–82.
[51] *Equal Remuneration Decision*, above n 45, at [276].
[52] *Oliveri*, above n 44, at [26].

childcare, a laptop and even cryptocurrency,[53] provided there is a legal entitlement to the relevant remuneration. In many instances, WIL studentships, whether they consist of monetary payments or in-kind support, could fit into this very broad understanding of remuneration.[54]

Whether or not a studentship will be understood as remuneration for the purposes of section 12 may depend on several factors, including the amount of the payment and the circumstances surrounding it. The sponsor of the payment is relevant; if the sponsor is not hosting the student to undertake any work, the nexus between reward and labour is more remote and the payment is less likely to be remunerative. Further, the less that a payment to a WIL participant seems to be related to the value of the work they perform, the less likely it is to be considered remuneration.[55] In contrast, where there is a contractual obligation for the host to make a payment which seems to be related to the value of work the participant is performing (for example, it is calculated on an hourly basis), then a court may conclude the payment does constitute remuneration.[56] This is potentially problematic, as Cameron has reported that university lawyers have suggested that some host organizations may, in classifying payments as a studentship, deliberately attempt to circumvent their obligations as an employer.[57] It is unfortunate that paying a WIL participant much less than the value of their work may make it less likely such unethical conduct is identified.

The Fair Work Ombudsman (FWO), the government agency responsible for enforcing the FW Act, has suggested that the vocational placement exemption may not be impacted 'where a host organisation may elect to provide payment at their discretion and under no obligation', such as gratuities and scholarships.[58] However, this is unlikely to resolve the issues posed by WIL studentships. While a gratuity may be a discretionary payment, WIL studentships (including scholarships) are often formal arrangements which are legally binding on the parties.[59] Where a host is legally obliged to provide the WIL participant a WIL studentship, it seems this FWO analysis will not apply.

Where a WIL studentship is financially supported by the organisation hosting the WIL experience, which also benefits from any productive work of a studentship recipient completing WIL, there is a real risk the studentship may be considered remuneration. This may be exacerbated if the amount of the studentship varies according to the work the student performs (that is, different students receive different amounts in their studentships according to the value of the work they perform) or the duration of their

[53] C Cameron, 'The Regulation of Cryptocurrency to Remunerate Employees in Australia' (2020) 33 *AJLL* 157 at 163–67.
[54] However, it does seem that reimbursement for expenses incurred by WIL participants is not ordinarily treated as remuneration: *Bell v McArthur River Mining Pty Ltd* (1998) 81 IR 436 at 449. Similarly, a bonus or gratuity to which there is no entitlement would not ordinarily be considered remuneration.
[55] Hewitt et al, above n 5, at 12.
[56] *Andreevski v Western Institute Student Union Inc* (1994) 58 IR 195 at 200; *Wieland v Return to Work SA* [2018] SAET 190 at [14].
[57] C Cameron, 'The Student as Inadvertent Employee in Work-integrated Learning: A Risk Assessment by University Lawyers' (2018) 19 *IJWIL* 337 at 345.
[58] FWO, *Facilitating Student Placements – FAQs for Higher Education Institutions*, FWO, 2015, at http://acen.edu.au/wp-content/uploads/2015/03/Student-placements-FAQs.pdf (accessed 30 March 2022).
[59] Cameron, above n 58, at 345.

WIL placement. Introducing a third party to this relationship may not be sufficient to prevent a court categorising the studentship as remuneration. A 2018 study identified instances of these 'tripartite arrangements' in which the student receives the WIL studentship payment indirectly from the host organisation, who is also the donor of funds.[60] For example, the host pays money to the university, and the university then pays the student. However, such structures to make the payment indirect, by introducing a third party (the university), may not be adequate to preclude a court from characterising the studentship as being 'in substance' consideration forming a contractual relationship between the studentship recipient (as employee) and the studentship funder (as employer), albeit the arrangement is labelled as a scholarship.[61] A dispute which may have provided clarity on the legal implications of such arrangements, but was settled before trial, involved an Australian university student who spent one year with a host organisation as part of an institution program which was not credit-bearing. Instead, it was a requirement of the degree qualification and students received a pass/fail outcome. The studentship arrangement involved the host paying a 'gift' to the university which was then distributed to the student as an hourly allowance. The student alleged an employment relationship, and claimed he was owed the difference between the hourly allowance he received and the prescribed minimum wage.[62] Unfortunately, because the case was settled, we do not have the benefit of judicial analysis of the consequence of such arrangements for the purposes of the establishment of a contract of employment nor the operation of the vocational placement exception.

Overall, a WIL studentship arrangement that is remunerative is likely to expose the WIL host to a risk that they are an employer as defined at common law. As an employee, the WIL participant would therefore enjoy labour law rights including either minimum employment entitlements according to the FW Act for national system employer hosts[63] or relevant state legislation for non-national system employer hosts, [64] as well as a right to superannuation.[65] Employment protections that extend to employees include protection against unfair dismissal,[66] adverse action,[67] workers' compensation, and federal and state prohibition of discrimination and sexual harassment.[68]

---

[60] Ibid, at 341.

[61] Hewitt et al, above n 5, See also *Personnel Contracting,* above n 21, at [90] (Kiefel CJ, Keane and Edelman JJ), at [158] (Gageler and Gleeson JJ), at [200] (Gordon J), in which the High Court determined that, a labour hire agency and individual who supplied labour to the agency's client (Mr McCourt) were, based on an examination of the rights and obligations of the parties described in the contract, in an employer-employee relationship, despite the description of Mr McCourt as a 'self-employed' contractor, in that contract.

[62] A Patty, '"Fascinating Test": Uni Student, NAB Locked in Pay Dispute', *Sydney Morning Herald*, 11 May 2018, at <https://www.smh.com.au/business/workplace/fascinating-test-uni-student-nab-lockedin-pay-dispute-20180510-p4zek1.html> (accessed 30 March 2022).

[63] For example, see leave and other entitlements in FW Act Part 2-2.

[64] See Stewart and Owens, above n 51, at 72–5.

[65] Under the Superannuation Guarantee (Administration) Act 1992 (Cth) (SG Act), an employer must pay a tax or 'charge' if it fails to pay a specified percentage (10.5% in July 2022) of each employee's ordinary time earnings into a superannuation fund. The terms 'employer' and 'employee' are given their common law meaning by s 12 of the SG Act.

[66] FW Act, Part 3-2.

[67] FW Act, Part 3-1.

[68] See Hewitt et al, above n 5, at 25–30.

The potential implications that a WIL studentship may constitute consideration and therefore establish a contract of employment, and/or remuneration obviating the application of the vocational placement exemption, is a significant potential hazard for WIL sponsors who host the student. If not properly managed, WIL studentships could inadvertently contribute to an employment relationship, and lead to a situation in which a host has failed to comply with their legal obligations to WIL participants. Further, the existence of this labour law risk may have broader implications for universities with regard to their strategic objectives and reputation. If this risk proves a disincentive for hosts to sponsor WIL studentships, universities will lose a valuable means of providing practical support to students undertaking WIL. In addition, it would reduce the capacity of universities to benefit from industry connections linked with WIL studentships. For these reasons it is interesting to consider how aware university staff are of the labour law hazards posed by WIL studentships. This will be considered in Part 2 below.

Part 2 – Stakeholder Awareness

One strand of our multi-method empirical research was the completion of interviews with academic and professional staff from Australian public universities who were involved in WIL studentships. Those interviews were designed to gather insights into WIL studentship use and design, university staff awareness and identification of the risks associated with WIL studentships, and the risk management actions they adopted. The process of collecting and analysing interview data are reported separately,[69] and are not included here for the sake of brevity.

Key issues arising from the data analysis are presented below, to give insights into the extent of awareness of the labour law risks associated with WIL studentships among university staff. In reporting the results all participant names have been replaced with gender neutral and culturally diverse pseudonyms to maintain anonymity, however participant role (*policy* **-** senior management level; *legal and risk* - legal or insurance/risk personnel; or *education* - academic or professional staff coordinating or teaching into WIL programs with some involvement with studentships) and nature of institution (member of the Group of 8 – *Go8*; member of the Australian Technology Network of Universities – *ATN*) are noted.[70]

A first point that arose from analysis of the data was that the university staff interviewed were broadly aware that there were legal issues associated with WIL studentships, and that some of those arose pursuant to the operation of the FW Act. In this context, they explicitly commented on not only the legal issues but also the complexity and potential ambiguity of the application and effect of the law. As Chen (Policy: Go8) stated:

> Universities have a whole range of offerings in this space and there are some Fair Work issues where there's a lack of clarity around valuing what students do.

[69] Cameron and Hewitt, above n 9, at 16–19.
[70] Interviews were also conducted at an Innovative Research University and an institution based in an outer-suburban area; however, the analysis revealed those interviews did not shed light on the issues canvassed in this article.

By and large, interviewees indicated that they did not have adequate specialist knowledge to identify and respond effectively to the legal complexities of the broad range of WIL studentships arrangements that could arise. Consequently, they suggested that access to specialist legal advice in the planning, negotiation and finalisation of WIL studentship design was important. However, if this was to be effective, interviewees clearly identified that adequate resourcing was imperative. Min (Policy: ATN) succinctly explained the issues that arise when there are inadequate experts to respond to questions:

> And of course enough staff workload as well. Like, we've got a WIL team and they're always super busy and sometimes, sadly, then emails can be a bit slow occasionally getting back to people and that's terrible, isn't it – so proper resourcing for the WIL team.

In addition, as Angel (Policy: Go8) identified, the legal advisor needed to be aware of the context of the WIL studentship for their legal advice to be relevant.

> [H]aving someone who has a legal background, understands all of that, is absolutely critical. So that's one of the lessons I think for us with this is that the person who's at the centre of the hub-and-spoke model… in order to find solutions when all the disparate problems come together and then you need someone in the centre who understands all of it. So Legal is not going to understand what a faculty is going to want to do... and then the Faculties have got no clue about the legal stuff. So having someone who sits in the centre who can arbitrate and then problem-solve and bring all the teams together, is absolutely critical.

Staff participants all agreed it was important to develop a system that informed staff about potential issues with WIL studentships, and ensured issues were identified early and specialist assistance was sought in a timely manner. In addition, it was recognised as important to create an environment in which university staff had confidence, and support from management, to disclose the legal risks attached to WIL studentship arrangements. As Min (Policy: ATN) stated:

> Most things are pretty straightforward if it's got time and you've worked it all out, isn't it? How do you get – this is back to what we were talking about before – a culture where, it's like risk isn't it? Because we all know risk happens but it's just managing risk, so how do you get people [who are] managing that to know it's fine to have it and we'll help you not to cover it up and not to just – or the opposite, end of semester go, 'Okay, I've got a problem, help me'.

A risk management practice raised in the interviews was provision of training about the various risks, including legal risks, associated with WIL studentships for the broad range of university staff involved with them. As Jamie (Education: Go8) explained, if all the staff involved in WIL studentships were not aware of the issues sufficient to identify potential problems and seek specialty advice as required, those with expertise were obliged to oversee all projects to ensure issues were identified and responded to appropriately.

> I've got to say I think there should be training on this. We need to have proper training for all WIL practitioners so that they feel comfortable and I think there's a lot of talk

> quite often particularly from Legal, not necessarily at the university but just in general, that 'You are responsible against the Fair Work Act, you are personally liable' and that frightens a lot of WIL practitioners. So unless we're providing the proper training, don't put them in that position.

Yan (Legal & Risk: ATN) also emphasised the importance of educating personnel in the institution that there are legal risks associated with WIL studentships.

> So I think it's important that people are aware of that and that's the issue again as we were saying earlier, is making sure that people actually understand that they can't just go and accept everything and anything.

An alternative to educating a broad range of staff was the establishment of systems ensuring expert staff from legal and risk reviewed all potential WIL studentships. As Aroha (Legal & Risk: ATN) explained:

> I think any WIL arrangement with any sort of stipend probably will come to us, at least in the first instance, for a bit of a look… I would say, while I can't see them all, probably a good idea just to make sure to the extent that I can, bearing in mind I'm not Tax and I'm not Employment but, you know, I could at least have a first look at something that's structured that way and go, 'No, this doesn't look kosher – it's hourly rates, the description is borderline, a job that they probably already have' – you know what I mean?

Conversely, Angel (Policy: Go8) explained the potential risks of proceeding without an awareness of the legal issues pertaining to WIL studentship initiatives.

> The legal issues, the government requirements, Fair Work, Legal, all of that stuff is so complex but absolutely the heart of it. So trying to pursue these sorts of initiatives without people who really understand the law, you are setting yourself up for way too many problems that will only disadvantage the students and the partner relationships.

Interestingly, some interview participants suggested that selected third parties attempted to manipulate the law to minimise their own legal exposure, or to transfer potential liability to the university rather than donors or hosts. This was commonly attempted by placing the university between the WIL studentship sponsor (who was often, although not always) the host, with the sponsor transferring funding to the university and the university in turn being responsible for paying money to students. Jamie (Education: Go8) noted:

> [T]hey love the fact they can pay the university [and] the university pays the student because it's like that abdication of responsibility.

Interviewee comments also suggested that in some instances a university proactively undertook this role for a host/sponsor. For example, Yan (Legal & Risk: ATN) commented:

> I do think it's easier if it doesn't go from the third party straight to the student insofar that sort of has that arms-length between the money and I guess the work that is being delivered by the student, if that makes sense?

However, while these comments suggest an attempt to make it less likely the WIL studentship could constitute legal consideration for the purposes of an employment contract, this may not be an effective strategy. As identified by the High Court in *Personnel Contracting*, which involved a labour hire relationship, the courts will look beyond the descriptions, or labels, the parties ascribe to a triangular arrangement, and focus on the 'totality of the relationship'[71] between the parties, which in the case of a comprehensive written contract involving the host, student, and university, is the rights and obligations of the parties established in the contract.[72] Therefore, a host-university-student transfer that may be an attempt to circumvent an employment relationship may not be sufficient to avoid a court or tribunal, on reviewing the contractual rights and obligations of the student and the host (as donor) in a WIL studentship agreement, finding that there is a contract of employment.

Conversely, the interviews demonstrated that sometimes universities insisted funding arrangements be organised between sponsor and student and refused to be involved. This risk management approach was summarised by Min (Policy: ATN):

> So, it sounds terrible, but our [institution] position was that we wanted to distance ourselves completely from it, so at the end of the project the students worked with the organisation directly… you know, we didn't want to get involved in any of the certification or anything so we sort of, in a nice way, wiped our hands of it, which is not good though for the student.

As implied at the conclusion of Min's comment, some interviewees recognised that by abdicating responsibility for WIL studentships, and the associated payments, universities were transferring risk to students, who were ill-equipped to manage it. For example, Aroha (Legal & Risk: ATN) observed:

> [I]t also has tax implications these things, the studentships and I mean that's something I can't advise on and that starts you going into territory where, you know… we're potentially putting students in a compromised tax situation and it's like, 'Well no-one here is going to advise the students on their tax implications' and it's pretty much, 'Go off and get your own tax advice' and so, well, how many students are tax lawyers, I don't know, not many.

Jamie (Education: Go8) suggested that one way to manage the risks to students was to encourage hosts to offer paid work to students, rather than sponsoring studentships.

> And often when companies are offering one-off bursaries like we talked about before, the simplest form of a studentship where they are just going, 'Well, okay, well here's $2,000 to cover your travel expenses', we aim to convert those to paid placements as quickly as we can… The hosts prefer it actually now because they feel that they are doing the right thing by the student and they feel they're doing the right thing by Fair Work.

In summary, the interview data suggests that there is a general awareness among university staff who interact with WIL studentships that they can have legal

[71] *Personnel Contracting*, above n 34.
[72] Ibid, at [59]–[61] (Kiefel CJ, Keane and Edelman JJ).

consequences, especially under the FW Act. However, most staff (with the exception of the two interviewees from the legal and risk cohort) did not feel that they were sufficiently expert to recognise and adequately respond to the potential legal issues. For these reasons, ensuring informed legal scrutiny of WIL studentships is imperative to identify potential risks for hosts and the university, and to design and implement the WIL studentships in a manner to minimise the hazards. Three risk management methods suggested by interviewees were:

1. the provision of WIL studentship agreements involving the student, host (as donor), and the university which sets out the rights and obligations of the parties with respect to the WIL experience and the WIL studentship;
2. ensuring all WIL studentship arrangements were examined and approved by legally educated individuals; and
3. providing training to staff involved with WIL studentships sufficient to enable them to identify potential hazards and to seek specialist advice regarding them.

In all instances, it was suggested the legal advisers needed to be aware of the broad context of the WIL studentship and be sufficiently resourced to review studentships promptly. However, there was a strong implication from interviewees that these systems were not uniformly or effectively embedded in their institutions. In light of this, it is interesting to examine actual WIL studentships being advertised in Australia, and consider the potential labour law hazards to which they might give rise. This will be done in Parts 3 and 4.

Part 3 - WIL Studentships in Australia

This part draws on the second strand of our multi-method empirical research to identify labour risks from the design of WIL studentships. Before this research was undertaken, there was little broad, cross-discipline knowledge of the features of WIL studentships. To fill this gap, we undertook qualitative research by collecting publicly available data about WIL studentships through a series of targeted web search searches. The data collection, using a methodology adapted from McDonald,[73] was refined through a pilot in late 2020, but was primarily conducted over a 4-week period between mid-February and mid-March 2021.[74] The data collection and analysis phases of the research are reported separately,[75] and are not included here for the sake of brevity.

Importantly, the criteria used to define a WIL studentship were:

- a formal arrangement which is intended to be non-remunerative financial support (whether in cash or by way of vouchers, program fee waivers, travel cards, provision of accommodation or travel etc.) to a tertiary student; where

[73] See generally P McDonald, 'Open Market Internships: What do Intermediaries Offer?' (2020) 33 *Journal of Education and Work* 33.
[74] The authors acknowledge the invaluable contribution of Charlotte Scobie to this research.
[75] Cameron and Hewitt, above n 9, at 14–16.

- completing a WIL placement was either an essential term (the student must complete WIL to receive the studentship) or a non-essential term (WIL was one of a variety of learning experiences the studentship could cover as part of the studentship).

A loan advanced to the student, the payment of a wage or salary, a gratuity or the discretionary reimbursement of expenses by the host which is not part of any formal arrangement involving the host, institution and/or student, were not considered to be WIL studentships.

A total of 59 WIL studentships were identified, and information about the features of each WIL studentship was recorded. The features relevant to labour law risk is reported at Table 1.[76]

Table 1: WIL studentship features relevant to labour law risk

Payment: $ (n=67)			Payment: Use (n= 60)			Payment: Source (n=62)			WIL as essential term (n = 59)		
Item	N	%	Item	N	%	Item	N	%	Item	N	%
<= $1,000	18	27	Not Specified	38	63	University	18	29	Essential	38	64
<= $4,000	20	30	Travel + Living	15	25	Host Organisation	17	27	Not Essential	21	36
<= $10,000	12	18	Student Fees	7	12	Individual Donor	10	16			
<= $20,000	8	12				Government	6	9			
> $20,000	7	10				Third party WIL provider	4	7			
N/A	2	3				Industry Association	4	7			
						Corporate Donor	3	5			

There are various aspects of WIL studentship design relevant to a consideration of labour law hazards. First, the source of the studentship payment, that is, who provides the funding for the WIL studentship, may intensify labour law hazards. Separation of WIL host and WIL studentship sponsor could minimise some of the legal risks described in Part 1 above, as it is less likely a payment from a third party (for example, an individual donor, professional association, or government department) would be considered legal consideration relevant to an agreement between a host and WIL participant, or remuneration for the WIL placement.

Second, most WIL studentships which were funded by the WIL host in which the quantum of the studentship was specified (14/16 WIL studentships: 88%) involved

[76] Some WIL studentships fell into multiple categories, therefore the payment amount, payment use, and payment source in Table 1 sum to more than the number of WIL studentships.

payments equal to or greater than $4,000. This is significantly more than the quantum in other WIL studentships, and potentially increases the risk of legal scrutiny to determine whether the payments are, in fact, remunerative. One potential trigger for such increased scrutiny is the quantum of payment, the second is that the funder also hosts the student during the WIL experience, and may be benefitting from the WIL participant's work.

A third potential hazard relates to the use of studentship payments. 63% of WIL studentship arrangements (38/60) did not mandate or specify the intended uses to which financial support could be directed. This potentially increases the risk the WIL studentship payment could be considered remuneration, by missing the chance to restrict the payment in terms which would make that legal conclusion less likely. For example, some WIL studentships were restricted to: reimbursement for travel, accommodation and living expenses incurred by students on their WIL experience (15 cases); the waiver, deduction, or payment of tuition fees attached to the WIL experience (5 cases); or to cover third party WIL provider fees (2 cases). These types of financial support are unlikely to be considered remunerative. Tuition fees relate to the contract of enrolment between the student and university for the WIL subject, in which the host organisation is not a party. However, such limitations are arguably most effective to minimise the labour law hazard of an unintended employment relationship if the payment use is a condition of the studentship agreement (or 'mandated'). This did not, from our research, appear to consistently be the case. For instance, 14 of 15 WIL studentships stipulated that the financial support provided was intended to cover travel, living and accommodation expenses. However there did not appear to be any process to approve or audit the spending, or for seeking reimbursement of expenses from the donor. As a result, there did not appear to be any enforceable obligation on the student to spend the studentship payment on the stipulated expenses. In the absence of any mandate for a student's use of the payment, a tribunal is likely to scrutinise the purpose and provider of the financial support to determine whether it is remunerative. In addition, when the WIL studentship did not provide a mechanism for reimbursement of actual expenses incurred, it is possible the quantum of the studentship may not adequately compensate the student for the expenses associated with their WIL experience.

A final labour law hazard arises in situations where completing WIL (as opposed to another form of work) was not an essential term of the studentship (36% of studentships identified). This meant that the student had the option of completing WIL as part of the studentship or undertake other non-WIL experience(s), such as work experience which is not part of a university program or course. These non-WIL work experience opportunities do not satisfy the FW Act definition of a vocational placement as the placement would not be 'undertaken as a requirement of an education or training course'.[77] This potentially increases the labour law risks of a studentship payment. If a tribunal finds that a non-WIL placement is not genuine work experience,

[77] FW Act s 12(b).

then, irrespective of the source of the studentship funding, an employment relationship is likely to exist, and the student will be entitled to the minimum prescribed wage and other statutory benefits.

As part of the authors' research, four cases were developed, which were intended to represent the common features of WIL studentships identified in the web-based study.[78] In Part 4, two of these cases will be considered as a vehicle for examining the labour law risks in current WIL studentship practice in Australia:

1. Whole of degree: The WIL experience and studentship payments occurred throughout the degree; and
2. Location-based: The WIL studentship was conditional on the student completing WIL at a specific location (for example, a rural or remote setting).

Part 4 – Cases

Case 1 - Whole of degree WIL studentship

> The Bachelor of Laws (Professional) is a specialist 3-year degree incorporating 1400 hours of placement with a workplace host. A scholarship supporting the degree is worth $40,000, paid by the host to the institution, and then the institution pays the student in bi-annual instalments over 3 years.
>
> All placement hours are unpaid and taken with the host. 1,000 placement hours are undertaken during Years 2 and 3, and the timing is by agreement between student and host. Students complete the remaining 400 placement hours as a one trimester WIL course called 'Professional Placement' for which they receive credit in Year 3 (equivalent full time study load).
>
> To be eligible for the scholarship, the applicant must be enrolling full time, is a domestic student*, and has an ATAR of 95+ or equivalent qualification. Selection is based on: (a) an interview during which students demonstrate their non-technical skills (interpersonal, teamwork etc) (b) academic and extra-curricular achievements, and (c) a 1,000-word statement demonstrating their interest and commitment to Legal studies. Students must maintain a 65% GPA / WAM during their degree to remain eligible.
>
> *Domestic: An Australian citizen, New Zealand citizen, Australian permanent resident, Australian humanitarian visa holder

This WIL studentship will offer valuable financial support for student recipients, not only to undertake one WIL placement, but for the duration of their tertiary qualification. However, there are some issues with the arrangement which give rise to possible legal risks.

First, the WIL studentship ($40,000 over 3 years) could constitute legal consideration for the work experience undertaken by the student with the host (which is also the WIL studentship donor) and form the basis of a contract of employment. The parties may

[78] Cameron and Hewitt, above n 9, at Appendix F.

have attempted to avoid this outcome through the tri-partite nature of the funding arrangement, in which the host provides funds to support the WIL studentship to the university, which then distributes the funds to the student recipient in instalments. However, a tribunal will focus on the 'totality of the relationship' and could look behind such an arrangement.[79] In the absence of a 'sham' or an arrangement not wholly committed to writing, the relationship will be considered according to the rights and obligations of the student, university, and the sponsor as outlined in the contract.[80] The relevant contract may specify details of the WIL experience and WIL studentship in one agreement, for example in cases where the WIL studentship donor is also the host, or be contained in separate agreements. In this case, the contract between the parties, whether wholly committed to writing or otherwise, presumably stipulates the student has the right to receive financial support which the host organisation is obliged to provide. The university involvement as intermediary does not impact the contractual rights and obligations of the parties. Alternatively, a tribunal could simply look behind such an arrangement, and disregard it if it appears to be a sham. The funding arrangement does not, therefore, eliminate the possibility that the WIL studentship payments constitute legal consideration by the host leading to the creation of a contract of employment.

However, in counter to this argument, the host organisation is funding the WIL studentship for the duration of the student's course of study, including a first year in which the student undertakes no work experience with the host. This supports the proposition that while the WIL studentship is valuable, it is not consideration for the WIL the student undertakes. However, as discussed above in Part 1, there remains a risk that the supervision and training offered by the host organisation to the student constitutes legal consideration, even in the absence of a monetary payment.

The impact of the WIL studentship on the application of the vocational placement exemption should also be considered. If the host/sponsor is a national system employer, it may seek to rely on the protection offered by that exemption. Whether it is applicable depends on satisfying the criteria of s 12 FW Act. Two issues arise here. First, whether both the 400 hours of work experience in the 3rd year of study for which the student receives academic credit and the additional 1000 hours of work experience are 'undertaken as a requirement of an education or training course'.[81] These two components will be considered separately. It is likely that the 400 hours will satisfy this requirement.[82] However, for the exception to apply the student must satisfy the second element of s 12, and not be entitled to any remuneration for that 400 hours of work experience.[83] In this context the WIL studentship payment could arguably be considered remunerative. If this was the case, then the vocational placement exemption would not apply, and if the placement would be considered a contract of

[79] *Brodribb*, above n 34, at [20]; *Hollis,* above n 34, at [24], discussed in *Personnel Contracting,* above n 21, at [55]–[62] (Kiefel CJ, Keane and Edelman JJ).
[80] See *Personnel Contracting,* above n 21, at [57]–[61] (Kiefel CJ, Keane and Edelman JJ).
[81] FW Act s 12(b).
[82] For further analysis see Stewart and Owens, above n 51, at 75–81.
[83] FW Act s 12(a).

employment under the common law, the host will have failed to provide the student participant their entitlements and will be liable both to remedy that and to potentially pay a pecuniary penalty.[84]

The application of the vocational placement exemption to the 1000 hours is more complex and turns on whether that work experience is a requirement of Bachelor of Laws (Professional), or simply an opportunity provided to students. This is unclear within the facts of the case. If this additional work experience is not a requirement of the degree program, then the vocational placement exemption cannot apply. If this is the case, then the rights of the WIL participant will turn on whether a common law contract of employment has been formed with the host. One point to note in this context is that if a contract of employment has been formed, it is possible that the WIL studentship payment in this case divided by hours worked would be sufficient to cover the applicable minimum wage requirements ($40,000 / 1400 hours = $28.57/hour). However, this does not satisfy any of the other rights of an employee (such as annual leave).

A strategy to minimise the labour law risk posed by this studentship arrangement would be (i) to reduce the quantum of the WIL studentship, and (ii) for the university to encourage the host and the student to enter a separate employment (commensurate in quantum to the reduction in the studentship) contract for the 1000 hours additional work experience. This would minimise the risks that an unintended employment contract was being created, by forming an intentional contract, and ensure that the student received all the entitlements of an employee for that period of work. There would be no significant reduction in benefit for any of the parties from such a change, so the advantages of the WIL studentship would be maintained, while reducing the potential for negative outcomes.

Case 2 - location based WIL studentship

A state Department of Education (DoE) offers undergraduate domestic students a 'Remote Education Grant' which is aimed at sparking student interest in pursuing a graduate teaching post in a rural or remote setting. The grant amounts are scaled from $1,000 to $3,000 according to the distance between the student's place of residence and the location of the student's placement, being a government-operated (public) school.

The Grant is paid as a lump sum prior to the start of the placement, and is intended to assist with travel and living expenses associated with the placement. Students are eligible to apply for a Remote Education Grant for each placement they undertake.

As part of the application process (which includes CV, cover letter and evidence of financial disadvantage), students must submit a 500-word statement as to

[84] FW Act, ss 539, 546.

why they have chosen to undertake placement in a rural or remote location, their strengths in a rural/remote context, and estimated additional expenses.

Selection criteria is based on: (a) student statement; (b) academic merit; and (c) financial disadvantage

This studentship is strategic in that it responds to a particular problem, that of recruiting teachers to work in regional and remote areas. The funding for these WIL studentships is provided by the DoE, which also administers the studentship and pays the successful applicants. Because of the nature of education, the DoE will also be the WIL host for placements undertaken in government schools. Accordingly, there is a minor risk that the studentship could be seen to constitute legal consideration giving rise to a contract of employment between the department and WIL participant. However, because of the strict rules around the activities student teachers can undertake in the classroom, it is less likely that the student teacher is providing legal consideration to the host than might be the case in other work experience contexts.

Further, the FW Act will not apply to government departments, except in Victoria, the Australian Capital Territory, and the Northern Territory. Therefore, except in those jurisdictions the department cannot seek to rely on the vocational placement exemption if a common law contract of employment exists. In Victoria, the ACT and the Northern Territory there is a minor risk that the agreement to pay the WIL studentship could be seen as creating an entitlement to remuneration, meaning the exemption in s 12 does not apply. This risk could be avoided by structuring the WIL studentship to reimburse students for actual expenses incurred in undertaking the WIL experience, which would not normally be considered remuneration. This may increase the administration costs for the department but would also maximise the benefit for students, by ensuring the quantum of the WIL studentship was commensurate with the costs of their placement, rather than a mere approximation thereof.

This article concludes by drawing on the doctrinal analysis in Part 1 and the multi-methods research findings reported in Parts 2, 3 and 4 to suggest strategies to manage the labour law risks associated with WIL studentships.

Part 5 – Conclusion: Managing labour law risks

There are labour law issues (or 'risks') associated with WIL studentships. A WIL studentship may involve legal consideration necessary to establish a contract of employment. Alternatively, it may be because a WIL studentship paid by a national system employer host constitutes remuneration, the vocational placement exception will not apply, and the host may not have complied with its obligations to employees under the FW Act.

When these situations arise, the primary responsibility will fall on the organisation deemed to be the employer. This would normally be the WIL host, typically an organisation external to the university. However, the increasing numbers of WIL placements within universities themselves (such as WIL placements at a university health clinic, or in the finance, marketing, or legal divisions) mean in some instances

the legal employer may in fact be the university itself. The host could face penalties in addition to their obligations to comply with the relevant obligations to the WIL participant/employee including paying the prescribed wage, withholding tax, and making superannuation contributions. In addition, even if it is not the host, the university which organised the WIL placement could also be potentially liable under provisions such as s 550 of the FW Act, to the extent that they were knowingly involved in the relevant breaches. Being exposed as having failed to comply with relevant labour laws, and potentially exploited a vulnerable student, may also lead to reputational damage to both university and host.[85]

It is challenging to eliminate the risk that a WIL studentship payment by a host could constitute consideration establishing a contract of employment with the WIL participant. One risk management strategy is to convert the WIL studentship to a discretionary gratuity or bonus paid at the end of the WIL experience. However, this arrangement would reduce the certainty of financial support and consequentially its potential to redress the risk of inequitable access to WIL.[86] It would also limit the potential reputational advantages associated with offering a WIL studentship for sponsors.

Another risk management strategy is to break the link between the WIL host (which is, arguably, receiving consideration from the student spending time in the host's business or organisation) and the WIL studentship sponsor. In fact, many of the WIL studentships identified in the web-based study (Part 3) were paid by parties other than the host including individual and corporate and individual donors, industry associations, and government organisations. For instance, a state or territory Law Society could fund a WIL studentship to support a law student to undertake WIL at a local firm. In the absence of other factors, the WIL participant's entitlement to receive a monetary payment from the Law Society seems unlikely to constitute consideration in the arrangement between the participant and the law firm host. Overall, ensuring that WIL studentships are sponsored by an organisation that does not benefit from any work performed by the WIL participant may limit the risk the WIL studentship is considered remunerative and prevents the FW Act vocational placement exemption applying to the WIL experience. Additional actions which may minimise this risk include:

- limiting WIL studentships to reimbursement for expenses, which are not traditionally considered as remuneration; and
- standardising WIL studentship amounts, particularly in cases where multiple WIL studentships are offered by the same sponsor or a pool of sponsors as part of a university program, to minimise the risk that they are commensurate with the value of the work performed and therefore regarded as remuneration.

[85] Cameron, above n 58, at 337.
[86] The equity implications of WIL, and how WIL studentships can respond to them, is discussed further in Cameron and Hewitt, above n 9.

As confirmed by the 2022 cases of *Personnel Contracting*, *Jamsek* and *Tracey*, careful contract drafting is also critical to managing the risk of the unintended creation of a contract of employment. Labelling a studentship payment as 'not remuneration' in a contract does not override a tribunal's power to find that there is an employment relationship based on the parties' rights and obligations ascribed in the contract. This is a timely minder for WIL hosts and university lawyers. Empirical research reported in 2019 identified that WIL contracts sometimes stipulated that the student is not, or is not intended to be, an employee.[87] While such inclusions are unlikely to be effective where they are contrary to the nature of the relationship established by the contractual terms when viewed holistically, judicious inclusion of other relevant contractual terms could minimise the risk a contract of employment is created. For this reason, as well as to ensure the obligations under the contract are clear, a WIL studentship contract should stipulate the purpose of the studentship (for example, the provision of assistance to a student in financial need), the uses to which the student can put the payment, the quantum, timing and mechanics of payments, any associated conditions (for example, promotion of studentship by the recipient, continuing enrolment, academic performance etc), provisions for termination of the studentship (for example, as a consequence of student misconduct), as well as terms designed to minimise labour law risks. Careful drafting and review of the contracts by university legal personnel is therefore essential.

A related risk management strategy is to seek legal advice about each WIL studentship. However, the uncertainty of the law, and its reliance on factual nuance as identified in Part 1, mean that it will not always be possible to accurately predict the legal implications a tribunal or court will impose on any factual situation. A more effective approach, which was identified by interview participants in our research (Part 2), was to encourage hosts who want to support students to gain practical experience to hire them as employees. This clarifies the legal obligations which apply and ensures that the host, and student, have increased transparency about the nature of their relationship and the rights and responsibilities it involves. Until the legal uncertainty relating to WIL studentships is resolved, this is the most effective way to clarify parties' rights and obligations, and to minimise the risks.

We acknowledge that the risk management strategies discussed above are not sufficient to eliminate all risk associated with WIL studentships. There remains uncertainty (and consequential legal risk) relating to the treatment of WIL studentships under labour law, namely whether the studentship arrangement may be a factor in concluding that the WIL placement is an employment relationship, and/or that the vocational placement exemption in the FW Act does not apply.[88] Clarification of the circumstances in which financial support will be regarded as a non-remunerative 'studentship', as distinguished from remuneration creating a contract of employment, would be welcomed by stakeholders . While the FWO could offer further guidance on

[87] C Cameron, 'Risk Management by University Lawyers in Work Integrated Learning Programs' (2019) 45 *Mon L Rev* 29 at 48.

this point, such advice would be non-binding. As a result, legislative reform or a clear legal precedent is required.

We suggest that a starting point for formulating a 'studentship test' to distinguish a WIL studentship arrangement from employment, may lie in considering the primary purpose of the payment. The primary purpose of payment in a WIL studentship should be to provide financial support for a student's tertiary education, which includes WIL. Work may be incidental to the WIL experience, but student learning remains at its core. In contrast, payment in an employment context represents the consideration for work. The key distinguishing factor therefore appears to be whether the payment is principally for educational purposes, to support a student's learning (studentship) or to provide a reward for work performed (employment). This studentship test may be supported by a series of factors including: the completion of WIL as part of the studentship, the relationship of the sponsor to the student, the type of financial support provided, and the timing of payments. Taxation law may also be usefully employed to assist with formulating a 'studentship test'. For instance, the Income Tax Assessment Act 1997 (Cth) exempts scholarship, bursary and allowance amounts paid to a full-time student from income tax, subject to six exceptions.[89] Three of the exceptions could be adopted in a studentship test, including:

- the payment is conditional on the student becoming or remaining an employee of the donor;[90]
- the payment is conditional on the student becoming or remaining a party to a contract with the donor that is wholly or principally for labour[91] (for example, engaged as a contractor or to work on a research grant); and
- the payment is not provided principally for educational purposes.[92]

WIL studentships have an important role to play in providing financial support for students to complete WIL experiences, as well as potential reputational and strategic benefits for universities, donors, and host organisations. However, the current level of labour law risk posed by many WIL studentships, and the challenges of effectively managing that risk, means that universities, donors, and hosts may be reluctant to involve themselves. This is a lose-lose outcome. If the regulatory context is to successfully maximise the opportunities to deliver WIL studentships and minimize the labour law hazards of WIL studentships for all stakeholders involved, reform is required.

[89] Income Tax Assessment Act 1997 (Cth) s 51-10, Item 2.1A.
[90] Ibid s 51-35(c).
[91] Ibid s 51-35(d).
[92] Ibid s 51.35(e).