



Law Council
OF AUSTRALIA

Business Law Section

Mr Sandford D Clark
Chairman
Law Admissions Consultative Committee
Via email: sandford.clark@ashurst.com
c.c. frances.mcmurray@lawcouncil.asn.au

25 March 2015

Dear Mr Clark,

Review of Academic Requirements for Admission to the Legal Profession

This submission, prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia, addresses question 6.1 of the Law Admissions Consultative Committee paper on Review of Academic Requirements for Admission to the Legal Profession (*'LACC paper'*), namely whether Company Law should be omitted from the Academic Requirements.

Our strong submission is that Company Law should not be removed from the compulsory list of requirements for admission to practice. There are a number of reasons why we say this, including the importance of core principles, wider relevance of the subject, insufficiency of the PLT Competency Standards in this area and inappropriateness of comparison with the United Kingdom. Most importantly, students will find it very difficult to find employment in the legal sector if they choose not to take Company Law as part of their degree. These points are addressed in turn.

Core Principles and Wider Relevance

Whether students wish to engage in the corporate area in their future careers or not, it is important for practitioners to have a sound understanding of the key principles in order to be able to deal with, and advise people who are dealing with, corporations. Corporations play a vital role in a wide range of areas of practice and professional life, and the corporate form is central to virtually every aspect of professional activity that law graduates (practitioners or otherwise) may be engaged in. For example, a significant number of family businesses are conducted through proprietary companies. Consequently, a detailed knowledge of corporate law is essential for solicitors giving advice in relation to the setting up of these businesses, as well as in providing for and dealing with, circumstances involving

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

death or family separation. Use of a corporate entity is also pervasive in other contexts, including government statutory corporations, charitable institutions, and industry bodies. There is a clear need for law students to have a sound understanding of the implications of the creation of a corporation as an artificial legal entity, including in relation to authorisation and execution of documents by corporations.

A detailed understanding of directors' duties is very important - these duties are complex given the combination of general law and statutory duties and given the detailed elements of certain of the statutory duties (such as the insolvent trading duties and the related party transactions regime). In light of the liability that directors face, it is essential for practitioners advising, or dealing with, directors to have a detailed knowledge of these duties. It is also useful to introduce practitioners to other forms of association such as partnership, unincorporated associations, joint ventures and unit trusts.

An introduction to the key principles of insolvency is also needed for practitioners to have some understanding of the relevant processes and requirements if they are advising, or dealing with, corporations in financial distress. In addition, an understanding of the core principles regulating capital maintenance is important so that students understand the regimes governing transactions involving capital reductions, share buybacks, dividends and financial assistance.

Moreover, the Company Law requirements give practitioners a solid grounding in other key principles. These include agency, the application of fiduciary and equitable principles in the context of a relationship other than that of trustee and beneficiary, convening and holding meetings properly and significant policy issues such as corporate social responsibility and sustainability. These policy issues will play a key part in the future direction of the law in general for students. Similarly, governance structures are an integral part of corporate law teaching, with widespread application to the environments law graduates are likely to be employed in.

Company Law also strengthens the statutory interpretation skills of practitioners given that much of the law is contained in the *Corporations Act 2001* (Cth). In fact, statutory interpretation needs to be taught in context and Company Law is an ideal context in which principles of statutory interpretation can be applied, and therefore, taught. In addition, it allows students to understand the parallel operation of statutory and general law regimes. Moreover, Company Law enables students to see how various areas of law intersect. Due to the nature of the law curriculum, students sometimes tend to view subjects in compartments. Company Law does well in breaking down this kind of thinking, due to the nature and influence of companies in modern society. Examples include where a company makes a contract (which involves principles of company law and contract), where a company commits a wrong (which involves principles of company law and torts/criminal law), the impact of companies on human rights and the environment, and a study of the constitutional basis of company law.

Company Law has been compulsory for over 20 years and in that time corporations have become infinitely more important. Rather than being removed from the list of compulsory requirements, the significance of Company Law should continue to be recognised.

PLT Competency Standards Insufficient

In contrast to the detailed core principles taught as part of Company Law, the PLT Competency Standards focus on setting up 'simple business structures' and providing 'basic advice' on finance, securities and companies' and their officers' obligations. As a result, they do not appear to cover important areas such as the effect of the company's constitution, corporate contracting or capital maintenance, or with the complexities of breach of officers' obligations and the remedies available to the company, to the Australian Securities and Investments Commission and to members upon proof of breach. In addition, the Competency Standards appear only to brush the surface of directors' duties, which are in fact complex due to the combination of statutory and general law duties.

Furthermore, Company Law provides a valuable opportunity to incorporate teaching the legal and moral issues related to loyalty and conflicts of interest in fiduciary contexts. Few areas of law are as well-suited as Company Law to illustrate how particular decisions require an ethical perspective. Without a proper understanding of the corporate structure, however, students may not have an opportunity to develop the insight to detect and deal with these types of issues. It is doubtful that the time and attention spent on company law in the PLT Competency Standards will be sufficient to develop this deeper thinking.

In an article entitled 'Teaching Good Corporate Lawyering' ((1999) 3 *Flinders Journal of Law Reform* 97, 98) Christine Parker and Paul Redmond state that

[b]ecause of their complexity it is difficult to be aware of, or understand, the ethical and social implications of routine behaviours in corporations and bureaucratic organisations without a guide. We short change our students if we do not explicitly teach them how to untangle difficult issues such as to whom within a corporate entity their loyalty is owed, what responsibility legal advisers have for corporate actions, including those that eventually cause social harm, or, how to make normative judgments about the goals of social and economic regulation. Unless we specifically address these issues, we will leave good students who want to graduate to become good lawyers and good citizens unequipped with the moral and social imagination to put their desires into practice.

We agree with this point.

Comparison with United Kingdom Inadvisable

A comparison with the United Kingdom (as outlined in the LACC paper) is not completely apposite because the *Companies Act 2006* (UK) fully codifies directors' duties and also because the United Kingdom does not have the public enforcement regime that we have Australia (which includes the civil penalty

regime). It is also important to note that the route to admission to practice is different in the UK, where completion of a two year training contract as a 'trainee solicitor' is the last requirement that has to be complied with in order to be admitted to practice. This requirement potentially presents graduates, or 'trainee solicitors', with an opportunity to learn aspects about the practice of corporate law to supplement any knowledge that they may or may not have. Australian admission requirements are different, however, and we (as educators) have a greater responsibility to ensure that graduates' law degrees equip them appropriately for practice. This means that the fact that Company Law is not compulsory in the UK does not mean that it should not be compulsory in Australia.

Job Prospects

If Company Law were to be made non-compulsory, students who chose not to undertake the subject would find it very difficult to obtain graduate positions in the legal area. This is particularly due to the significance of companies in society and the fact that Company Law reaches into many areas of practice. Our strong recommendation is, therefore, that Company Law should continue to be compulsory so that such students are not disadvantaged.

Summary

In summary, Company Law is a key academic requirement due to the importance of the key principles taught and the fact that these principles are of significant relevance outside of the corporate context. The PLT Competency Standards are insufficient to properly equip graduates in these key principles and students choosing not to take Company Law would be highly disadvantaged in the competitive market for graduate legal positions. To quote the LACC, Company Law is "is an area of such basic potential importance to the great majority of practitioners today that no law graduate should be permitted to practise without it."

The Corporations Committee would be pleased to discuss any aspect of this submission. Please contact the Chair of the Committee, Bruce Cowley, on 07 3119 6213 if you would like to discuss this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves, Chairman
Business Law Section