

Book Review – Legal Professional Privilege in Australia (3rd ed)

Ronald J Desiatnik

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In a time of voluntary reporting by corporations and freedom to information, privacy and confidentiality issues often arise.¹ However, legal professional privilege ('PLP') is the exception to the movement towards transparency.² Over time, PLP has been recognised as crucial to the legal system, ensuring that persons are free to discuss matters pertaining to litigation without fear that these discussions will later be used against them.³

The book begins by introducing readers to the doctrine of PLP in Australia before exceptions are explained and analysed in the context of their development. Desiatnik informs readers that despite the central and foundational nature of the doctrine, the scope and application of PLP has shrunk.⁴ This is somewhat unsurprising in an era where the approach of courts is to take a broad interpretation of 'relevant evidence', so all probative evidence is available to decision-makers.⁵ Desiatnik, through strict doctrinal analysis, maintains the development of PLP in this way enables the balancing of client and public interest. This doctrinal analysis offers the reader a balanced view of the law, although it does make the arguments difficult to discern at first reading.

Desiatnik consistently maintains the dominant purpose test set out in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* is at the core of the debate of waiver and exceptions to PLP.⁶ The dominant purpose test provides that when considering whether communications fall within the scope of PLP, a judge must consider what the dominant purpose of the communication is, and then whether that purpose falls within the ambit of PLP.⁷ Desiatnik reminds readers the current approach is intended to allow the judiciary to balance competing interests, such as the exposure of wrongdoing and client confidentiality.⁸

¹ Ronald J Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis Butterworths, 3rd ed, 2017) 9.

² Ibid.

³ Ibid 328.

⁴ Ibid, 9–10.

⁵ Ibid 330, quoting Australian Law Reform Commission, *Evidence*, Report No 26 (1985) vol 1 481 [848]; see, eg, *Evidence Act 2008* (Vic) s 55 and *Green v The Queen* [2015] VSCA 279, [34].

⁶ Ibid, 53.

⁷ Ibid, 47.

⁸ See, eg, ibid, 5, 147; Christine Parker, Suzanne Le Mire and Anita Mackay, 'Lawyers, Confidentiality and Whistleblowing: Lessons from the *McCabe Tobacco Litigation*' (2017) 40(3) *University of Melbourne Law Review* 999, 1014–18.

A pertinent example is when Desiatnik explores common law exceptions to PLP through a chronological analysis of Australian case law, focussing on the crime/fraud exception.⁹ The crime/fraud exception to PLP provides if communications were made for the purpose of furthering fraud, crime or other wrongdoing then PLP does not apply to the communication.¹⁰ The chronological analysis is helpful to the reader as it provides the background for Desiatnik to consider the issues with the crime/fraud exception. One issue Desiatnik identifies is that evidence must be made public to determine whether the purpose of the communication was for furthering fraud, crime or other wrongdoing.¹¹ Desiatnik questions the practicality of this approach when the purpose of PLP is to uphold client confidentiality, but fails to provide a resolution.¹²

Recent writing focuses on advice for practitioners in specific areas of law.¹³ Comparatively, Desiatnik provides some commentary on changes in the law, generally restricting his critique to a description and analysis of the changing scope of PLP.¹⁴ One issue other writers advise practitioners on, is how directors should interact with regulators to ensure they do not waive PLP.¹⁵ Other writers argue that the current approach towards PLP and waiver places directors in conflict with regulators.¹⁶ They argue that the question directors should consider, is whether providing communications to regulators will waive any privilege that may have existed over the communication.¹⁷ This is exemplified by recommendations made to in-house lawyers, to adopt measures such as separating commercial and legal advice to ensure that any waiver or exception that may apply to commercial advice will not compromise the accompanying legal advice.¹⁸

While one of the book's strengths lies in its reliance on primary sources to advance arguments, the minimal use of secondary sources limits its persuasiveness, particularly where there is interplay with current affairs. For example, Desiatnik considers generally the implications of the broadening of PLP to other professions.¹⁹ However, specific analysis on the recent Australian Royal Commission into Institutional Responses to

⁹ Desiatnik, above n 1, 143–62.

¹⁰ Ibid 155.

¹¹ Ibid 166–8.

¹² Ibid.

¹³ See, eg, Emily Rumble, “‘The Easy Way or the Hard Way’: Should Directors Cooperate with Regulators?” (2016) 34 *Company and Securities Law Journal* 135; Jemima Harris, ‘Down to Business with Legal Privilege’ (2017) 37(2) *The Proctor* 24; Parker, Le Mire and Mackay, above n 8.

¹⁴ See generally, Rumble, above n 13.

¹⁵ Rumble, above n 13, 139; Laura Guttuso, ‘A View of the Macrocosm of International Cartel Enforcement: How the Boomerang of Cross-Border Disclosure Springs Back to its Domestic Context’ (2015) 43 *Australian Business Law Review* 27, 31.

¹⁶ Rumble, above n 13, 147; Guttuso, above n 15, 36.

¹⁷ Ibid.

¹⁸ Harris, above n 13, 25.

¹⁹ Desiatnik, above n 1, ch 11.

Child Sexual Abuse is omitted,²⁰ even though recommendations made by the Royal Commission included changing the law for professional privilege so priests can be compelled to give evidence about the subject-matter of confessions.²¹ As final recommendations were not made by the Royal Commission until August 2017, it is perhaps understandable the author considered an incomplete case study unconvincing.²²

Desiatnik is consistent throughout his book, in the logic behind his arguments, and writing succinctly on an area of law which is a minefield of exceptions. In summary, this book is ideal for both law students and practitioners wishing to gain a fuller and more balanced understanding of PLP in Australia.

*Sophie Hey**

²⁰ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017).

²¹ Stephanie Anderson and Jessica Kidd, 'Child Abuse Royal Commission: Bishops Oppose Forcing Priests to Report Details in Confession' *ABC News* (online), 15 August 2017 <<http://www.abc.net.au/news/2017-08-14/royal-commission-into-child-sexual-abuse-recommendations/8804040>>.

²² Ibid; *Criminal Justice Report*, above n 20, 124–5.

* BBus-LLB (Hons) University of Tasmania, and Co-editor of the *University of Tasmania Law Review* for 2017.