BOOK REVIEW

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Ronald J Desiatnik, Without Prejudice Privilege in Australia (LexisNexis Butterworths, Australia, 2010) 182 pp

For many years, practitioners have wanted a book which deals in detail with the subject of without prejudice privilege. The subject is often touched upon in publications relating to evidence or civil procedure, but there has never been a book to focus solely on the subject (at least not an Australian one). *Without Prejudice Privilege in Australia* by Dr Ronald J Desiatnik fills that gap.

It is strange that it has taken so long for a book focussed on without prejudice privilege in Australia to be published. Consider how many proceedings are issued in Australia in a given year, and what percentage of those matters relate to, say, company liquidation. Without prejudice communications occur in the vast majority of *all* of those proceedings, not just the liquidation matters. Yet compare how many books are written on the subject of company liquidation with how many are written on without prejudice privilege.

The book is a modestly sized (182 pages), hardbound monograph. The layout of the book is much the same as Desiatnik's work on *Legal Professional Privilege in Australia*, with which many practitioners will already be familiar. It draws on a range of authorities, many Australian, although it must be said that reference is made to quite a number of United Kingdom decisions. This is probably inevitable given that without prejudice issues seem to arise less in the higher courts in Australia than their United Kingdom counterparts.

The first of the book's nine chapters is an introduction which touches on some of the common themes which arise in the book. One is the common tension between competing public policy considerations: that the law should not get in the way of people who are trying to resolve their disputes, and that the courts should have access to all information relevant to the matters that they are deciding. This is a theme which is played out throughout the book. Desiatnik also points to the inherently practical nature of without prejudice privilege, and the importance of

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understanding this in order to understand the principles which have developed (sometimes haphazardly) around it.

The history of without prejudice privilege is dealt with in Chapter Two. It briefly tracks the development of the privilege, explaining the rise of the words "without prejudice" and the significance of their use in practice as part of that history. Desiatnik makes the interesting point that historically the reluctance of courts to look at the admissions made by parties in the course of negotiations was because such admissions did not necessarily mean anything negative about that party's case. This is something that is probably not at the front of mind of many modern practitioners (although perhaps it explains why there are relatively fewer cases on without prejudice issues – maybe it is seen that the issues are often not worth fighting about).

Chapter Three considers the definition and application of without prejudice privilege. This chapter sets out some helpful elements required for the privilege to exist. There are detailed discussions of each of the elements, and various topics which often cause complications – such as determining whether the relevant communications have been made for the purpose of negotiating a settlement of the dispute; the significance (or lack thereof) of the use of the words "without prejudice"; the scope of the privilege (ie whether it applies only to admissions or the entire content of negotiations); and the issues which arise when third parties become involved.

The Chapter Four looks at the jurisprudential basis of the doctrine – the question of why without prejudice privilege exists. One possible explanation is that it is in the public interest for people to be able to have frank discussions to try to settle their disputes rather than waste court time hearing them. Another possible explanation is that it is based on the agreement of the parties. There are various other possible bases which Desiatnik considers. After reviewing the various possible options, Desiatnik concludes that the one thing that is clear is that the privilege offers "an escape valve to the pressures which, inexorably, litigation creates".[1] He accepts that this is really the effect of the doctrine rather than the reason for it, but concludes that in the absence of a convincing unifying rationale it will serve as an acceptable justification for it. (This reviewer must say that he found it difficult to distinguish between this justification and the "public policy" justification mentioned above.) Overall, this chapter certainly provides the most interesting content in terms of analysis, as opposed to description, of without prejudice privilege. The book might be improved in future editions if this issue were used as a recurring theme for analysis throughout the book. Such a theme has potentially greater utility than the theme which currently appears (analysis in terms of the two competing public policy considerations identified in the

[1] Ronald J Destiatnik, *Without Prejudice Privilege in Australia* (2010), 65.

introduction), because looking at the basis of the privilege could potentially help to decide difficult cases. The competing policy considerations do not seem to help one to make a decision about how a particular case should be decided – they merely allow one to comment on a particular decision once it has been reached. In other words, the policy consideration analysis is descriptive, rather than normative, and for that reason of less utility to a practitioner.

Qualifications to the privilege are set out in Chapter Five. This includes things which are not exceptions to the privilege, but which might nonetheless cause it not to arise in a particular case. It considers, for example, the need to claim the privilege and the evidence by which such a claim must be supported.

Chapter Six sets out the exceptions to the doctrine. This chapter is heavy going. Churchill once said that Russia was "a riddle, wrapped in a mystery, inside an enigma"[2] – one cannot help thinking the same thing about the subject matter of this chapter. That is no criticism of the author. Desiatnik patiently explains the various court decisions, often diametrically opposed, on a number of categories of exceptions.

Chapter Seven deals with waiver of privilege. Many of the concepts in relation to waiver of other forms of privilege are relevant here. The interesting aspect of waiver in the context of without prejudice privilege, however, is that it is privilege held jointly by the parties to the dispute. This means, as one would expect, that one party to the dispute cannot waive the privilege over their without prejudice discussions without the other's consent.

The style of the book is vivid, engaging, authoritative and, at times, even entertaining. There are many "quotable quotes". One of the best was Desiatnik's description of the use of the expression "without prejudice" as being like a designer label: *"The product it is attached to can certainly exist without it and its misuse does not make the product what it is not, but its proper addition adds value to the product."*[3] Further, at times when the reader is confronted by inexplicably inconsistent authorities, the author does step in to provide some light relief. He concludes the section on "The 'Unambiguous Impropriety' Exception" with *"The existence of the exception is therefore clear. Less clear, in a particular case, is what is meant by 'unambiguous'."*[4]

There were one or two minor errors. One which jumped out to this Queensland-based reviewer was the reference to a Full Court of the Supreme Court of Queensland judgment of "Macpherson

[2] Nigel Rees, *Brewer's Famous Quotations* (2006), 135.
[3] Destiatnik, above n 1, 29.
[4] Ibid, 92.

CJ"[5] (he meant Macrossan CJ, not McPherson J as his Honour then was). Overall, though, the book seems to be well edited.

In terms of layout, the book was easy enough to navigate. The chapters are logically organised, and the index is relatively detailed. However, the use of the "above n" method for case citations was quite annoying – particularly when, in longer chapters, the reader is sent back dozens of pages to find a reference to a key case.

The key audience for the book will obviously be practitioners. This reviewer made the mistake of bringing his copy of the book to the office. It had been sitting on the reviewer's desk for no more than a few hours when a colleague saw it and asked to borrow it. From then, it went to another colleague and then another. It was several weeks before the book returned. Clearly, this is a resource that practitioners have been in need of for some time. The book will be of less use to law students, as without prejudice privilege is generally only covered briefly in the standard law degree. It will probably also be of limited use for academics, although as noted above the question of the jurisprudential basis for the doctrine is an area that seems ripe for further consideration.

Overall, *Without Prejudice Privilege in Australia* is a useful examination of this sometimes complicated and inconsistent area of the law. At least some of those complications and inconsistencies have probably come about because of the absence of a book like this. Practitioners now have a useful starting point when arguing about these issues, and hopefully, over time, the controversies will be resolved in a more consistent way.

[5] Ibid, 6.