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USING ‘WITHOUT PREJUDICE’ WITHOUT ERROR

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The words “without prejudice” are arguably some of the most misused words in business and commercial dealings.

Using those words does not automatically and magically cloak your documents, correspondence or discussions with the protection that it will not be used against you in Court proceedings.

To obtain that benefit, those documents, correspondence and discussions must be made “in connection with an attempt to negotiate a settlement of a dispute”.

WHAT IS THE “WITHOUT PREJUDICE” PRIVILEGE?

The “without prejudice” privilege arises from section 131(1) of the NSW and Commonwealth *Evidence Act 1995* and excludes certain communications and documents being used against a party in court proceedings.

That section states:

Exclusion of evidence of settlement negotiations

Evidence is not to be adduced of:

- a) *A communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or*
- b) *A document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.*

EVIDENCE OF SETTLEMENT NEGOTIATIONS

It is often preferable to resolve a dispute to save the time and costs involved in extensive litigation.

Parties therefore often make concessions and admissions in an attempt to resolve a dispute.

The “without prejudice” privilege protects those concessions and admissions from being admitted as evidence in court, in order to promote and encourage genuine settlement negotiations between parties.

For the without prejudice privilege to arise, the document or correspondence must be created:

1. In relation to the dispute between two or more parties (not necessarily a court or arbitral process, but an exchange of allegations and denials); and
2. In connection with a genuine attempt to negotiate a settlement of the dispute.

MARKING A DOCUMENT OR CORRESPONDENCE “WITHOUT PREJUDICE:”

Lawyers and businesspeople alike frequently fall into the trap of thinking that marking or stating “without prejudice” on communications or documents will magically make them invisible in Court proceedings or that they are “off the record”.

The pure use of the words itself does not attract the ‘without prejudice’ privilege.

Further, a document can be covered by the without prejudice privilege even if it is not expressly marked so, so long as it is in relation to a dispute and is connected with a genuine attempt to resolve the dispute.

The privilege can also be waived with the consent of both parties.

EXCEPTIONS TO THE RULE

There are however some exceptions to the “without prejudice” privilege which would enable such documents and communications to be disclosed to the Court.

Some of these situations are where the document, correspondence or discussion:

1. Expressly states that it was not to be treated as confidential (section 131(2)(d) of the *Evidence Act*);
2. Affects the Court’s ability to determine who must pay legal costs (section 131(2)(h) of the *Evidence Act*);
3. Contradicts or qualifies evidence that is likely to mislead the Court (section 131(2)(g) of the *Evidence Act*); and
4. Was made in the furtherance of the commission of a fraud or an offence (section 131(2)(j) of the *Evidence Act*).

KEY TAKEAWAYS

1. Marking or stating “without prejudice” does not magically mean that the document or discussion cannot be used against you in Court proceedings although many people err on the side of caution and do so.

2. “Without Prejudice” communications should relate to a dispute and be connected with a genuine attempt to settle a dispute.
3. Consider the context under which certain communications or documents are made.
4. “Without Prejudice” privilege can be waived by consent and there are other exclusions that apply.
5. Seek legal advice if you are unsure whether the “without prejudice” privilege applies.

CONTACT US

If you would like assistance or further information please do not hesitate to contact Associate **Anish Wilson** at Kreisson on (02) 8239 6500 or at excellence@kreisson.com.au.

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