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WHAT DOES 'WITHOUT PREJUDICE MEAN' AND WHEN CAN I USE IT?

INTRODUCTION

'Without Prejudice' is an expression which attaches privilege to written or verbal statements made by parties during alternative dispute resolution. Without prejudice privilege ensures that such statements will not be admissible in court as evidence against the person who made the statements.

THE BENEFITS OF WITHOUT PREJUDICE PRIVILEGE

Without prejudice privilege is extremely valuable when parties are in dispute because it enables parties to make concessions and compromises without having to worry about those concessions being used against them in court if negotiations break down.

MISUSE OF THE EXPRESSION

Simply using the phrase "without prejudice" on every communication does not automatically mean that communication can't be used in court. This is a common misconception that many people have.

It is not about the words "without prejudice" appearing on a document. Rather, it is about the substance of the document itself.

The rule in the *Evidence Act* (section 131) states that documents will attract without prejudice privilege are:

- communications between any of the parties to a dispute that occurs during the negotiation; or
- documents prepared in connection with the negotiation, cannot be adduced as evidence in a court.

DOCUMENTS WHICH SHOULD NOT BE SET OUT ON A WITHOUT PREJUDICE BASIS

Written or verbal statements which show no intention to settle a dispute once legal proceedings or alternative dispute resolution proceedings have been considered or commenced. Some examples include:

- correspondence which is not related to settling a dispute;
- letters of demand, unless it includes concessions or a discount to a debt owed;
- statements made with the intention of finalising the terms of a contract or agreement where the agreement is not a settlement; and
- letters setting out and reserving a client's rights (mere assertion of rights).

DOCUMENTS THAT WONT ATTRACT WITHOUT PREJUDICE PRIVILEGE

You should be aware that without privilege will not attach to all types of communications, including the following:

- a demand or a threat where there is no reference to a settlement of the dispute;
- express words in the document which states that the communication should not be viewed as privileged;
- if the communication is made in relation to a fraud, offence or contrary to the Australian Consumer Law (misrepresentations and misleading and deceptive conduct);
- if the communication contradicts evidence that has already been admitted / used in open court; and
- if a settlement is achieved, evidence of the negotiations may be disclosed to enforce the settlement agreement.

WAIVING PRIVILEGE

Waiving without prejudice privilege requires the consent of both parties. Only when the consent of both parties has been obtained can the documents be relied upon in Court.

Any confidentiality attached to documents due to privilege or the *Evidence Act* can be waived by clearly stating that the document is an "Open Communication", which will allow the document to be adduced as evidence in Court.

For more information

For more information on without prejudice communications, contact our Principal Solicitor/ Director

Jessica Rippon

T + 0285919132
E: admin@constructionlegal.com.au

