

Bird & Bird

Privilege Guide - Australia

What you need to know about
legal professional privilege and
without prejudice privilege

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Quick summaries



Legal professional privilege



Quick summary

1. Overview of Legal Professional Privilege

Legal professional privilege (LPP) protects certain confidential documents and communications relating to the provision of legal advice or legal services for actual or anticipated litigation from disclosure in litigation where the client objects to such disclosure unless an exception applies. The privilege does not excuse a client from disclosing the existence of a privileged document, which means that privileged documents must usually be listed (as privileged) in lists of discovered documents.

This guide provides an outline of some of the key principles.

2. Summary of the Test for Legal Professional Privilege

Subject to certain exceptions, legal professional privilege applies to confidential:

- communications between a client and a lawyer, or between two or more lawyers; and
- documents created by a client, a lawyer or another person:

For the dominant purpose of either:

- giving or receiving legal advice; or
- providing the client with legal services in relation to actual or anticipated litigation.

It also protects confidential communications between a client and a third party, or a lawyer and a third party, made for the dominant purpose of the client being provided with professional legal services in relation to an actual or pending legal proceeding in Australia or overseas in which the client is or may be (or was or might have been) a party.

Where legal professional privilege applies, and a client objects to adducing evidence on that basis, a court will not require evidence be given that would result in the disclosure of a privileged communication or the contents of a privileged document unless an exception applies.

The test for legal professional privilege at trial is governed by the uniform Commonwealth, State and Territory evidence legislation. The test applicable for discovery and other pre-trial procedures is determined by the common law,¹ which now largely aligns with the statutory test. Certain State and Territories have modified this stance.²

3. Partially Privileged Communications

It is good practice to separate privileged communications from communications made for another purpose, as this assists when it comes to establishing that the dominant purpose test is met.

Sometimes documents contain a mixture of material which includes privileged communications and non-privileged communications. In such circumstances, privilege can generally be claimed over the severable privileged portions of the document. It is usual practice to produce a redacted copy of the document in such circumstances which black outs the privileged portions.

¹ *Eso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49.

² See, eg, section 131A of the *Evidence Act 1995* (NSW).

4. Requirements in relation to legal services and advice

Legal professional privilege applies in relation to services and advice provided by lawyers in their professional capacity. This includes in-house lawyers. Key details and exceptions are discussed below.

5. Loss of client legal privilege

As noted above, legal professional privilege provides a basis for a client to object to evidence of communications or documents being adduced, which is subject to exceptions.

This section provides a summary of key exceptions under the uniform evidence legislation and the common law.

Under the uniform evidence legislation, key examples of where LPP does not prevent evidence from being adduced include:

- where the evidence is adduced with the consent of the client or party who has the benefit of the privilege;
- where the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence (also described at common law as being where it is inconsistent with the maintenance of the confidentiality intended to be protected by the privilege).³ Subject to exceptions (see below), this includes where:
 - the client or party knowingly and voluntarily disclosed the substance of the evidence to another person. Disclosure by an employee or agent will only trigger this exception if it was authorised by the client, party, or lawyer for whom the employee or agent works;
 - the substance of the evidence has been disclosed with the express or implied consent of the client or party.

A client is not taken to have acted inconsistently with a client objecting to the adducing of evidence because the substance of evidence was disclosed, for example, as a result of duress or deception, compulsion of law, or in the course of making a confidential communication or preparing a confidential document.

At common law, a client can waive privilege directly by intentionally disclosing protected material, or by authorising their lawyer to do so. A waiver of privilege can also be implied or imputed when it becomes unfair to the opposing party to maintain the privilege (because of some conduct on the part of the client or their agent). When considering if an implied or imputed waiver has taken place, a court may consider whether the conduct of the party is inconsistent with the confidentiality intended to be protected.⁴

Disclosure will not ordinarily constitute a waiver or otherwise prevent the privilege from being established where:

- a disclosure was made on a confidential basis to a person with a common interest in a proceeding or a pending or anticipated proceeding in an Australian court or foreign court (this is generally referred to as common interest privilege);
- a disclosure is made for a limited purpose, which is consistent with the maintenance of privilege, on a confidential basis subject to appropriate restrictions. This is sometimes referred to as 'limited waiver'⁵ because there is a waiver of privilege vis a vis the recipient of the disclosure but not vis a vis the disclosure to third parties.

³ See *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275.

⁴ See *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275.

⁵ See generally *Northern Energy Corp Ltd, Re* (2020) 147 ACSR 572.

Without prejudice privilege



Quick summary

1. What is it?

Without prejudice privilege (WPP) protects communications and documents exchanged by parties to a dispute made in good faith for the purpose of achieving settlement of the dispute from being admissible in the proceedings to which they relate. This can include a communication between a party or parties to a dispute and a third party. WPP also prevents admissibility of these communications to third parties in litigation and litigation involving neither party.

2. How is it claimed?

The uniform evidence legislation provides that evidence cannot be adduced of:

- '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
- a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute'.⁶

For communications or documents to attract WPP at common law:

- there must be a dispute between prospective litigants which is the subject of negotiation;
- the communications must contain admissions made for the purpose of achieving settlement of the dispute; and
- the admissions must have been made in good faith.

3. Should you use a 'without prejudice' heading on communications or documents to attract WPP?

The use of the heading 'without prejudice' is not, in and of itself, conclusive as to the availability of WPP to the information subject to that heading. Rather, the substance of the information, read in context of the communications or documents, must satisfy the above test for WPP to be available. However, we recommend using a 'without prejudice' heading so that it may be presumed, on its face, that the communications or documents were made for the purpose of trying to settle the dispute.

4. What are the key exceptions?

Waiver

WPP may be lost if the parties consent to waive privilege, either expressly or implicitly. For example, parties may waive WPP in respect of costs. If the communications or documents clearly state that the parties seek to rely on those communications or documents on the question of costs (e.g. by use of the heading 'without prejudice save as to costs'), then that communication or document may be admitted on the question of costs.

Concluded compromise agreement

If it has been alleged that a settlement has been achieved as a result of without prejudice communications or documents, those privileged communications or documents are admissible in relation to the question of whether or not the settlement has in fact been concluded, or in the event of a dispute as to the terms and meaning of the settlement agreement.

⁶ Section 131(1) of the *Evidence Act 1995* (Cth).

In detail



Legal professional privilege



In detail

Description

LPP protects a party from the normal obligation of disclosure in respect of confidential communications or documents made between a lawyer and their client in a regulatory investigation or legal proceedings (subject to the exceptions below). If communications are privileged, then a party is generally entitled to withhold it from inspection or production to a third party or a court. However, in litigation, the claiming party is still required to disclose the existence of the privileged communications.

Source

The source of LPP depends on when the claim for privilege arises and in which jurisdiction the claim is made.

Privilege at common law applies to claims for LPP in all jurisdictions when the claim is made pre-trial (e.g. under subpoena or discovery).⁷ Certain State and Territories have modified this stance.⁸

The uniform evidence legislation applies to claims of LPP that arise in the course of a trial in the following Australian jurisdictions: Australian Capital Territory, Commonwealth, New South Wales, Northern Territory, Tasmania and Victoria. In Queensland, South Australia and Western Australia, claims for LPP made at trial are determined by privilege at common law.

Test

The test for LPP under the uniform evidence legislation mirrors that at common law. In both instances, LPP applies to *confidential communications or documents* between a lawyer and their client where the *dominant purpose* of the communications or documents must be either:

- to provide or obtain legal advice (advice privilege); or
- to be used in reasonably anticipated or existing litigation in which communications with third parties may also be privileged if they are for the use in the litigation (litigation privilege).⁹

The party claiming privilege bears the onus of satisfying this test on the balance of probabilities.

Communications or Documents

Under the common law, LPP can protect both communications and documents. A document can be subject to LPP where it records or constitutes a communication which is 'prepared, given or received for the purpose of obtaining legal advice or assistance'.¹⁰ Communications can be written, oral or recorded in some other form.¹¹

⁷ *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49.

⁸ See, eg, section 131A of the *Evidence Act 1995* (NSW).

⁹ Sections 118 and 119 of the *Evidence Act 1995* (NSW).

¹⁰ See *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 168 ALR 123 at [80].

¹¹ *Rosenberg v Jaine* [1983] NZLR 1.

Under the uniform evidence legislation, LPP applies expressly to documents, which is broadly defined.¹² To attract privilege, communications must:

- be confidential;¹³
- be for a particular purpose (see dominant purpose below); and
- arise out of a lawyer-client professional relationship.

Confidentiality

Confidentiality of the communication or document can be express or implied. Confidentiality will be lost where the communication or document is made public. In practice, lawyers should ensure that confidential communications or documents be marked as such and disclosed only to those people who 'need to know'. Particular care should be taken in relation to email communications: people should not unnecessarily be copied in.

Dominant purpose

The dominant purpose is the ruling, prevailing or most influential purpose of the communication over which privilege is being claimed.¹⁴ It is not enough to attract privilege merely to show that the advice or litigation was one of the purposes of the communication, or even that it was a significant purpose of it.¹⁵ Whether a purpose was the dominant one is a question to be determined objectively at the time when the communication was made.¹⁶ In the case of advice privilege, the communication in question must have been made for the dominant purpose of obtaining legal advice. In the case of litigation privilege, the communication in question must have been made for the dominant purpose of use in existing or 'reasonably anticipated' litigation. Whether or not litigation is reasonably in prospect is an objective question.¹⁷

Where a document contains material which is readily severable based on privileged and non-privileged purposes, that document can be produced subject to appropriate redactions such that only non-privileged material is produced.¹⁸ If the document is not readily severable, privilege will apply to the whole document.¹⁹ The dominant purpose test can present challenges for in-house lawyers who perform legal and non-legal (such as commercial) functions. In-house lawyers may communicate with others for a range of reasons, including to provide legal advice. Where possible, in-house lawyers should ensure that their legal and non-legal roles or functions are separated and should seek to keep privileged records or documents separate from others. If a document is privileged, it is good practice to mark the document as 'privileged and confidential'.

Lawyer-client professional relationship

This includes communications between lawyer-client, lawyer-agent of client,²⁰ and agent of lawyer-client.²¹ A client can be a natural person or an entity. To attract privilege, the communication must be made to or by the lawyer in their professional capacity as a lawyer.²²

This includes in-house lawyers in the course of providing legal advice.²³ The requirement that lawyers demonstrate that they are working in their professional legal capacity can also be challenging for in-house lawyers who perform legal and non-legal functions. To overcome this challenge, in-house lawyers should maintain a current practising certificate, separate their legal and non-legal functions where possible, and

¹² See, e.g. definition of 'document' under s 3 of the *Evidence Act 1995* (NSW).

¹³ *Ritz Hotel Ltd v Charles of the Ritz Ltd [No 22]* (1988) 14 NSWLR 132; see also definitions of 'confidential communication' and 'confidential document' under s 117 of the *Evidence Act 1995* (NSW).

¹⁴ *Ensham Resources Pty Ltd v AIOI Insurance Company Ltd* [2012] FCA 710.

¹⁵ *Kennedy v Wallace* (2004) 208 ALR 424.

¹⁶ *Matthews v SPI Electricity Pty Ltd (No 5)* [2013] VSC 285.

¹⁷ *Axa Seguros SA v Allianz Insurance plc* [2011] Lloyd's Rep IR 544.

¹⁸ See, e.g. *Orix Australia Corporation Ltd v Crouch* [2006] FCA 1610.

¹⁹ See, e.g. *Techfarm Pty Ltd v AXA Insurance Australia Ltd* [2004] WASC 166.

²⁰ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

²¹ See *Trade Practices Commission v Sterling* (1979) 36 FLR 244 and s 117(1) of the *Evidence Act 1995* (NSW).

²² *Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

²³ *Australian Securities and Investments Commission v Rich* [2004] NSWSC 1089.

record the purpose of any advice given in the document. LPP has also been found to only apply to communications involving an admitted legal practitioner.²⁴

Exceptions

LPP may be lost where:

- legislation provides that privilege does not apply (in the case of LPP under the uniform evidence legislation); or
- the communications facilitated unlawful purposes; or
- the privilege has been waived.

The uniform evidence legislation provides for the following circumstances where LPP is lost, namely:

- the evidence is relevant to the intentions or competence of a deceased party/client;²⁵
- the evidence would prevent the enforcement of an Australian court order if it were not adduced;²⁶
- the evidence is of a communication that directly affects the actual rights of a person (mere relevance to rights will not give rise to loss of privilege);²⁷
- the communications were made for the purpose of furthering a deliberate abuse of a power,²⁸ requiring the decision-maker being aware that they are abusing their power;²⁹ and
- the communications are adduced by an accused person in a criminal proceeding unless it is evidence of confidential communications between a defendant and a lawyer acting for that person in connection with the prosecution or the contents of a confidential document prepared by a defendant or by a lawyer acting for that person in connection with the prosecution of that person.³⁰

There are other, limited circumstances, where various state and federal legislation provides that privilege does not apply.

Unlawful purposes

LPP does not attach to communications otherwise meeting the test for privilege where it is sought or given in furtherance of, or to facilitate, criminal, fraudulent or other unlawful purposes.³¹ It is for the party alleging the fraud or unlawful conduct to establish it on its face.³²

Waiver

Generally only the client in a lawyer-client relationship can waive their privilege. A client can waive privilege directly by intentionally disclosing protected material, or by authorising their lawyer to do so. A waiver of LPP can also be implied or imputed when, by reason of some conduct on the part of the client (or their agent), it becomes unfair to the opposing party to maintain the privilege.

Privilege is generally waived where the substance of the privileged communication is disclosed by the client. For example, the disclosure of the conclusion reached in, or a course of action recommended by, an advice can amount to waiver of privilege in respect of the undisclosed reasons for that conclusion.³³ Care should therefore be taken when making any such reference to legal advice in documents which are not confidential (for example, media or market announcements or correspondence).

²⁴ *Glengallan Investments Pty Ltd v Arthur Andersen* [2001] QCA 115.

²⁵ Section 121(1) of the *Evidence Act 1995* (NSW).

²⁶ Section 121(2) of the *Evidence Act 1995* (NSW).

²⁷ Section 121(3) of the *Evidence Act 1995* (NSW); *Dunstan v Orr* (2008) 217 FCR 559.

²⁸ Power meaning a power conferred by or under Australian law; see s 125(3) of the *Evidence Act 1995* (NSW).

²⁹ See section 125 of the *Evidence Act 1995* (NSW).

³⁰ Section 123 of the *Evidence Act 1995* (NSW).

³¹ *R v Cox and Railton* (1884) 14 QBD 153; s 125 of the *Evidence Act 1995* (NSW).

³² *Freeman v Health Insurance Commission* (1997) 157 ALR 339.

³³ *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 140 FCR 101.

Notwithstanding the above, privileged communications may be shared with a third party for a limited and specific purpose with clear conditions of confidentiality such that LPP is not waived generally (limited waiver). To claim limited waiver, the party disclosing the privileged communications must retain full control of the further dissemination of those communications, such that the receiving party cannot act in a manner inconsistent with the LPP. An example of the use of limited waiver is seen in the provision of legal advice to auditors. Consistent with the principles articulated above, such advice can be shared with an auditor without waiving LPP where:

- the dominant purpose of the advice was for obtaining legal advice, not to provide the advice to the auditors; and
- the legal advice is provided to the auditor for a limited and specific purpose with clear conditions of confidentiality.

We strongly recommend that any proposed 'limited waiver' be recorded in writing and confirmation as to the terms of disclosure be agreed in writing in advance by the third party.

Common interest privilege

An exception to the principles regarding waiver of LPP is 'common interest privilege'. It is not a distinct privilege, but provides that if a third party shares a 'common interest' with the privilege holder, then privilege over that communication may not have been waived by sharing it with that third party.³⁴ Further, the third party may be able to assert LPP over the privileged documents in their own right.³⁵

Common interest is not rigidly defined and is determined on a case-by-case basis. Some examples in which common interest may be found include: litigation funder and litigants, co-tenants, insurer and insured and liquidator and creditors. It has been found not to exist in respect of debtor and creditor relationships.

Privilege in cross-border litigation

The orthodox position is that courts and regulatory authorities apply the law of the forum when dealing with questions of LPP. This is because privilege comprises part of the laws of evidence in a jurisdiction and is to be governed accordingly as a procedural matter.³⁶ Further, the law of the forum in Australia permits privilege to attach over foreign legal advice.

³⁴ *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601, 609-612.

³⁵ *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601.

³⁶ *Bain v Whitehaven & Furness Railway Co* [1850] EngR 670.

Without prejudice privilege

In detail

Description

WPP prevents communications exchanged by parties to a dispute made in good faith for the purpose of achieving settlement of the dispute from being adduced, subject to exceptions (discussed below).³⁷

Source

The uniform evidence legislation applies to claims of WPP that arise at trial in the following jurisdictions: Australian Capital Territory, Commonwealth, New South Wales, Northern Territory, Tasmania and Victoria.

In Queensland, South Australia and Western Australia, claims for WPP made at trial are determined by privilege at common law.

In all jurisdictions, common law principles now largely align with uniform evidence legislation in relation to pre-trial procedures and outside the litigation context, for example in investigations.³⁸

Uniform Evidence Legislation

The uniform evidence legislation provides that evidence cannot be adduced of:

- '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
- a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute'.³⁹

Dispute means disputes of a kind in respect of which relief may be given in an Australian or overseas proceeding.⁴⁰ The nexus requirement contained in the legislation is 'in connection with' an attempt to negotiate a settlement.⁴¹ While the communication needs to be direct, 'it is not necessary that the communication itself make an offer or that it be directed at achieving a compromise'.⁴²

Exceptions in the uniform evidence legislation include (by way of example):

- where the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute;⁴³
- where the communication or document included a statement to the effect that it was not to be treated as confidential;⁴⁴
- where the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute;⁴⁵
- where making the communication, or preparing the document, affects a right of a person;⁴⁶

³⁷ See generally *Field v Commissioner for Railways for New South Wales* (1957) 99 CLR 285.

³⁸ See generally *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (ACCC) (2002) 213 CLR 543 as an example of a case involving LPP in the context of an investigation.

³⁹ Section 131(1) of the *Evidence Act 1995* (Cth).

⁴⁰ Section 131(5)(a) of the *Evidence Act 1995* (Cth).

⁴¹ Section 131(1) of the *Evidence Act 1995* (Cth).

⁴² *Hera Resources Pty Ltd v Gekko Systems Pty Ltd* [2019] NSWSC 37 at [22].

⁴³ Section 131(2)(b) of the *Evidence Act 1995* (Cth).

⁴⁴ Section 131(2)(d) of the *Evidence Act 1995* (Cth).

⁴⁵ Section 131(2)(e) of the *Evidence Act 1995* (Cth).

⁴⁶ Section 131(2)(i) of the *Evidence Act 1995* (Cth).

- where evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence;⁴⁷
- where the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty;⁴⁸
- where one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.⁴⁹

Common Law Test

For WPP to apply to communications:

- there must be a dispute between prospective litigants which is the subject of negotiation;
- the relevant communications must contain express or implied admissions; and
- the admissions must have been made bona fide for the purposes of achieving settlement of the dispute.

Principles

The party claiming privilege bears the onus of satisfying this test on the balance of probabilities.

Dispute and Negotiation

A dispute need not have materialised into the commencement of legal proceedings for WPP to apply.⁵⁰ The negotiations can be directed towards resolving current litigation, or where 'litigation was contemplated if the negotiations did not result in a satisfactory resolution of the matters in dispute between the parties'.⁵¹

Admission

This has been interpreted broadly by the Courts to cover 'all conversations and mutual communings which go on with the purpose of trying to settle a dispute between parties',⁵² and 'all matters disclosed or discussed in the without prejudice discussions concerned'.⁵³

Purpose

There must be a nexus between the communications and the settlement negotiations to attract WPP.⁵⁴ This requires a 'sufficiently close connection' between the communications and any attempt to negotiate a settlement to attract WPP.⁵⁵ In the case of *Field v Commissioner for Railways for New South Wales*,⁵⁶ the court had regard to whether an admission was made with a 'proper connexion with any purpose connected with the settlement of the action'.⁵⁷ Also, the settlement negotiations themselves must be made in good faith such that they are held with a view to settling the dispute.⁵⁸ In practice, we recommend ensuring all communications relating to settlement are separate and distinct from any other communications which are generally related to a dispute. Otherwise, there may be a risk that the communications are not seen as being sufficiently closely connected to an attempt to settle to attract WPP.

In practice, the use of the heading 'without prejudice' in and of itself is not conclusive as to the availability of WPP to the information subject to that heading. Rather, the substance of the information, read in context of the communications, must satisfy the above test for WPP to be available.⁵⁹ It is good practice though to label

⁴⁷ Section 131(2)(g) of the *Evidence Act 1995* (Cth).

⁴⁸ Section 131(2)(j) of the *Evidence Act 1995* (Cth).

⁴⁹ Section 131(2)(k) of the *Evidence Act 1995* (Cth).

⁵⁰ *Rodgers v Rodgers* (1964) 114 CLR 608; see also s 131(5)(a) of the *Evidence Act 1995* (NSW).

⁵¹ See *Glengallan Investments Pty Ltd v Arthur Andersen* [2001] 1 Qd R 223 at [29].

⁵² *Davies and Davies v Nyland and O'Neil* (1974) 10 SASR 76 at 105.

⁵³ *Somatra Ltd v Sinclair Roche & Temperley (a firm)* [2000] 1 WLR 2453 at [22].

⁵⁴ See generally *Field v Commissioner for Railways for New South Wales* (1957) 99 CLR 285.

⁵⁵ *Hera Resources Pty Ltd v Gekko Systems Pty Ltd* [2019] NSWSC 37 at [26].

⁵⁶ (1957) 99 CLR 285.

⁵⁷ *Field v Commissioner for Railways for New South Wales* (1957) 99 CLR 285 at 293.

⁵⁸ See generally *GPI Leisure Corporation Ltd (in liq) v Yuill* (1997) 42 NSWLR 225.

⁵⁹ *GPI Leisure Corporation Ltd (in liq) v Yuill* (1997) 42 NSWLR 225.

any document over which a claim of without prejudice privilege is to be made 'without prejudice' to give notice of the intention to make that claim. Failure to use a 'without prejudice' heading does not necessarily mean that WPP cannot apply – it can be inferred in the circumstances. However, we recommend using a 'without prejudice' heading so that it may be presumed, on its face, that the communications were made for the purpose of trying to settle the dispute.

Exceptions

WPP may be lost, including, but not limited to when:

- the privilege has been waived;
- the communications resulted in a concluded compromise agreement; and
- the communications are required to explain delay.

Waiver

Parties to a dispute may consent to waive WPP, either expressly or implicitly, in certain circumstances. Section 131(2) of the *Evidence Act 1995* (NSW) expresses such consent in the following terms:

- the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent, or
- the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute, or
- the communication or document included a statement to the effect that it was not to be treated as confidential.

A party may also waive WPP by adducing privileged evidence at an anterior stage of litigation (e.g. discovery), as disclosure of the evidence may be reasonably necessary to enable a proper understanding of the evidence which has already been adduced.⁶⁰ In practice, we recommend making no reference to any communications intended to be 'without prejudice' at an anterior stage of litigation to avoid any implied or imputed waiver of WPP.

Parties may waive WPP in respects of costs. For example, if the communications clearly states that the parties seek to rely on those communications on the question of costs (e.g. by use of the heading 'without prejudice save as to costs'), then that communication may be admitted on the question of costs.

Concluded compromise agreement

When it has been alleged that a settlement has been achieved as a result of without prejudice communications, those privileged communications are admissible in relation to whether or not the settlement has in fact been concluded,⁶¹ or in the event of a dispute as to the terms and meaning of the settlement.

Delay

Communications subject to WPP may be admitted in some circumstances where they are used to justify delay in those proceedings, for example, in response to applications for dismissal due to lack of progress.⁶²

⁶⁰ See section 131(2)(c) of the *Evidence Act 1995* (NSW).

⁶¹ See, eg, *Austotel Management Pty Ltd v Jamieson* (1995) 57 FCR 411; *First Capital Partners Pty Ltd v Sylvatech Ltd* (2004) 186 FLR 266; see also ss 131(2)(e) and (f) of the *Evidence Act 1995* (NSW).

⁶² See r 12.7 of the *Uniform Civil Procedure Rules 2005* (NSW); *Walker v Wilsher* (1889) 23 QBD 335.



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