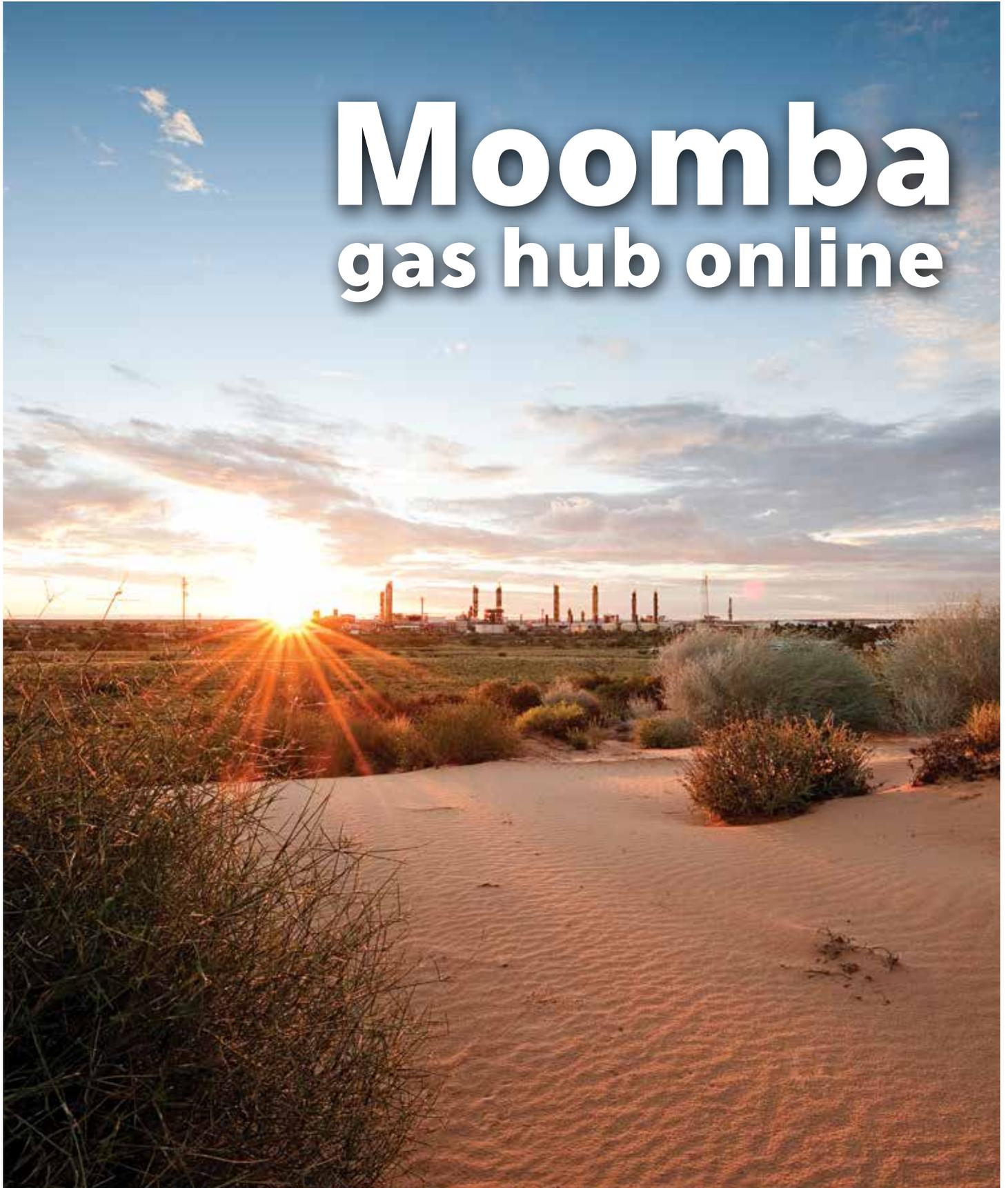


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# ‘WITHOUT PREJUDICE’ COMMUNICATIONS IN COMMERCIAL SETTLEMENT DISCUSSIONS

If used correctly ‘without prejudice’ communications can assist in the timely and efficient resolution of commercial disputes, including disputes relating to claims on live project. This article explores practical issues associated with the use of ‘without prejudice’ communications.



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## WHAT ARE ‘WITHOUT PREJUDICE’ COMMUNICATIONS?

Without prejudice communications are discussions and correspondence to which ‘without prejudice privilege’ (WPP) applies. Where WPP applies, the content of the without prejudice communication cannot be used as evidence in court or arbitration proceedings unless the privilege in the without prejudice communication is waived (see below).

WPP can apply to:

- » Written communications, such as correspondence (emails and letters);<sup>1</sup>
- » Oral communications, including negotiations;<sup>2</sup> and
- » Other conduct.<sup>3</sup>

## WHY IS WPP IMPORTANT?

Without prejudice discussions and correspondence can be used to facilitate the resolution of claims and disputes. WPP allows parties to negotiate without the fear of having information they provide or positions they are will to consider (in an attempt to resolve a dispute), used against them in subsequent proceedings.

WPP therefore, provides an opportunity for parties to reach a settlement rather than litigate. This can be especially important for disputes on live projects where parties need to maintain a working relationship while the balance of the project is delivered.

## HOW IS WPP ESTABLISHED?

For communications to attract WPP, the following two requirements must be satisfied:

1. There must be a dispute between the parties; and,
2. The communications between the parties must be made with the aim of genuinely attempting to settle the dispute.

## CAN WPP BE LOST?

WPP can be lost via a waiver. Despite the formal requirements of WPP being met, the parties may waive the WPP (meaning, in general terms, that the communication can be relied upon as evidence in legal proceedings).

WPP is generally only waived if both parties to consent to the waiver.<sup>4</sup> However, the parties do not have to waive the WPP simultaneously. It is for this reason that it is important to be cautious and not unintentionally waive, or affirm another party’s waiver of, WPP.

Parties may also lose the protection of WPP where a recognised exception applies. The privilege will not apply when a claim of WPP is used to withhold information which would mislead or deceive the other party or a Court.<sup>5</sup> It will also not apply where a claim of WPP is used in furtherance of an offence or fraud.<sup>6</sup>

## NOTHING IS “OFF THE RECORD”.

### PRACTICAL TIPS

#### 1. Use the correct terminology

Nothing is “off the record”. A common mistake made is providing information on the condition that it is “off the record” under a mistaken belief that the information provided or statements made will be protected by WPP.

In Australia there is no concept of “off the record” privilege arising from commercial discussions. Parties should avoid using terms such as “off the record” when seeking to communicate that they are communicating or negotiating on a without prejudice basis.

The simplest way to demonstrate an intention to negotiate on a without prejudice basis, is to include the words ‘without prejudice’ on the relevant letter or email.

While the use of the words ‘without prejudice’ are not necessarily sufficient (without the other formal requirements of WPP being satisfied) to attract WPP, it will certainly assist in supporting a conclusion that the relevant communication was made on a without prejudice basis.<sup>7</sup>

In terms of verbal negotiations, it is important to communicate to the other party in advance of the discussions, for instance by sending an email the day prior to the discussion, that the relevant discussions will be on a without prejudice basis.

#### 2. Cost considerations

If legal proceedings are on foot, a party may wish to rely later on without prejudice communications (such as settlement offers) for the purpose of cost applications (at the end of a hearing) on the question of which party must pay the other’s legal costs of the litigation. This needs to be clearly communicated by the parties. The simplest way of achieving this is to state on the relevant communications: “without prejudice save as to costs”.<sup>8</sup>

### CONCLUSION

As can be seen, there are a number of important considerations when conducting without prejudice discussions and correspondence during, or prior to, formal legal proceedings. It is important to obtain expert legal advice on the correct use of WPP to ensure your rights are protected. **GT**

1. *Lukies v Ripley (No2) (1994) 35 NSWLR 283, per Young J at 287*  
 2. *Lukies v Ripley (No2) (1994) 35 NSWLR 283, per Young J at 287*  
 3. *Lukies v Ripley (No2) (1994) 35 NSWLR 283, per Young J at 286- 287*

4. *Re Turf Enterprises Pty Ltd [1975] Qd R 266*  
 5. *Pitts v Adney (1961) 78 WN (NSW) 886*

6. *Phiga Pty Ltd (ACN 002 297 056) and Others v Roche and Others (2011) 278 ALR 209; and Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd [1972] Ch 553 at 564-565*  
 7. *Rush & Tompkins Ltd v Greater London Council [1989] AC 1280 per Lord Griffiths at 1299*

8. *Evidence Act 1995 (Cth), s131(2)(h); Evidence Act 2008 (Vic), s131(2)(h); Evidence Act 1995 (NSW), s131(2)(h); Evidence Act 2001 (Tas), s131(2)(h); Evidence (National Uniform Legislation) Act 2013 (NT), s131(2)(h); Evidence Act 2011 (ACT), s131(2)(h); Evidence Act 1929 (SA), s67C(2)(h): all permit, per se, without prejudice comments to be admitted if they are relevant to the question of costs.*