# Holding Back the Tide: King Canute Orders and Internet Publications

**Sophie Dawson and Paul Karp consider the treatment and utility of King Canute orders and their implications for internet publishers.**

## 1. Introduction

The internet poses new challenges for the law of sub judice contempt. Contempt is a common law crime that is committed when material is published which has a real and definite tendency, as a matter of practical reality, to prejudice proceedings.[1] Accepted examples of material which may constitute contempt include publication of prior convictions of, and serious allegations against, a person who is facing trial or against whom proceedings are pending.

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In contrast to other media, internet publications can easily be accessed long after their initial publication date, cannot be adjusted for different jurisdictions, and can be uploaded and accessed by anyone anywhere in the world. This means that articles which have been published on the internet in circumstances in which they did not pose any contempt risk (for example, because they relate to crimes for which no arrest has been made), later do give rise to such risk due to intervening events (such as the arrest and charge of a suspect). The global nature of this medium means that traditional means of managing contempt risk, including paring back publications for the jurisdiction in which a case is to be tried (and from which the jury will be drawn) are not available.

In recent years, New South Wales and Victorian Courts have faced those challenges in cases in which take down orders have been sought in relation to material which it was alleged might prejudice jury members if they were to see them. Such applications reflect the ongoing and easily accessible nature of internet publications. They are not ordinarily made in relation to publications in print or by way of TV or radio, because such publications are not generally as easy to access after their initial publication or broadcast.

Those courts took different approaches when assessing the risk posed by non-current internet publications which could only be found by searching. The Victorian Court of Appeal in *Mokbel*[2] took the approach that the risk posed by such publications was not sufficient to warrant a take down order, whereas the in *Perish*[3] decision in the New South Wales Supreme Court, Price J made take down orders in relation to such material.

These differing decisions reflect differing assessments of the extent to which jurors need to be protected from potentially prejudicial publications. They also reflect differing assessments of the utility of take down orders, which have been referred to as 'King Canute' orders, on the basis that requiring reputable media to take down publications does not prevent publication of, or access to, other publications available on the internet control of which may be beyond the jurisdiction of the Court. The apparent futility of attempting to hold back the tide of publications has been likened to King Canute's order to the sea to stop the rising tide.

These decisions are significant for internet publishers when considering how to manage contempt risk for continuing publications. The Mokbel case, in particular, provides guidance on the issue of when and where publication occurs for the purpose of the law of contempt. The approach taken is quite different to the approach taken for defamation by the High Court in *Gutnick*.[4] The decisions together also highlight that the application of the law of contempt is a developing area in relation to which there will be a degree of uncertainty until there is more case law, particularly at an appellate level.

## 2. Jurisdiction for issuing take-down orders

The ***Mokbel*** and ***Perish*** decisions each relate to applications for take down orders. Both courts confirmed that superior courts have an inherent jurisdiction to make such orders in suitable cases as part of their inherent jurisdiction to control the criminal process and protect the fundamental right of the citizen to a fair trial.[5] In NSW, Section 23 of the *Supreme Court Act* 1970 confirms that inherent jurisdiction[6] which is to do 'what is necessary for the administration of justice'.[7] Necessary does not have the meaning of essential, but is 'subjected to the touchstone of reasonableness'.[8] So the jurisdiction may be stated as 'no wider than what is reasonably necessary to secure the object of ensuring that justice is done.'[9]

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1 See, eg. *Victoria v Australian Building Construction employees and Builders Labourers Federation* (1982) 152 CLR 25.

2 *News Digital Media Pty Ltd and Fairfax Digital Ltd v Antonios Sajih Mokbel and DPP* [2010] VSCA 51

3 *R v Perish* [2011] NSWSC 1102

4 *Dow Jones & Co Pty Ltd v Gutnick (2002)* 210 CLR 575

5 See, eg, *Jago v The District Court of New South Wales* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292

6 *John Fairfax Publications Pty Ltd v District Court of New South Wales*, 353

7 *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264, 270

8 *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 452

9 Above n1, [42]

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As noted above, such orders have not traditionally been sought. One reason for that is that traditional media is more fleeting in the sense that it is more difficult to go to the library for a back copy of a newspaper, or to find a recording of a broadcast than it is to search for a non-current internet article.

Two further reasons that suppression orders as well as take down orders for contempt are (or should be) relatively rare were noted by Warren CJ and Byrne AJA in *Mokbel.* First, it is 'the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act (and contempt of court is a criminal or quasi-criminal act) unless the penalties available under the criminal law have proved to be inadequate to deter commission of the offences'.[10] Second, the Court must give appropriate weight to counterveiling public interests. Their Honours noted that two different competing public interests may come into play. In the *Mokbel case,* the relevant competing interest was the public's 'right to know' the matters in the articles in question. Their honours noted if (which was not the case) the articles had been reports of criminal proceedings, then the public interest in open justice would have also been in question. They noted that the principle of open justice is an important one, and that there is an 'interesting question' as to the ambit of the inherent power of the court to restrain publication of a fair and accurate report of a criminal proceeding for the purpose of protecting its process in that or another proceeding.'

## 3. Where and when is internet material published?

In *Mokbel,* the Court considered the question of when and where material is 'published' for the purpose of contempt. This is important because contempt is a strict liability crime which is committed by way of publishing material which gives rise to the requisite risk of prejudice.

The Court found that the test for when and where material is 'published' is different for contempt than it is for defamation. The High Court held in the *Gutnick* case that in defamation proceedings, internet material is 'published' each time it is read or viewed or listened to, and that publication occurs in the place of each person who accesses it.[11] In *Mokbel,* it was held that in relation to contempt where 'the concern is the risk to the legal process' publication occurs when and where the material is made available to a juror or potential juror 'whether it be shown that the person accessed it or not'. Warren CJ and Byrne CJ explained that this fits in with existing principles. They said:

Contempt occurs when the court process is exposed to risk, irrespective of whether the risk becomes actuality. This is consistent with the approach of the Court to allegations of contempt by publication of prejudicial material in the print or radio media. In such a case, the prosecution case does not depend upon proof that a juror or potential juror actually read or heard the prejudicial material; it is sufficient that, as at the time of publication, the publication, assessed objectively, has a real and definite tendency to prejudice or embarrass the particular proceeding.

This is important because it means that material uploaded in one jurisdiction may be in contempt of court in another. The case of *R v Nationwide News Pty Ltd*[12] confirmed that the criminal law proscribes conduct within the jurisdiction but is not intended to affect criminal acts outside, so NSW and Queensland publications in that case did not constitute contempt of court in Victoria. This reasoning will not readily apply in relation to internet publications assuming *Mokbel* is followed.

The test for the timing of publication is also important because it means in effect that a person may be in contempt if they fail to take down an internet publication which gives rise to the requisite risk of prejudice even if it did not pose any risk of prejudice when first uploaded.

## 4. When will an internet publication pose sufficient risk to be in contempt?

The central issues in both *Mokbel* and *Perish* were whether it was necessary to make an order to protect the administration of justice, and whether an order would lack utility. The Courts reached different conclusions on those issues in the particular circumstances they faced.

The courts in both cases found that it should be assumed that juries will follow directions not to make enquiries (and to decide cases only on the evidence before them). They also both found that this does not mean that 'the law should abandon its traditional role of protecting them from events which put this integrity to the test.'[13][14]

It is important to note that there are also relevant offences in some Australian jurisdictions. For example, section 68C(1) of the *Jury Act* 1977 (NSW) prohibits jurors making an inquiry for the purpose of obtaining information about the accused or matters relevant to the trial, and section 68C(5)(b) defines making an inquiry as including 'conducting research, for example by searching an electronic database for information (such as by using the Internet)'.

Warren CJ and Byrne AJA found that, in view of these protections, a take down order was not relevantly 'necessary' in relation to non-current material. Their honours said:

> We respectfully doubt the necessity for making that part of the order requiring the applicants take down the material from their website provided the articles, the subject of the order, were no longer sufficiently current or were not presented in

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10 Ibid, [49], citing *A-G v Random House Group Ltd* [2009] EWHC 1727, *[28] citing in turn the judgment of Lord Donaldson MR in P v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370.

11 *Dow Jones & Co Pty Ltd v Gutnick (2002)* 210 CLR 575, 606 [44]. Note that the choice of law consequences of this finding have now been altered in the uniform Defamation Acts.

12 [2008] VSC 526

13 Above n2, [73]

14 Above n1, [54]-[55]

15 Ibid

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such a way as to be forced upon a visitor to the site who was not searching for them.[15]

Their honours noted that this approach is consistent with the approach traditionally taken to libraries. They noted that it has never been suggested that suppression orders should be made to libraries in relation to potentially prejudicial material, and identified the fundamental reason for this as 'that the information is available only for those persons who actually search for it.'[16]

Price J considered these findings in *Perish.* However, his honour found that there was a sufficient risk of prejudice in the case before him on the basis that jurors may come into contact with people who have accessed the internet and read these articles, and this would be a source of prejudice.[17] His honour distinguished *Mokbel* on the basis that the articles before him were much narrower and much more specific than those sought in *Mokbel*. Both cases do however relate to non-current articles containing potentially prejudicial material and in that respect are very similar.

Futility was also an issue in both cases. In *Mokbel* the court noted that if a juror did deliberately disobey directions, they would be able to access the same material from a cached website,[18] and indeed might access material from less reliable sites if mainstream media were the subject of take down orders, as more obscure publications would be given greater prominence in search results.[19] However, in *Perish* it was determined that 'the inability of a court to remove all offending material does not necessarily lead to a conclusion that the provision of the relief sought would be futile.'[20]

## 5. The perish direction to the registrar

In *Perish,* Price J also made a direction to the Registrar of the Court 'to contact and make representation to the search engines ... to block access to the articles in the cases of each of the accused'.

It is important for internet publishers (including search engines) to note that the effect of such notification may be to deprive them of the protection which they might otherwise have under clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth). Such protection is available only where an internet service provider or internet content host is not aware of the nature of relevant content.

## 6. Conclusion

Some people who refer to King Canute orders have in mind the futility of the orders he directed at the sea to stop the tide from rising and wetting his feet and person. Others have in mind that he made those orders for the purpose of demonstrating his lack of power to those who watched.[21]

Likewise, views will no doubt differ on the question of whether and to what extent Courts should make take down orders and suppression orders in relation to internet (and indeed other) publications in the face of the practical difficulties which now stand in the way of keeping information from any juror who seeks it.

Until the approach to those issues is finally settled, prudent internet publishers will have policies in place to minimise the contempt risk in relation to their non-current as well as their current publications.

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16 Above n2, [80].

17 Ibid, [31]

18 Above n2, [74]

19 Above n2, [94], [86]

20 Above n1, [44] 21 It seems appropriate to have an internet reference in this context: see, eg. the Wikipedia entry in relation to King Canute.