



Client Newsletter

Managing the Risk of Sub Judice Contempt

June 2009

What is sub judice contempt?

Sub judice contempt is the common law offence of publishing material which has a *tendency to interfere with the administration of justice* while proceedings are sub judice; that is, 'under a judge'. The rationale for the offence is to avoid a 'trial by media' by prohibiting the publication of material which might prejudice issues at stake in particular proceedings, or which might influence or place pressure on persons involved in the proceedings, including jurors, witnesses or potential witnesses, and parties to the proceedings. In deciding whether material is prejudicial, the court will attempt to balance the public interest in free speech with the public interest in ensuring a fair trial.

Who can be held liable for sub judice contempt?

Anyone involved in publishing contemptuous information or communicating such information to the media, can be held liable for sub judice contempt. Courts are most interested in bringing contempt proceedings against people who have real control over the content, production, distribution or broadcasting of contemptuous material.¹

Elements of sub judice contempt

In order to prove the offence it must be established beyond reasonable doubt that:

Summary

The VGSO is often asked to advise on when it is permissible and appropriate for government to publish information relating to legal proceedings and the content of such publications. Publishing information relating to a proceeding, or releasing such information to the media, while a proceeding is underway, can expose the government to a number of legal issues, both under statute and at common law.

In this newsletter, we consider the nature of the common law offence of sub judice contempt and the perennial issue of how government can avoid it.

1. the material was published;
2. publication occurred while proceedings were sub judice; and
3. the publication has the requisite tendency to interfere with the administration of justice in those proceedings.

Controversy: guilty mind not required

In Australia, it is not necessary to prove that the tendency to interfere with the administration of justice was intentional.² Consequently a person may be found guilty of sub judice contempt even if they did not know that proceedings were pending,³ or if they mistakenly believed that the proceedings were completed.⁴

We will now consider each of these elements in turn.

When is material published?

According to Lowe and Sufrin, material is regarded as published if it is 'made available to the general public or at any rate a section of the public which is likely to compose those who have a connection to the case.'⁵ Typically this type of mass dissemination is achieved by media organisations. Government newsletters, pamphlets, press releases, websites, TV/radio advertisements and even public speeches which are disseminated to a wide enough class of people, or a class of people likely to be involved with the proceedings, could also be considered 'published' for the purposes of sub judice contempt.⁶

Public servants should also be aware that *information that is provided to a journalist, reporter or media agency* is regarded as having been published, as it is expected that the journalist, reporter or media agency will publish that information.⁷ Publication will occur at the moment the information is provided to the media,⁸ for example during a press conference.⁹ It will be irrelevant whether or not the media organisation goes on to publish the information to a wider audience. Accordingly, public servants should be particularly careful in their dealings with the media both on and off the record.

The ongoing risks of Internet publication

Information placed on the Internet is generally regarded as being published at the time it is uploaded. However, at there is some support for the view that material is considered to be published each time the material is viewed or downloaded and so can be regarded as being continually published as long as it is accessible for viewing or downloading.¹⁰

Although material can be removed, some search engine servers can make complete removal difficult or almost impossible. This is problematic in at least two ways for government departments which archive or simply leave press releases and other potentially prejudicial material

on their websites for long or indefinite periods of time:

- (i) material published online prior to the commencement of proceedings could become contemptuous once proceedings begin; and
- (ii) material published after proceedings have ended could become contemptuous if the accused is later arrested for, or charged with, another crime, or in the case of civil proceedings, if an appeal is lodged or a retrial ordered.

These risks can be overcome by automatically deleting information published on government websites after a specified period of time - the shorter the time period, the lower the risk.

When are proceedings sub judice?

Proceedings are sub judice when legal proceedings have commenced but have not yet been completed.¹¹

Criminal proceedings

Generally speaking, in criminal proceedings the sub judice period begins at the time of arrest or charge, whichever occurs first.¹² It also possible that proceedings may be regarded as pending once a summons or warrant for arrest has been issued,¹³ an information or complaint has been laid, notice has been given of an intention to prefer a presentment,¹⁴ or extradition proceedings have been commenced.¹⁵

Criminal proceedings are completed when charges are withdrawn or the accused is acquitted or sentenced, or the time for lodging an appeal has passed, or all possible appeals have been heard. Hence, proceedings will still be sub judice following a hung jury, between verdict or a guilty plea and sentencing, between sentence and the time for lodging notice of an appeal,¹⁶ during any appeal, and before or during any retrial ordered on appeal.¹⁷

Civil proceedings

In civil proceedings, the sub judice period begins when a writ, statement of claim or other initiating process is issued. This means that

proceedings might remain sub judice for years while pre-trial processes take place.

Unlike criminal proceedings, there is authority for the proposition that civil proceedings only remain pending until judgment is entered, and not until the time for lodging an appeal has passed or until all appeals have been exhausted. Instead, it may be that the sub judice period revives if a retrial is ordered or if notice of an appeal is lodged.¹⁸

Imminent proceedings

The sub judice period does not apply during a siege or when a search for a crime suspect is in progress (unless, perhaps, a warrant has been issued for a person's arrest), or when a suspect who has not been arrested or charged is being questioned by the police.¹⁹

When is there a tendency to interfere with the administration of justice? In other words: what can't be published?

The court will make an objective assessment of whether a publication has a tendency to interfere with the administration of justice by considering the effect of the material on the ordinary reasonable member of the community.

The court will consider the mode of the trial (jury trials are considered more susceptible to media influence),²⁰ the subject matter (criminal cases are regarded as more dramatic and sensational),²¹ the nature of the material, and the particular circumstances at the time of publication.²² The court will not consider any subsequent events or whether the publication actually caused an interference with the proceedings.

The court will pay particular attention to the amount of time between the publication and the proceedings, the audience, the distribution area or coverage, the identity of the maker of the statements, the presence of other prejudicial publications and whether the publication was in a form which was likely to make a deep impression on a person who read, saw or heard it.²³

Comments by public officials

Comments made by prominent figures such as Ministers, senior public officials and members of the police force will be seen to have more impact. This was the case in *Director of Public Prosecutions v Wran* (1987) 86 FLR 92, where the former Premier of NSW, Mr Wran, publicly stated that his friend Justice Murphy was innocent of the charges laid against him while standing outside the court where a retrial had just been ordered. This comment was later published in *The Daily Telegraph*. Both Mr Wran and the publisher were found guilty of contempt and fined on the basis that the comments could influence potential future jurors to acquit Justice Murphy in his retrial.

Statements made by government media liaison officers could be perceived as having been made on behalf of, or with the authority of, their department heads, even when they were not. For this reason all government employees need to exercise caution when communicating with the media.

Photographs and film

As photographs and film are capable of making a deep impression on the minds of jurors, courts have held that photographs and film of an accused should not be published if the identity of the accused may come into question. This will always be likely where an accused pleads not guilty, unless some special circumstances clearly indicate otherwise.²⁴

Photographs and film of the accused may be contemptuous as they may confuse eye witness testimony, or create an adverse impression of the accused, even where the accused has been de-identified (for example by blurring the face of the accused). Similarly, caution should be exercised with images of property or seized evidence because identification of such items may be in issue, or may become an issue at trial.

Material which may be held to be contemptuous

Given that each case is considered in its specific circumstances, it can be difficult to predict exactly which publications will or will not be held to be contemptuous. Helpfully, academics

and commentators have isolated loose categories of publications which may amount to contempt.

In criminal proceedings, these include material which prejudices the guilt or innocence of the accused, material which criticises or creates sympathy for the accused or the victim, prior convictions, criminal history, photographs or film of the accused, alleged confessions, and interviews with witnesses or potential witnesses.

In civil proceedings, problems may arise where a publication has the potential to prejudice a juror or witness, places improper pressure on parties to discontinue or compromise their action or defence, or which prejudices issues at stake in the proceedings.

The Public Interest Principle

The High Court has not closed the door on a possible ground of exoneration under the so called 'Public Interest Principle'. Under this principle, where a publication which relates to or promotes a public interest and which was not published with an intention to interfere with the administration of justice, is nevertheless found to have caused such interference, the court will proceed to consider whether the publication should be excused from being contemptuous. The question becomes whether the public interest in the administration of justice is outweighed by the public interest in the discussion of public affairs or some other competing public interest.²⁵ The public interest in the administration of justice will be far less likely to be outweighed in criminal proceedings due to the seriousness of the consequences for an accused.²⁶

Courts have refused to define which public interests may outweigh the public interest in the administration of justice, except to say that it will defer to the public interest in freedom of communication in the context of reports of court proceedings and parliament, and to matters of extreme public importance, such as a major constitutional crisis or imminent threat of nuclear disaster.²⁷

In balancing the interests, the court will consider whether reference to the proceedings was incidental to a broader discussion of a matter of

public interest, or at the heart of it. The risk of prejudice will be stronger where references to the subject matter of the proceedings are central to public discussion.²⁸ The possibility of excusing direct discussion of proceedings has not been excluded, however the High Court has provided no guidance on when this may be possible.²⁹

Managing the risk: what can be published?

Courts have held that the public is entitled to be curious about certain proceedings.³⁰ As such, it is not prejudicial to publish the 'bare facts' of a case, or to publish a fair and accurate account of anything said in open court, in the presence of the jury (if there is a jury), in good faith.³¹

The government may also have an interest in conveying certain law enforcement, safety or other messages stemming from particular proceedings pending in court. There is a risk that such comments may amount to sub judice contempt.

Government should be cautious about relying on the public interest principle when publishing material in the sub judice period given, that the current approach of the High Court makes it extremely difficult to predict what weight the courts will give to competing public interests in any given situation.³²

In light of the uncertain way in which sub judice contempt can operate in practice, a careful consideration of all the circumstances should be undertaken when considering publishing material which may relate to proceedings which are sub judice. However, with a cautious and considered approach, it should be possible for government to convey relevant messages without interfering with the administration of justice and falling foul of the law of sub judice contempt.

For further information

For further information or legal advice on any issues raised in this newsletter contact:

James Ruddle on 8684 0470

Deputy Victorian Government Solicitor

Kirsty McIntyre on 9247 6797

Assistant Victorian Government Solicitor

Shaun Le Grand on 9247 6798

Managing Principal Solicitor

The VGSO is the primary source of legal services to the Victorian State Government and its statutory authorities, providing strategic advice and practical legal solutions.

¹ *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 60; New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper 43 (2000), [3.17].

² *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371; *Lane v Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56, 95, 133; *Registrar of Court of Appeal v Willesee* (1985) 2 NSWLR 650 at 673-676; *Attorney-General (SA) v Nationwide News Pty Ltd* (1986) 43 SASR 374; *Director of Public Prosecutions v Wran* (1987) 86 FLR 92 at 100-101; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 46-47, 69-70, 85; *Attorney-General (NSW) v Dean* (1990) 20 NSWLR 650 at 655; *R v West Australian Newspaper Holdings Ltd; Ex parte Director of Public Prosecutions (WA)* (1996) 16 WAR 518 at 533. Note however that intention will be relevant to liability and sentence and will exclude operation of the 'Public Interest Principle': *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371; *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15 at 40, 43, 52-53, 66-67, 69, 85; *Attorney-General (NSW) v X* [2000] NSWCA 199 at 172 per Mason P.

³ *R v Odhams Press Ltd* [1957] 1 QB 73; *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR10 at 28; *R v Pearce* (1992) 7 WAR 395 at 429.

⁴ *Attorney-General (NSW) v Radio 2UE Sydney Pty Ltd* (Unreported, New South Wales Court of Appeal, Priestley, Meagher and Powell JJA, 11 March 1998).

⁵ N Lowe and B Sufirin, *The Law of Contempt*, 3rd Edition, London, 1996, p 85.

⁶ See: *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682; *Prothonotary v Collins* (1985) 2 NSWLR 549.

⁷ *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 378-379.

⁸ *Director of Public Prosecutions v Wran* (1987) 86 FLR 92.

⁹ See: *Attorney-General (NSW) v Dean* (1990) 20 NSWLR 650, where a police member was found guilty of sub judice contempt for comments made in a press conference.

¹⁰ *Her Majesty's Advocate v William Beggs Opinion No 2 of Lord Osborne* [2002] SLT 139 at [22]. See discussion in D Butler and S Rodrick, *Australian Media Law*, 3rd Edition, Sydney, 2007, p 235.

¹¹ *James v Robinson* (1963) 109 CLR 593 at 615.

¹² *Stirling v Associated Newspapers Ltd* [1960] SC LT 5; *R v Clarke; Ex parte Crippen* (1910) 103 LT 636; *Packer v Peacock* (1912) 13 CLR 577 at 586; *James v Robinson* (1963) 109 CLR 593 at 606, 615; *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 374-375.

¹³ *Packer v Peacock* (1912) 13 CLR 577 at 586; *James v Robinson* (1963) 109 CLR 593 at 615; [1964] ALR 7 per Windeyer J; *R v Clarke; Ex parte Crippen* [1908-1919] All ER Rep 915; (1910) 103 LT 636 at 639 per Darling J, at 640 per Pickford J, at 641 per Lord Coleridge J; 27 TLR 32, Div Ct.

¹⁴ S Walker, *The Law of Journalism in Australia* (1989), p 41 and the cases referred to therein.

¹⁵ New South Wales Law Reform Commission, (2000) [7.9]-[7.22] and the cases referred to therein.

¹⁶ *Delbert-Evans v Davies* (1945) 2 All ER 167; *Ex parte Attorney-General; Re Truth & Sportsman Ltd* [1961] SR (NSW) 484.

¹⁷ New South Wales Law Reform Commission, *Contempt by Publication*, Report 100 (2003), [7.46]-[7.71]. See discussion in Butler and Rodrick, p 236.

¹⁸ See discussion at pp 236-237 Butler and Rodrick.

¹⁹ *James v Robinson* (1963) 109 CLR 593. Note however that the publication of prejudicial material before the sub judice period can impact upon a court's decision whether to order a stay of proceedings, discharge a jury, overturn a conviction etc. See: Butler and Rodrick, p 237.

²⁰ Accordingly, there is less practical importance for the offence in summary hearings by a magistrate, appellate proceedings, and coronial inquests as these proceedings do not involve jurors. See: New South Wales Law Reform Commission (2003), [6.2].

²¹ Judges are generally assumed to be immune to outside influences due to their training in making decisions based only on evidence which is admissible in court. See for example the comments of Gibbs CJ in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 58.

²² *Attorney-General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 697; *Director of Public Prosecutions v Wran* (1987) 86 FLR 92 at 101; *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 64; *Attorney-General (NSW) v Radio 2UE Sydney Pty Ltd*

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- (Unreported, New South Wales Court of Appeal, Priestly, Meagher and Powell JJA, 16 October 1997).
- ²³ See: Butler and Rodrick, pp 265-268 and the cases referred to therein.
- ²⁴ *R v Australian Broadcasting Corporation* [1983] Tas R 161 at 172 per Neasey J.
- ²⁵ *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* [1937] 37 SR (NSW) 242; *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15.
- ²⁶ Butler and Rodrick, p 272.
- ²⁷ *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 26 per Mason J. See also: Butler and Rodrick pp 274-276.
- ²⁸ *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 384.
- ²⁹ New South Wales Law Reform Commission (2000), [8.20].
- ³⁰ *Packer v Peacock* (1912) 13 CLR 577 at 588.
- ³¹ *Ex parte Terrill; Re Consolidated Press Ltd* [1937] SR (NSW) 255 at 257, 259.
- ³² I Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions*, Oxford, 2002, p 110.