

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
TRIAL DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CR 2013.....

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 Criminal
Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

**AFFIDAVIT IN SUPPORT OF APPEAL UNDER SECTION 272 BY THE
APPELLANT**

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

I, Kyle Magee, the Appellant, declare and affirm as follows:

1. I have been representing myself in this matter since 14 February 2013.
2. On 14 February 2013 I was charged by Constable Shayne Wallace (the Respondent) with Posting Bills, under section 10(1) of the Summary Offences Act 1966. Now produced and shown to me at the time of swearing this affidavit, and marked "**KM - 1**", is a copy of the charge sheet.
3. The case number for these proceedings in the Magistrates' Court is No D10987761.

4. The matter proceeded as a contested hearing on 20 August 2013. Senior Constable Suzanne Benskin represented the Respondent. Called as the sole witness by the prosecution was the Respondent, Constable Shayne Wallace, who reiterated the claims made in his statement and further explained being unable to interest the advertising company in seeking restitution or making a statement. The Respondent was cross-examined by the Appellant regarding the accuracy of his recollection of statements allegedly made by the Appellant. The prosecution tendered:
- a) A Summary of Charges, now produced and shown to me at the the time of swearing this affidavit and marked "**KM - 2**".
 - b) Statements from the respondent, Constable Shayne Wallace, and from Joseph Mana, security supervisor at Southern Cross Station. Now produced and shown to me at the time of swearing this affidavit and marked "**KM - 3**" are copies of those statements.
 - c) Photos of the expression (alleged offending) and implements used to make it. Now produced and shown to me at the time of swearing this affidavit, and marked "**KM - 4**", are copies of photographs 1 - 3.
5. The Appellant then gave evidence in chief, accepting the factual descriptions of the actions contained in the summary and statements, although not accepting the recollections of his statements as true. He also attempted to explain his political motivations, which can be summarised as a concern for democracy and social injustice when the for-profit sector, itself the largest impediment to greater democracy and social justice, is allowed to dominate public space and media through the action of the for-profit media/advertising complex -- as a result being able to corrupt the theoretical framework and political agenda of our democracy, and, ultimately, corrupt the political conscience of the democratic citizenry.
6. Written submissions were filed by the Appellant, now produced and shown to me at the time of swearing this affidavit and marked "**KM - 5**". The main argument was that

the expression was protected under section 15 of the Victorian Charter of Human Rights and Responsibilities Act 2006, and this protection could constitute the "consent of ... any person or body having authority to give such consent" required to exempt the Appellant from prosecution under section 10(1) of the Summary Offences Act 1966. The Appellant tendered as evidence copies of the typed-text posters affixed on top of the blacked-out advertisements, which explained the meaning behind the expression and constituted an important part of the expression, now produced and shown to me at the time of swearing this affidavit, and marked "**KM - 6**". The Appellant also tendered as evidence his criminal record, now produced and shown to me at the time of swearing this affidavit, and marked "**KM - 7**", which shows his only involvement with the criminal justice system has been due to his peaceful, politically-motivated anti-for-profit-advertising expressions.

7. The matter was marked part heard on 20 August 2013 and adjourned to 18 September 2013. On this date a discussion of the Appellant's arguments occurred between the Appellant and His Honour Magistrate Capell. Written submissions and short oral submissions were made on behalf of the Respondent. A copy of the Prosecutions' written submissions, now produced and shown to me at the time of swearing this affidavit, is marked "**KM - 8**". The matter was then set aside for a decision to be made on 7 October 2013.
8. On 7 October 2013 His Honour Magistrate Capell found the Appellant guilty of the offence charged, convicted and fined the Appellant an aggregate amount of \$400. His Honour did not publish reasons for his decision. The Appellant obtained the court recording of the decision and produced a transcript. Now produced and shown to me at the time of swearing this affidavit, marked "**KM - 9**", is a copy of the decision transcript.
9. On 4 November 2013 the Appellant filed a Notice of Appeal pursuant to section 272 of the Criminal Procedure Act 2009 in relation to the decision of 7 October 2013.

DECLARED AND AFFIRMED by the said)

KYLE MAGEE)

at Melbourne in the State of Victoria)

this 4th day of November 2013)

Before me:

IN THE SUPREME COURT OF VICTORIA
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BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 1"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 1**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____

CHARGE - SHEET AND SUMMONS

Accused Copy - Bring this with you to Court

Magistrates' Court Criminal Procedure Rules 2009 Form 3 Rule 11

TO THE ACCUSED

Kyle MAGEE

NFPA, VIC

Unsuitable Dates: 26/10/13-30/12/13,

Preferred Dates: Nil Preferred Dates

M

F

Co

Date of Birth

☒

☐

☐

15/10/1983

You have been charged with an offence against the law.
Read these pages to see what you must do

Registration No.

State VIC

MNI / JAID:

Licence No.

State VIC

Details of the charge against you

What is the charge?

1 The accused at Melbourne on 14/02/2013 did post a document on a structure namely advertising board without consent of the occupier or owner or any person or body having authority to give consent.

Under what law?

☒ State ☒ Act ☐ Other - Specify

Act or Regulation No.

Section/Clause (Full Ref.)

☐ C'Vealth ☐ Reg

Summary Offences Act

10(1)

Type of Offence

☒ Summary Offence (You should go to Court)

☐ Indictable Offence (You must go to Court)

Request for Committal Proceeding

☒ No ☐ Yes

Are there more charges?

☒ No ☐ Yes - see "Continuation of Charges" attached

Informant

Constable Shayne WALLACE 37276

Phone No: 03 92475478

Agency and Address

Melbourne West Police Station Uniform 1/637 Flinders St, Melbourne VIC. 3005

Email

MELBWESTUNIDOCSSR@police.vic.gov.au

Fax

92475338

Informant Signature



Date

20-2-13

Where will the case be heard

Where you must go

The ☒ Magistrates' / ☐ Children's Court of Victoria at Melbourne

Address

233 William Street, Melbourne 3000

Phone No 9628 7777

When

Time 9:30AM

Day 19th

Month June

Year

2013

Details about this summons

☐ S 14

Issued at:

Melbourne

Date

15-3-13

Issued by:

Signature



☒ Registrar

☐ Magistrate

☒ Police Informant

Charge Filed at

Melbourne

by (member)

Shayne WALLACE

Emp No

Method of Filing

Personal

Date

15-3-13

CHRISTOPHER PATERSON

Registrar

Magistrates' Court of Victoria

233 William St. Melbourne

IN THE SUPREME COURT OF VICTORIA
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BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 2"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 2**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____

SUMMARY OF CHARGES

VP Form L20

DATE PROCESSED	14/02/2013	MNI No.	[REDACTED]	Prior Convictions	R.S.D.	<input type="radio"/> Yes <input checked="" type="radio"/> No
Family Name	MAGEE	1st Name	Kyle	Vic Roads	<input type="radio"/> Yes <input checked="" type="radio"/> No	
DOB	15/10/1983	AGE	29	<input checked="" type="radio"/> Male <input type="radio"/> Female <input type="radio"/> Child	2nd Name	

SUMMARY OF OFFENCE (What the accused is alleged to have done, including any explanation given.):
THIS SUMMARY HAS BEEN PREPARED AS A GUIDE ONLY

At approximately 3:30p.m. on Friday the 14th February 2013, the accused has attended the concourse of Southern Cross Railway Station, Melbourne.

At this location the accused was observed by station security, pasting glue onto an advertisement sign. The accused placed approximately 25 pieces of black paper and documents across this sign.

The accused has then approached another advertisement sign. Where he has pasted glue across the sign. The accused has then placed black paper and documents onto the sign. Security have approached the accused and asked him to stop. The accused stated he was making a statement against corporate greed, and everything they stand for, and continued to bill post.

The Police were called and subsequently attended at the Southern Cross Railway Station at approximately 3.54p.m. that afternoon. Police observed the accused bill posting. Police conducted a field interview with the accused. The accused did not have permission nor permits to bill post.

Accused 's explanation:

Reason for bill posing- "These advertising posters have an effect on democracy".

CO-ACCUSED	FAMILY & Given Names	Court	Court Date
ACCUSED (Cross as many as appropriate) <input type="checkbox"/> Cooperative <input type="checkbox"/> Good Demeanour <input checked="" type="checkbox"/> Uncooperative <input type="checkbox"/> Abusive/Insulting <input type="checkbox"/> Physically Aggressive <input type="checkbox"/> Intoxicated		Informant Shayne WALLACE Rank/No Constable 37276 Station Melbourne West Police Station	
ADMISSIONS <input type="radio"/> Yes <input checked="" type="radio"/> No <input type="checkbox"/> Audio/Visual Recording <input type="checkbox"/> Confessional Statement <input type="checkbox"/> Record of Interview <input type="checkbox"/> Statement of Interview			
SEX OFFENDER REGISTRATION <input type="checkbox"/> Mandatory <input type="checkbox"/> Discretionary <input checked="" type="checkbox"/> Not Applicable			
ORDERS/COSTS Forfeiture/Court Orders Required? <input type="checkbox"/> (If YES, give details) <input type="checkbox"/> YES <input checked="" type="radio"/> NO S.1481 LCRA Exclusion Order Application Required? <input type="checkbox"/> YES <input checked="" type="radio"/> NO Witness/Restitution Costs (form attached)? <input type="checkbox"/> YES <input checked="" type="radio"/> NO DNA Sample Required? <input type="checkbox"/> YES <input checked="" type="radio"/> NO			

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KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 3"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 3**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____

STATEMENT

Name: Joesph MANA

STATES:

My full name is Joesph MANA. I am employed as the security supervisor at Southern Cross Railway Station. I have been working in this role for approximately four months.

On Thursday the 14th February, 2013, at approximately 3:40pm. I was working in the security control room. At this location I was contacted by a metro staff member informing me a male was gluing posters in the Collins Street, concourse area. I then dispatched two guards to attend.

I then placed the CCTV cameras on this male. I observed this male pasting glue onto the advertisement LIPTON sign, and then placing black paper across the sign. This male was wearing a yellow high vis vest and black shorts. He was Caucasian, medium build, 5 foot 8 tall.

I then observed him walk over to the VLINE entry barriers and apply paste to another signage, and place black papers across this signage. The guards contacted me via radio, stating the male refused to stop putting the posters up. I told the guards I was coming down to speak to him.

A short time later I spoke to this male at the concourse area. I said to this male you cant be doing this. I immediately started taking the posters down. He said "what are you doing.?" I said, if you can put it up I can take it down. I said, "What is your problem?." He said he was making a statement against corporate greed, and everything they stand. I said " the police have been called." He said, They can stop me, you cant. I said, The police will be here shortly.

I then left the male. A short time later Police arrived where I spoke to Constable Shayne WALLACE and detailed my observations to him. I later showed CCTV footage of this male.

At no point in time did I give anyone permission to post up posters anywhere at Southern Cross Railway Station.

.....

(Joesph MANA)

Statement taken and signature witnessed by me
at 4:57 pm on 15/02/2013 at Melbourne

Shayne WALLACE
Constable 37276

I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury.

.....

(Joesph MANA)

Acknowledgment made and signature witnessed by me
at 4:57 pm on 15/02/2013 at Melbourne

Shayne WALLACE
Constable 37276

STATEMENT

Name: Shayne WALLACE
Address: Melbourne West Police Station
1/637 Flinders St Melbourne VIC
Occupation: Constable of Police
Ph Work: 03 92475478

STATES:

My full name is Shayne Linton Wallace. I am a Constable of police currently stationed at the Melbourne West Police Station.

On Thursday 14th February 2013, I was performing divisional van duties in the Melbourne area in company with Constable Talisa BLACKHALL, 38341.

At approximately 3.50pm we received information from the Police Communication Centre to attend the concourse of Southern Cross Railway Station, Spencer Street, Melbourne. Regarding a male bill posting.

At approximately 3.54pm we attended at the Southern Cross Railway Station. On our arrival to the concourse. I had a conversation with security supervisor, Joesph MANA. Who detailed his observations to me in relation to a males' actions at the station

We have then attended at the Collins Street end of the concourse. Where I observed a male using a paint brush and sticking black pieces of paper, and documents to an advertisement board. The male was wearing a sleeve less yellow fluoro veast, black short. I would describe his as approximately 180cms tall, Caucasian, medium build, bald head. I now know this male to be the accused in the matter, Kyle MAGEE.

I have then approached the accused, in the presence and hearing of Constable BLACKHALL. I had the following conversation with the accused.

I said, "Hi my name is Constable WALLACE and this Constable BLACKHALL, we are from the Melbourne West Police Station. "

He said, "You cannot stop me doing this."

I said, "Can you please stop what you are doing I want to speak to you?"

He said, No reply from the accused

I said, "Can you please state your full name and date of birth?."

He said, "Kyle MAGEE 15/10/1983."

I said, "Where are you currently living?."

He said, "Squatters houses, abandon houses."

I said, "Do you have any identification."

He said, "Yes."

The accused produced a Victorian Drivers Licence, number 058277184 with a recorded expiry of 16/10/2013 bearing a photograph of the accused. The name of Kyle MAGEE with the date of birth of 15/10/1983, was printed on the front of the licence.

I then conducted a name check over the radio via Police Communication Centre. Which confirmed the accuseds' identity.

I said, "Kyle I am going to ask you some questions in relation to the offense of bill posting. Before continuing, I must inform you that you do not have to say or do anything but anything you say or do may be given in evidence. Do you understand that?"

He said, "Yes."

I said, "I have received a report from Southern Cross Security you were asked to stop bill posting, and you have continued to do this. I have then observed you bill posting and you continued to do this?."

He said, "I am making a statement against corporate greed. I'm just going to keep on doing this."

I said, "Why are you bill posting here today?"

He said, "Political protest."

I said, "What are you using to stick these documents to the advertising wall?."

He said, "A flour and water paste."

I said, "What were the documents you were sticking to the advertising wall?."

He said, "It explained my objection to advertising?."

I said, "Has anyone given you permission to stick these documents to the advertising wall?."

He said, "A part from myself, no body."

I said, "Do you have any permits to do this."

He said, "No."

I said, "Do you know its an offence to bill post?."

He said, "No."

I said, "Did southern cross security ask you to stop bill posting?."

He said, "Yes."

I said, "What is your reason for bill posting?."

He said, "These advertising posters have an effect on democracy."

I said, "The matter will be reported and you may receive a summons?."

He said, "I'm going to keep doing it."

I then took a photograph of the paint brush and bucket containing paste.

I now produce a photograph of the paint brush and bucket containing paste.

I then took two photographs of the advertisement wall.

I now produce a photograph of the advertisement wall.

I now produce a close up photograph of the document attached to the advertisement wall.

A short time later Constable BLACKHALL and I attended at the Southern Cross security control room . Where MANA showed me CCTV of the accused bill posting.

At approximately 16:20pm Senior Constable BLACKHALL and I resumed patrol duties.

.....

Shayne WALLACE

Constable 37276

I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury.

.....

Shayne WALLACE

Constable 37276

Acknowledgment made and signature witnessed by me
at 2:00 pm on 20/02/2013 at Melbourne

James BIRCH

Constable 38578

IN THE SUPREME COURT OF VICTORIA
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BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 4"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

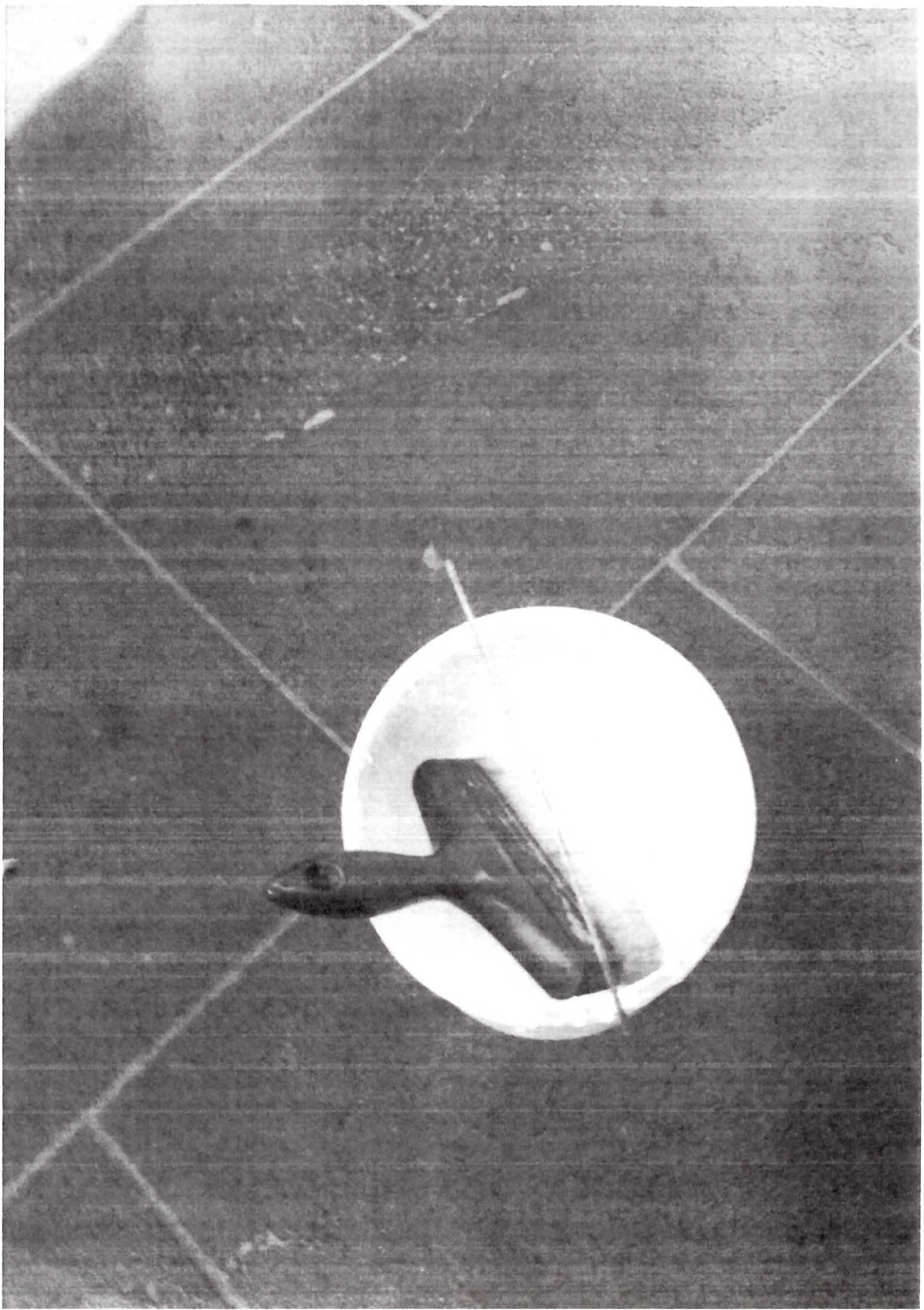
Email: kyle@globalliberalmediaplease.net

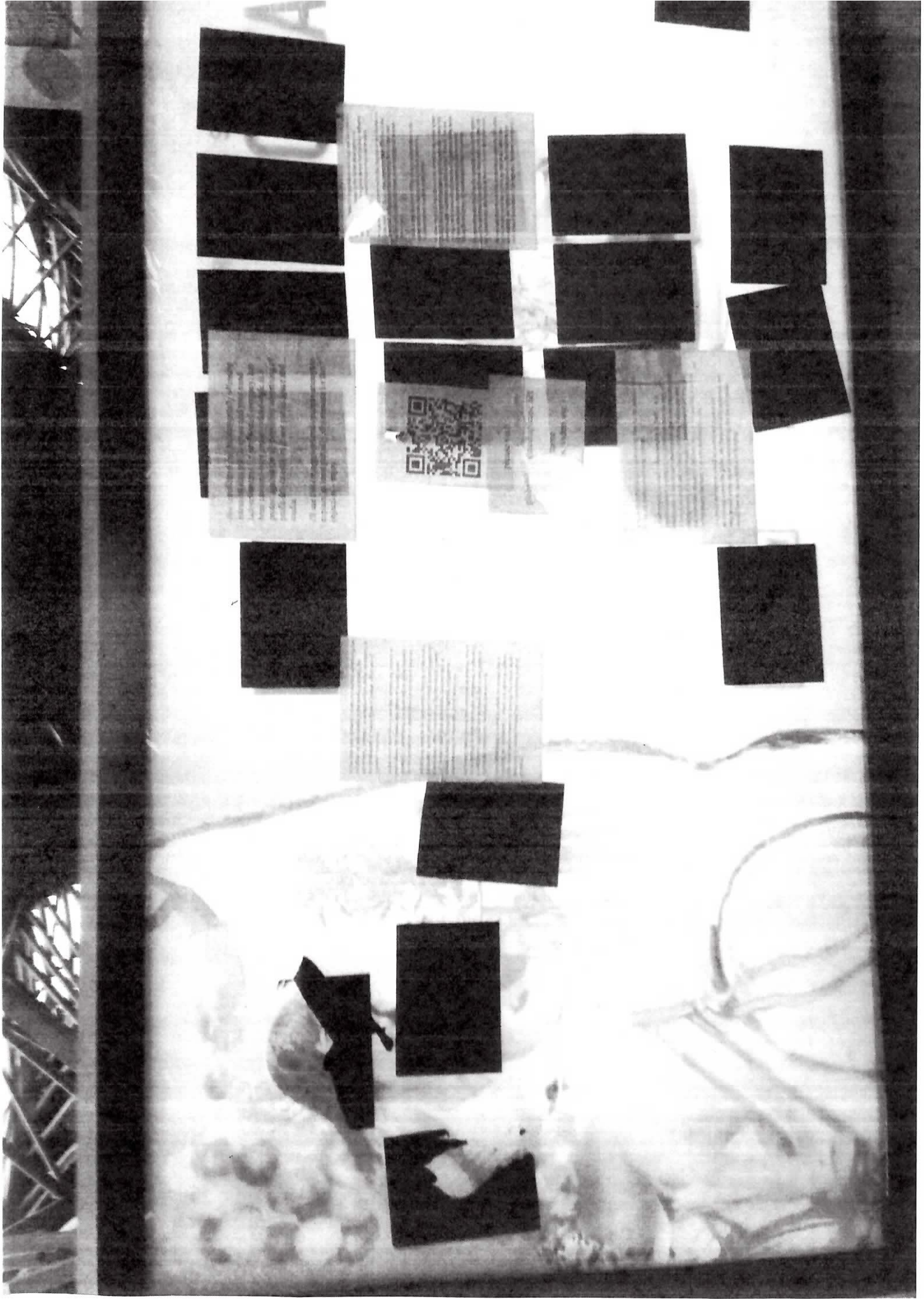
This is the exhibit marked "**KM - 4**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____

Accused: MAGEE, Kyle**Exhibit List**

<i>No.</i>	<i>Exhibit (include MPB No.)</i>	<i>Produced by</i>	<i>Relevance</i>	<i>VFSC No./Charge No.</i>
1	Photograph of a paint brush and a bucket containing paste.	Shayne WALLACE Constable 37276	Depicts the paint brush and bucket, the accused was observed using at the time of the offence.	VFSC No. - Charge No. - 1
2	Photograph of the advertisement wall.	Shayne WALLACE Constable 37276	Depicts the advertisement wall, the accused posted black paper and documents onto.	VFSC No. - Charge No. - 1
3	Photograph of the document.	Shayne WALLACE Constable 37276	Depicts the document the accused posted onto the advertisement board.	VFSC No. - Charge No. - 1





in the best-case scenario (where we assume advertising no effect on individuals or the media it funds), the advertising 'industry' is a multi-billion dollar investment in the production of waste (both of human effort and of material resources).

in the much more likely case that advertising impacts on individuals, the media, and therefore society more generally – advertising is a multi-billion dollar industry for the corruption of democratic functions and faculties.

advertising corrupts the democratic function of the media that makes up our public sphere (which in turn negatively affects many other functions of the democratic system) and corrupts individual democratic faculties such as critical thinking, formation of agenda, enlightened understanding of important global issues, etc.

the money that is poured into corporate advertising, which flows through to corporate media companies, is ultimately a community expenditure on media that would prefer to exploit the community for profit than serve it.

when advertising is aimed at adults, we should find it insulting and intolerable – where it is aimed at children (who have had no chance to develop the critical skills necessary to defend themselves) it is nothing short of criminal.

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KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 5"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 5**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____

**IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE**

CASE NO. [D10987761](#)

IN THE MATTER OF

CONSTABLE WALLACE

V.

KYLE MAGEE

DEFENCE SUBMISSIONS & AUTHORITIES

**Date of Document:
Prepared and filed by:**

**19 August 2013
Kyle Anthony Magee
The Accused
Telephone: 0417 66 99 71**

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- 3.c Magee v Delaney - findings and distinctions with this case
- 3.d Limitations on Section 15(2)
- 3.e Limitation on Section 15(2): Section 15(3)(a)
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- 3.g Conclusion

4. Can Posting Bills etc. and Defacing Property be Interpreted Consistently with Freedom of Expression?

- 4.a How has section 32 been interpreted?
- 4.b Interpretation of Posting Bills etc. and Defacing Property
- 4.c Why this Interpretation is Consistent with the Intention of Parliament

5. If Posting Bills etc. and Defacing Property cannot be Interpreted Consistently with Freedom of Expression, is the restriction on Freedom of Expression justified by Section 7(2) of the Charter

6. Declaration of Inconsistent Interpretation & referral to the Supreme Court

1. Summary of Legal Argument

1. I, Kyle Magee, the accused, plead not guilty to the offence of Posting Bills etc. and Defacing Property under section 10(1) of the Summary Offences Act 1966. I accept the factual description of my actions (although not the rendering of my statements¹) on the 14th of February, 2013, as outlined in the summary and accompanying statements. I submit that those actions are protected under section 15 (Freedom of Expression) of the Charter of Human Rights and Responsibilities Act 2006 (**the Charter**), which may establish my innocence.
2. In summary, it is argued that:
 - a. I hold a genuine belief that for-profit advertising has a detrimental effect on both individuals and democracy, and that intervention by the government to ban and regulate such advertising is required;
 - b. My actions of posterage over advertisement panels inside Southern Cross Station are a symbolic, non-violent, non-damaging protest designed to express, in an artistic manner that includes literal explanation, my logically-justified objection to for-profit advertising;
 - c. Section 15(2) of the Charter protects expression of ideas, even where the form of expression is abstract, the practice previously relatively unknown, and the action deemed unacceptable by police culturally conditioned to accept and protect the exclusive private domination of public space.
 - d. Section 32 of the Charter protects my right to freedom of expression by operating to interpret criminal laws "so far as it is possible to do so consistently with their purpose" in a manner compatible with human rights.
 - e. The offence of posting bills etc. and defacing property can be interpreted in a manner compatible with my human rights by considering the protection of the Charter as granting "the consent of... [a] body having authority to give such consent" necessary to exempt me from prosecution under section 10(1) of the Summary Offences Act 1966.
 - f. If the Court cannot interpret the law of Posting Bills etc. and Defacing Property consistently with my right to freedom of expression it must consider whether the restriction on freedom of expression created by the offence of Posting Bills etc. and Defacing Property can be justified by reference to section 7(2) of the Charter. It is argued that this limitation cannot be justified within a free and democratic society.
3. It is accepted that this argument is unusual and is reliant upon development of jurisprudence through use of the Charter. In relation to the development of human rights jurisprudence, President Maxwell has stated the following:

1 Although the summary itself and statements made by police and security staff badly misrepresent all statements I made or are entirely fictitious, such is the claim by Constable Wallace that I said "You cannot stop me from doing this." (presumably in my best Arnold Schwarzenegger voice), I take no formal issue with these claims as they are hardly relevant to the legal case. I have, however, learned an important lesson, that I should never talk to the police, or anyone likely to make statements to the police, unless the conversation is being recorded, either in police interview or by myself personally -- even if no deliberate distortion is carried out, the recollection of statements made is usually coloured by what the listener was able to comprehend, which can at times be very limited.

I wish to emphasise, as follows:

1. The Court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding.
2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.
3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise.

That there is a proper place for human rights-based arguments in Australian law cannot be doubted.²

2. R v Momcilovic – Applying the Charter

4. The Charter protects the rights enumerated in it by, amongst other things, section 32. Section 32 provides as follows:

Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

5. On 17 March 2010 Maxwell P, Ashley & Neave JJA delivered the Court of Appeal's unanimous decision in **Momcilovic**³. This decision clarifies the Court's interpretative function under section 32.
6. When interpreting legislation in accordance with section 32, the Court must:
 - a. Determine the content of the right under consideration.
 - b. The Court must then see if the relevant statutory provision can be interpreted in accordance with this right. If it can be, the enquiry stops here.
 - c. If the right cannot be interpreted consistently with the statutory provision, is the restriction of the right justifiable by reference to section 7(2) of the Charter? If the restriction can be justified, the enquiry stops here.
 - d. If the restriction cannot be justified by reference to section 7(2) of the Charter the Supreme Court must issue a declaration of incompatibility.
7. This decision proposed a different approach to that previously enunciated by Chief Justice

² Royal Women's Hospital v Medical Practitioners Board of Victoria [2006] VSCA 85 (20 April 2006), paragraphs 70 - 71

³ *The Queen v Vera Momcilovic & Ors* [2010] VSCA 50.

Warren in Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381 (7 September 2009) and a number of judgments of Justice Bell when he was sitting as President of the VCAT.

8. These submissions follow the test set out in Momcilovic.

3. Determine the content of the right under consideration – Section 15 of the Charter

3.a. Motivation for the Expression

9. Submitted as evidence are copies of the documents posted over the advertising panels inside Southern Cross Station. The documents cover, albeit very cursorily, my objection to advertising and the for-profit media system it sustains. The main points of this objection are:
- a. The advertising of profit-driven companies has come to dominate many of our public spaces and much of our public discourse without democratic consent -- it has crept up to its dominant position over the last century and continues due to the apathy or perceived powerlessness of a largely unquestioning and subdued public.
 - b. The dominance of for-profit advertising has immediate, destructive psychological effects for individual citizens, as well as structural effects on the content and contextualising language of our mainstream media, which is centrally comprised of for-profit media companies funded by for-profit advertising -- this has a negative impact on how the majority perceive, or are ignorant of, world systems and the practical applications of the concepts of global justice and global democracy.
 - c. The interests of for-profit organisations are the largest impediment to global justice and democracy facing the modern world -- to allow these very interests unrestricted and almost total dominance of our public spaces and public political discourses makes a mockery of the democracies of the 'developed' world.
 - d. Legal prohibitions on the paid advertisements of for-profit companies in our public space and media would benefit us all psychologically and politically, and it would undermine the business model of the for-profit media that corrupts our democracy to an untenable degree.
 - e. In place of the corporate/capitalist media/advertising complex, a media constitutionally bound to serve liberal democratic principles could be instituted -- this way issues of global justice, democracy and sustainability can become the priority political issues they should be, replacing our present priority number one, which is to 'ensure a strong and growing economy', a euphemism for doing everything to please the inhumane and profit-crazed future-eaters (global capitalist organisations).
10. This expression is rational and intentional. I conducted this expression in the middle of the day, at a busy public location I knew to be surveilled by security staff, with the full expectation of being disturbed by police. I make no attempt to hide or 'get away with' my expression as I am neither ashamed of my expression nor unwilling to defend it in the court of law. This expression is meant to be calm, peaceful and non-threatening to members of the public, as well as being totally unobtrusive to those uninterested in the expression (in contrast to the jarring imagery of modern advertising that is clambering for the attention of passers-by through any means available). While making my expression I was approached and questioned by some interested

passers-by, some of whom expressed enthusiastic support (one engaging me in a 'high five'), none of whom expressed displeasure at my actions -- many quietly read the documents, some took photographs. That this expression effectively imparted ideas to some direct observers is unquestionable.

11. I have turned to this avenue of expression through lack of effective alternative. In my opinion the method I have chosen is the only method with any real chance of effectively and appropriately raising this issue in the public sphere -- an issue which is often studiously ignored by even the most educated and intelligent among us, as if through some kind of cultural blindness, even where no direct conflict of interest exists (such as that created with systemic certainty within the corporate/capitalist media/advertising system). All unquestionably legal alternative methods of attempting to raise this issue in our corporate/capitalist-dominated mainstream media ('public' discourse) are doomed to fail for obvious reasons:
 - No for-profit media company is going to give air to ideas that would see its main source of income abolished. The owners and operators of for-profit media companies have aligning interests with the entire for-profit sector, they would always attempt to suppress ideas, such as the one I express, that would weaken the illegitimate power of capitalist elites in favour of democracy.
 - The public media we do have is already beset with allegations of 'left-wing bias'. The ABC is a minority that tends to adhere to the framework set by the dominant for-profit media in order to be seen as a 'legitimate' and 'reasonable' voice -- it is terminally insecure in its future funding, and unlikely to in any way promote ideas that would only redouble attempts to have its funding slashed.
 - No politician is going to touch ideas that would set the entire for-profit media and for-profit sector against them.
 - A 'successful' life of scholarly writings on this issue in academia would result in hardly a ripple on the surface of our mainstream public discourse -- I know this because it has been done repeatedly in the preceding decades by many very intelligent people, far more scholarly than I.
 - No amount of publishing in the alternative media could push this issue into the mainstream media, which is what defines which ideas are credible and sensible and those that are not.
 - The distribution of pamphlets outlining my ideas, or any such similar modes of consciousness raising, would simply be dismissed or washed over in the current political climate. Words made empty by being divorced from meaningful action that creates a substantive point of conflict, could not engage the public or their sphere. I would die only having wasted a lot of paper and a lot of time.

This issue is too important to remain outside our mainstream/'public' discourse any longer. This expression, whether allowed by the courts or repeatedly denied, has the potential to break this issue into the public sphere that is designed to keep such things out -- it could give those journalists and media commentators who possess integrity a context in which to discuss these long ignored yet blatantly unworkable conditions -- the elephant in the press gallery, so to speak.

12. I do not set out to in any way insult the police or the judiciary by choosing to act as I do. I simply see it as a moral imperative to express meaningful opposition to the corporate/capitalist media/advertising system that is railroading our democracy and which results, and will continue to result, in nothing less than the suffering and death of millions. The personal risk of further incarceration that I expose myself to, as unpleasant and traumatic as that happens to be, can be no deterrent when so much is at stake. My criminal record, which I tend as evidence, details numerous convictions and several short jail terms totaling around 6 months, all relating to the covering of advertising in a similar form of protest. This record should not speak to any insolence on my behalf, simply the depth and strength of my convictions and the persistence I possess in relation to this issue. This is to be my life's work, I would not have set out on this path if I didn't believe it right, and if I believe it is right, receiving no arguments or information that could lead me to consider that I may be mistaken, there is no reason for me to desist. In all my time before magistrates and judges there has never been a single defence of for-profit advertising or the for-profit media it sustains -- magistrates and justices instead position themselves as the cold interpreters of legislation, and none of the moral judgments that accompany other sentencings have been heard in mine. Neither have I heard a single realistic assessment of how my actions negatively impact society, only the pallid and one-dimensional assessment that I am infringing on the 'property rights' to public space of anti-social advertising companies that systemically and repeatedly negatively impact society. As I am not harming anyone and am attempting to raise an issue of great importance, I can continue on in good conscience, despite the past insistence of the judiciary that the property rights of anti-social for-profit organisations to invade public space are more important than the democratic rights of citizens and the progress of democracy. I mean no disrespect by admitting my frustration, but to conceal it would be disingenuous. Being repeatedly jailed tends to induce some level of resentment in people, especially in situations where the jailing is only to protect systematised injustice.
13. I seek to make my point in a way that creates no damage to any property. What the advertising corporation may refer to as 'damage' is only the reversible prevention of its advertising from reaching its 'targets' who exist in the public space nearby. No damage has been caused to the property of the advertising corporation, which exists completely unharmed behind the posters. The dissatisfaction on the part of the advertising corporation with their advertisement being prevented from reaching public space and being replaced by meaningful political expression leads them to think that the posters need to be removed, and I am to be held responsible for the actions their poor taste and materialistic motives dictate they carry out. The cleaning is not necessary by any objective measure, it is only the corporations responsible for the advertisement that deem it necessary, the cleaning process itself arguably unduly interfering with my right to freedom of political expression. The cleaning costs of the advertising company have not been tended as evidence by the prosecution, probably because the cleaning was carried out by maintenance staff employed by the advertising company JCDecaux during their normal shifts, resulting in no additional cost to the company. Although since the upgrade of Spencer Street Station, the newly named Southern Cross Station is actually now classed as private property, it is still undoubtedly a public place in its function⁴. The advertising company does not and cannot own public space, they should not be allowed an absolute and exclusive right,

4 The act I am charged under, the Summary Offences Act 1966, contains in section 3 the definition "public place includes and applies to— ... (c) any railway station platform or carriage;", indicating that a railway station is a natural public place, even if it has somehow been transferred into private hands recently.

protected by public servants (the police), to project any image they wish into public space, at the cost of the human rights of those who wish to express themselves politically.

14. This expression is not restricted to the particular advertising panels I obscured and replaced with meaningful political comment -- the expression is a criticism of for-profit advertising as a whole, across the world, in all its forms and its every negative impact on society. The reaction of the police and judiciary to this situation is also an important part of the expression, as it lays bare who and what it is that our justice system sets out to protect. This case is a clear instance of the human rights of a citizen with legitimate concerns for the health of individual citizens, our planet and our democracy, versus the property rights of non-human profit-driven entities that use their 'private' property to project into public space which they do not own -- profit-driven entities the likes of whom have shown time and time again their disrespect for the health of individuals, our planet and our democracy. The decisions of the judiciary will determine whether the 'public' space of our democracy is exclusively for the private use of those who possess great wealth, as it has hitherto, inexplicably, been held. Whatever the result, I hope to stir thoughts and conversations amongst members of the public regarding the whole occurrence, the reactions from all parties involved, and what this says about our society.

3.b. *Application of Section 15 of the Charter to the Expression*

15. Section 15 of the Charter provides:

15. Freedom of expression

1. Every person has the right to hold an opinion without interference.
2. Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether-
 - a. orally; or
 - b. in writing; or
 - c. in print; or
 - d. by way of art; or
 - e. in another medium chosen by him or her.
3. Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-
 - a. to respect the rights and reputations of other persons; or
 - b. for the protection of national security, public order, public health or public morality.

16. It is submitted that given the above explanation of the expression, I clearly hold opinions and ideas and am attempting to communicate them through the only avenue I believe capable of having a significant and satisfactory impact in the public sphere. The purpose of imparting these ideas is to encourage other people to consider these issues and hopefully adopt similar ideas. By expressing myself in this way I hope to elevate this issue into mainstream political thought and create political pressure on the government to seriously engage these

issues -- in the hope that this will ultimately lead to a ban on the paid advertisements of for-profit companies in public space and public media.

17. This is fundamentally a political expression, any artistic components are practical devices aimed at a precise political end. I have expressed myself both in print and by way of art, but considering the unusual nature of the art, it could be said that I have expressed myself in another medium chosen by myself. As all these types of expressions are able to be protected, it is not relevant to assign labels to this particular expression.
18. Section 32(2) of the Charter provides that “international law and the judgments of... foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision”.
19. There is Canadian authority for the proposition that freedom of expression includes postering.
20. In *Ramsden v Peterborough (City)*⁵ (the **Ramsden Case**) the Full Court of the Canadian Supreme Court considered a municipal by-law prohibiting the placing of posters on any public property within the city of Peterborough. The defendant in that case had put up posters advertising an upcoming performance by his band on utility poles within the city. He was charged with an offence under the by-law. He claimed the law was unconstitutional because it violated his right to freedom of expression. The offence created was a summary offence, punishable by a maximum fine of \$2,000.
21. Similar to section 15 of the Charter, section 2(b) of the Canadian Charter provides that “Everyone has the following fundamental freedoms:... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”
22. Iacobucci J gave the judgment of the unanimous Court in the *Ramsden Case*. He considered whether postering constitutes expression under section 2(b). It was held that it did, as it is an activity which conveys or attempts to convey a meaning. The by-law prohibiting all postering in the city was ruled unconstitutional and struck down, as it could not be justified by reference to section 1 of the Canadian Charter, which guarantees rights only subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. He made the observation that :

“posterage has historically been an effective and relatively inexpensive means of communication. Posters have communicated political, cultural and social information for centuries. Postering on public property including utility poles increases the availability of these messages, and thereby fosters social and political decision-making.”⁶
23. Iacobucci J further referred to a decision of L'Heureux-Dubé J in *Committee for the Commonwealth of Canada v. Canada* (1992), 17 Queen's L. J. 489 that emphasised that for those with scant resources, the use of public property may be the only means of engaging in

5 *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

6 *Ramsden Case*, page 16

expressive activity⁷.

24. In the case of my expression, it is not only scant resources that make use of public space the only means of engaging in expressive activity. The inherent conflict of interest in the mainstream commercial media, as well as inexplicable cultural dismissal of this issue as one beyond democratic control are both factors that make the direct physical action of posterism my only option for effective expression. It is a logical extension of freedom of expression that such expression should not be limited to modes of expression that can have no considerable effect.
25. It is important to note that in Ramsden's case the Court was considering expression that essentially constituted promotion of the accused's own band. Such expression is largely self interested, the cumulative effect of allowing such expressions may produce a stronger musical culture, but in the accused's particular case it was aimed at getting more paying patrons through the door. An analysis of cases related to freedom of expression demonstrates that political expression is generally to be afforded the greatest protection of all types of expression (see paragraphs 27 and 52). Accordingly, the principles which were applied in Ramsden's Case should be applied with greater force here, because of the fact the expression is political.
26. That my ideas, opinions or expression may be unwelcome to those possessing a punitive conscience should not be a limiting factor. In the case of *Sanders v Kingson* [2005] EWHC 1154 (Admin) the UK High Court quoted the following with approval:

“[T]he court has to recall that freedom of expression... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self fulfillment. Subject to paragraph 2 (*similar to section 15(3) discussed below*), it is applicable not only to “information or ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb”⁸
27. At paragraph 84 of that judgment the Court states that political expression “attracts a higher level of protection” than other expression.
28. Obviously the police are offended by my breaking of a social convention that for-profit advertisements have inalienable 'rights' to public space. This may be what prompts them to charge me with posting bills while many 'legitimate' poster advertisement businesses can continue to operate, fully in the open, without the police prosecuting them out of business, as they could easily do. The practice of these 'legitimate' businesses falls directly under the activities proscribed by section 10(1) of the Summary Offences Act, and these companies, not being human beings expressing political opinions, have no recourse to protection under the Charter. Perhaps because these posterism companies are themselves advertising for-profit companies much of the time, they do not offend the police enough to prompt them to press charges, as they are simply carrying on the socially accepted absurdity of private companies selling access to public space which they do not, and by definition cannot, own.
29. The opinions I express receive much support from highly qualified, intelligent and insightful

⁷ Ramsden Case, page 17

⁸ At paragraph 69

people, even though such opinions are largely washed from our public sphere through the power of vested interests. My expression represents an attempt to address this imbalance through the only effective means available to me. That my actions may offend, shock, disturb or confuse some of the police force should not be a further limiting factor in addition to those limiting factors already laid out in the Charter.

3.c. Magee v Delaney - findings and distinctions with this case

30. In the case of *Magee v Delaney* (2012) VSC 407, Justice Kyrour made several findings on the interpretation of the Charter in regard to Freedom of Expression.
31. In *Magee v Delaney* Justice Kyrour was concerned with a charge of criminal damage. The damage consisted of painting over an advertising panel. His Honour held that any expression involving damage could not be protected under section 15 of the Charter for public policy considerations⁹, over and above the specific limitations of the Charter itself. Central to Justice Kyrour's decision was that the political expression was made by way of committing an act of damage.
32. The present charge concerns a charge of posterage over an advertising structure. Unlike criminal damage, it is not an element of the present charge that damage occurred. Nor does the charge sheet allege that damage occurred.
33. Furthermore, if the prosecution seeks to allege damage they should have preferred either the charge of Wilful Damage or Criminal Damage. The Court cannot take into account an aggravating feature which, if proved, would render me liable for a more serious crime – see the principles in *R v De Simoni* (1981) 147 CLR 383.
34. For these reasons, the public policy limitation imposed by Justice Kyrour on expressions that involve damage has no application in this case.
35. Justice Kyrour went on, after already having made his decision, to rule that the limiting considerations within section 15(3) of the Charter itself were sufficient to limit the right to Freedom of Expression in that case. As the magistrates court is bound to follow the interpretation of Justice Kyrour in relation to section 15(3), these findings will be addressed where relevant.

3.d Limitations on Section 15(2)

36. Of course, the Charter does not protect all types of expression, such a situation would be absurd, and accordingly the Charter sets out a broad set of limiting factors. Each expression must pass a number of hurdles to be protected under the Charter.
37. These hurdles easily capture any expression that is in any way damaging to our democratic society. The protection of one specific expression by no means opens the flood-gates -- If one expression passes through, it is no easier for other expressions to pass through, they will only pass through if they are similarly positive for a vibrant liberal democratic society.

9 *Magee v Delaney* (2012) VSC 407, Paragraph 97

38. The right of freedom of expression outlined in section 15(2) is followed directly by the limitations of section 15(3). Accordingly, the first hurdle when considering freedom of expression is to ensure the freedom in a specific instance is not limited by the operation of section 15(3).

3.e Limitations on Section 15(2): Section 15(3)(a)

39. Section 15(3)(a) provides that the right to freedom of expression may be limited subject to lawful restrictions reasonably necessary to “respect the rights and reputation of other *persons*” [emphasis added].
40. Section 3 of the Charter carries the definition “‘person’ means a human being”. Section 6(1) of the Charter states that “only persons have human rights” and further clarifies “Note: Corporations do not have human rights”.
41. Justice Kyrrou found that section 15(3)(a) of the Charter, when referring to the rights and reputations of other *persons* (clearly defined as human beings), was in fact referring to the rights and reputations of all non-natural persons¹⁰. Since the magistrates court is required to follow Justice Kyrrou's findings, we must determine whether the rights of any legal entity have been infringed.
42. I expect it will be argued by the prosecution that my actions fail to respect the rights of the multinational, multi-million-dollar advertising corporation JCDecaux, or the private consortium that owns and rents the public property to JCDecaux. Justice Kyrrou's ruling that the rights and reputations of all non-natural legal entities are to be considered in limiting human rights does not grant non-natural legal entities rights under the Charter, as “only persons have human rights”. The rights which Justice Kyrrou ruled were infringed, the only rights it could be argued have been infringed, were the rights under criminal law to private property.
43. As no damage has occurred to the property of the advertising corporation, no infringement of the property rights of the corporation has occurred. There exists no legal right that the advertising corporation should be able to project whatever image it likes into public space from their private property, so the fact that the posters blocked such an image from reaching public space does not infringe the rights of the advertising corporation either. Section 15(3)(a) has no application in this case.

3.f Limitations on Section 15(2): Section 15(3)(b)

44. Section 15(3)(b) provides that the right to freedom of expression may be subject to “lawful restrictions *reasonably necessary* for the protection of national security, public order, public health or public morality” [emphasis added].
45. It is submitted that my expression does not place national security, public health or public morality at risk. Public morality may arguably be jeopardised by writing or actions of a profane or obscene nature, however no profanity or obscenity attends my actions. The removal of for-

¹⁰ Magee v Delaney (2012) VSC 407, paragraphs 109 - 126

profit advertising from our society is more likely to improve public morality -- lessening the materialistic scourge that for-profit advertising seeks to promote and profit from could slow our rush toward ecocide, freeing mental energy to work towards more admirable goals. Public health could also stand to be improved by the removal of for-profit advertisements -- advertising and the superficial, over-indulgent consumer culture it promotes inducing a range of mental and physical illnesses in our society, often the victims being vulnerable children with limited ability to defend themselves.

46. The only conceivable justification under section 15(3)(b) for restricting my right to freedom of expression might be that the offence of Posting Bills etc. and Defacing Property is a lawful restriction reasonably necessary for the protection of public order. Public order is not defined in the Charter.
47. Public order is certainly jeopardised by any breach of the peace. No violence or apprehension of violence is caused by my expression at any stage. I have 29 priors for criminal damage all relating to the obscuring of for-profit advertisements as a peaceful political expression. In all that time I have no history of violence, or of resisting police, or even of speaking disrespectfully or insultingly to the arresting officers. I have received more expressions of support and gratitude from the public than I have of disapproval. At no point has a breach of the peace occurred, or threatened to occur, as an unlawful response to my actions.
48. In *Brooker v The Police* [2007] NZSC 30 (4 May 2007) (**Brooker's Case**) the Supreme Court of New Zealand considered the meaning of public order in a Freedom of Expression context.
49. Brooker was convicted of offensive behaviour or language by making a public protest outside the house of a police constable. This was done by Brooker standing outside the Constable's address at 9:20pm (after the Constable had been on night shift) and singing with a guitar accompaniment. The lyrics were not profane, but suggestive that the constable had engaged in illegal searches and malicious prosecutions¹¹. He continued to sing for 25 minutes before his arrest for declining to desist.
50. The Charge was "Offensive behaviour or language" and provides "every person is liable to a fine not exceeding \$1,000 who, in or within the view of any public place, behaves in an offensive or disorderly manner".
51. The Court considered that this offence had to be interpreted in light of the right to Freedom of Expression contained in section 14 of the New Zealand Bill of Rights Act 1990 (NZ). The Court acknowledged that the right to expression was limited by the need to protect other important interests, including public order¹².
52. In this context, the New Zealand Supreme Court, composed of 5 separate Justices, gave five separate judgments. These judgments had a tendency to concur as to the question of what constituted a threat to public order.

11 Brooker's case, paragraphs 13-15

12 Brooker's case, paragraph 4

- Elias CJ stated that behaviour threatening public order had to go beyond being disruptive or seriously annoying. Instead, it requires “an overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question”¹³.
- Blanchard J held that behaviour “must cause a disturbance of good order which in the particular circumstances of time and place any affected members of the public could not reasonably be expected to endure because of its intensity or its duration or a combination of both those factors”¹⁴. Furthermore, “public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour”¹⁵.
- Tipping J held that “conduct... is disorderly if, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear”¹⁶ and went on to hold that “where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case”¹⁷.

53. It is submitted that this test should be followed in this case as a partial test. On any of the definitions provided above, it is submitted that my expression falls short of being a sufficient threat to public order to limit the right.
54. My conduct caused very little to no interference to the ordinary and customary use of the train station. My bodily presence there is no more interference than that caused by any of the hundreds of people within the public train station. My activity is calm and unobtrusive to anyone without interest. Until the paste dries, there is a small risk that a member of the public may lean up against the advertising hoarding and get paste on their clothing. The panels were not situated where anyone was likely to lean, I hoped people would be attentive and notice the poster before leaning, and any paste that could have contacted a person's clothing would easily wash out, as it was only wheat-flour and water. The paste on the first two panels was dry by the time the police arrived, preventing them from immediately peeling off the posters as they did on the third.
55. The interference doesn't go beyond being disruptive or seriously annoying. It is a very minor and temporary one, lasting only until the paste dries. Once the paste is dried, the posters could provide reading much more interesting and real than the advertisement for bottled sugar-water they obscured, perhaps enhancing the the experience of waiting for a train.
56. Importantly, there was no complaint made by the public either during or after the incident, implying no member of the public found my activities disturbing or the cause of anxiety. The police were phoned by the security staff acting on their own initiative and members of the

13 Brooker's case, paragraph 42-47

14 Brooker's case, paragraph 56

15 Brooker's case, paragraph 59

16 Brooker's case, paragraph 90

17 Brooker's case, paragraph 92

public only expressed interest by approaching, observing and reading the posters.

57. Furthermore, because my conduct is intended to convey information or express a political opinion, public order should less readily be seen to be disturbed by my actions.
58. The test outlined in Brooker's case, which focuses on an auditory expression, fails to consider one aspect relevant to my particular expression. Because my expression involves the obscuring of a commercial advertisement (a key part of the expression signifying that, contrary to popular belief, the use of public space is a democratic issue that we should, and have a right to question), it may be seen that this kind of challenge to the exclusive and ever-expanding 'right' of advertising corporations to dominate public space poses a threat to public order, by undermining private property rights.
59. My actions do not challenge the private property rights of advertising corporations. What they do challenge is the 'right' of advertising corporations to use their private property to project their images into public space. My actions do not damage the private property of advertising corporations, they simply temporarily and reversibly prevent the private property from projecting into public space, as I believe they should not have the right to do. I 'damaged' the advertising panels less than a shirt is 'damaged' by being worn once -- although a dirty shirt is generally agreed to have been made more offensive by being sweated upon, an advertising panel that has been covered has been made less offensive to anyone of good taste (not sure if that constitutes the majority). It is not surprising that the advertising corporation sees this shielding as damage, as the entire and sole purpose of their private property is to project into public space. This 'right' to project into public space from a strategically-placed, thin slice of 'private property', which has become culturally accepted for some strange reason, has no legal basis -- there is nothing explicit or implied in private property law that grants the right to property owners to project whatever image they would like into public space. There is no abrogation to any actual private property rights of persons or non-natural legal entities -- the only 'right' I set out to challenge is the culturally-accepted, self-imposed right of non-human advertising corporations to dominate public space through the abuse of private property law. This issue should become a political question to be determined by an engaged community -- hence my expression.
60. Any concern that protecting this expression could lead to the widespread abrogation of private property rights under the protection of Freedom of Expression is unfounded and alarmist. If an expression unduly interfered with or damaged the private property rights of any person, it would be excluded from protection by section 15(3)(a). If an expression involved actual and considerable damage to property, whether owned by a person or a non-natural legal entity, in such a way that public order was threatened, it would be limited by the action of section 15(3)(b). Any precedent set in this case would be unhelpful for expressions causing any damage.
61. My action is intended to push for a change in public order, as any political expression pushes for a change to a certain aspect of the current public order, in the broadest conception of public order. What I am trying to express is that a society without the alienating domination of for-profit advertising, without the total for-profit domination of our mainstream media that advertising enables, that instead instituted a truly liberal democratic media system, would be a richer participatory democratic public order. A push for a new and more democratic public order

cannot be objected to simply because it is a 'threat' to the existing, problematic order -- if that were the case, all political expression could be prohibited for being a threat to the current public order.

62. I do not deny that my intention in trying to have this kind of expression protected is that it would allow a peaceful social movement to make a real issue out of the negative influence of for-profit advertising in our democracy. That would be democracy in action, opening up discussion and debate on an issue that has been kept off the radar by the owners and controllers of the radar tower, those that will continue to profit and exert illegitimate power for as long as the present situation remains unchallenged. If the justice system acts to uphold the present 'public order' of for-profit dominance and punish those that seek to demonstrate against it in the only meaningful way they can, that would be to act as an obstacle to the progress of democracy rather than an advocate, only to protect the depraved interests of the rich and their organisations.

3.g Conclusion

63. It is submitted that my expression constitutes political expression, the type afforded greatest protection under the Charter. Canadian Supreme Court authority supports the proposition that posterage can constitute protected expression.
64. Furthermore, it is submitted that section 15(3), which is a limit on the right to freedom of expression, doesn't operate in this case to restrict my freedom of expression. The only limit which could potentially apply is the need to preserve public order under section 15(3)(b). Any disturbance to public order is minimal and well below the threshold of acceptable disturbance as outlined in Brooker's case. There is neither any threat to public order engendered by any perceived abrogation of private property rights. My action only seeks to highlight the existence of the non-legal, culturally-accepted, and exclusive 'right' of the non-personal owners of private property to project whatever images they wish into public space. Only the private property of advertising corporations that unlawfully interferes in public space is prevented from doing so. No actual damage has been caused to any private property, no actual private property rights have been breached by my actions, and no abrogation of property rights exists for those reasons. For surviving the test outlined in Brooker's case, and for posing no threat to private property rights, I submit that there exists no threat to public order sufficient to limit the right in this instance.

4. Can Posting Bills etc. and Defacing Property be Interpreted Consistently with Freedom of Expression.

4.a How has section 32 been interpreted?

65. Section 32 of the Charter is set out at paragraph 4 above. In Momcilovic the Court found that section 32(1) has the same status as the Interpretation of Legislation Act 1984 (Vic):

It is a statutory directive, obliging courts (and tribunals) to carry out their task of statutory interpretation in a particular way. It is part of the body of rules governing the interpretive task.

Compliance with the s 32(1) obligation means exploring all ‘possible’ interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is ‘possible’ is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights. That is a powerful presumption, as Gleeson CJ made clear in Plaintiff S157/2002 v The Commonwealth, for example:

[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. ... [I]n the absence of express language or necessary implication, even the most general words are taken to be ‘subject to the basic rights of the individual’.

As this passage makes clear, the presumption does not depend for its operation on the existence of any ambiguity in the statutory language.¹⁸

4.b. Interpretation of Posting Bills etc. and Defacing Property

66. Having above determined the content of the right under consideration, being section 15 (2), the Court must then attempt to interpret relevant statutory provision in accordance with it. The relevant statutory provision in section 10(1) of the Summary Offences Act 1966 (Vic).

67. Section 10(1) of the Summary Offences Act 1966 (Vic) creates an offence entitled "Posting Bills etc. and Defacing Property". It provides that:

Any person who posts any placard bill sticker or other document on or writes or paints on or otherwise defaces any road bridge or footpath or any house building hoarding wall fence gate tree tree-guard post pillar hydrant fire-alarm petrol pump or other structure whatsoever without the consent of the occupier or owner of the premises concerned or of any person or body having authority to give such consent shall be guilty of an offence.

Penalty: 15 penalty units or imprisonment for three months.

68. The offence provides the defence of having been granted the consent of "any person or body having authority to give such consent".

69. It is submitted that the Victorian Government is a body having authority to give such consent. If the conduct in question is deemed to be protected under the Charter of Human Rights and Responsibilities Act 2006, as I submit it is in part 3 of these submissions, then consent can be said to be granted by virtue of that Act on behalf of the Victorian Government.

¹⁸ Momcilovic, paragraphs 102 - 103

70. As courts are not to "impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language"¹⁹, this is most acceptable interpretation of section 10(1) of the Summary Offences Act, where it is ruled that actions that would otherwise fall under it are protected by the Charter.

4.c. Why this Interpretation is Consistent with the Intention of Parliament

71. It was the clear intention of parliament to protect the rights of citizens to effectively express themselves. The statement in section 15(2) of the Charter, that citizens may express themselves "in another medium chosen by him or her", reflects the desire of parliament to protect expression in any unforeseen future form that a reasonable citizen in our modern society may deem necessary for effective communication, including forms that go beyond the style of political expression familiar to the people of the 1920's, which are now in many cases unacceptably ineffective. Many limitations apply of course, and these limitations exclude from protection all expressions of an anti-social nature. Once clearing these limitations, as I submit my expression does, statutory provisions further limiting that right can only do so explicitly, making particular mention of the right to be curtailed, which the Summary Offences Act does not do. If parliament had meant that this type of expression be limited by the action of section 10(1) of the Summary Offences Act, they would have amended the Act appropriately.
72. A legitimate concern is that protecting this expression would open the flood-gates to poster type offences, and that this is contrary to the intention of parliament in creating section 10(1). This concern is unjustified in light of the fact that commercial companies are openly pouring through the open flood gates presently, plastering both public and private property all over the city with all kinds of advertisements, and the police do not see fit to prosecute them as they easily could. If anything, protecting only the poster expressions of human beings that have real political or cultural value, such as those directly opposing corporate advertising, while clamping down on commercial poster advertising companies under existing laws, would close the flood-gates considerably. The effect of this would be a more vibrant and participatory culture, instead of one where the alienating expressions of non-natural for-profits dominate owing to their financial advantage.
73. Another legitimate concern is that protecting this expression could abrogate the private property rights of persons and non-natural legal persons in a way that parliament would never have intended. This concern is not justified either, as only the legitimate expressions of human beings that temporarily, and without any real damage whatsoever, prevent the property of non-natural corporations from projecting into public space could be similarly protected. This would not serve to abrogate the actual private property rights of non-natural persons in any way, it would only serve to democratically limit the illegitimate ability of non-natural corporations to project into public space from their thin slices of private property.
74. Protecting the freedom of expression of citizens carries an implicit wish to further democracy. In the current media and political landscape, protecting the peaceful freedom of expression of citizens seeking to address a vital issue, one excluded by a number of factors from our political

¹⁹ Momcilovic, paragraph 103

agenda, could be the only way forward. It is not inconceivable that truly democratic politicians would welcome media systems being made a real political issue by concerned and active citizens, especially as they are unable to raise the issue themselves lest the entire might of for-profit media system be turned against them.

5. If Posting Bills etc. and Defacing Property cannot be Interpreted Consistently with Freedom of Expression, is the restriction on Freedom of Expression justified by Section 7(2) of the Charter

75. This section is only relevant in the event that the Court finds that it cannot interpret the offence of posting bills etc. and defacing property consistently with the Charter.
76. In Momcilovic the Court stated that if a right cannot be interpreted consistently with a statutory provision the Court should look to whether the restriction is justifiable by reference to section 7(2) of the Charter.
77. Section 7(2) provides as follows:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- a. the nature of the right; and
- b. the importance of the purpose of the limitation; and
- c. the nature and extent of the limitation; and
- d. the relationship between the limitation and its purpose; and
- e. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

78. At this point, the onus falls upon the party seeking to limit a right, in this case the prosecution, to ‘demonstrably justify’ the restriction. Chief Justice Warren stated the following in *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381:

The onus of ‘demonstrably justifying’ the limitation in accordance with s 7 resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high. It requires a ‘degree of probability which is commensurate with the occasion’. King J observed in *Williams* that the issue for the court is to balance the competing interests of society, including the public interest, and to determine what is required for the accused to receive a fair hearing. It follows that the evidence required to prove the elements contained in s 7 should be ‘cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit’

79. This was quoted with apparent approval in the case of Momcilovic at paragraph 144.
80. In this case, it is submitted that the prosecution would fail in this task for the following reason.

There is no evidence that political postering of this kind constitutes a significant problem which needs to be addressed by the criminal justice system. The criminal justice system declines to address commercial postering which is currently prolific and which has no defence under Freedom of Expression. Given the importance of Freedom of Expression, especially where the expression is political, and given the difficulty of effectively raising this extremely important issue in the current media climate, the Court would need to be satisfied that using the criminal law to limit this expression, only to save billion-dollar advertising corporations like JCDecaux from what they see as a minor inconvenience was "demonstrably justified in a free and democratic society based on human dignity, equality and freedom". The advertising industry wastes around \$550 billion dollars annually as it increasingly invades our lives, psychologically corrupting us as it corrupts our media -- in a world where so many live and die in poverty, no society based on human dignity, equality and freedom could use its justice system to put the advertising industry further beyond question, by outlawing the one effective, peaceful and totally harmless expression of discontent available. Neither the media itself nor politicians are going to raise this issue, and coupled with combination of complacency and defeatist attitudes that decades of corporate media dominance has induced in the public, this issue will not see political light unless citizens are allowed to express meaningful and direct opposition through this peaceful and harmless method.

81. The prosecution is calling no evidence to establish that the prohibition on political postering created by the offence of posting bills is "demonstrably justified in a free and democratic society". Absent this evidence, it is submitted that the court does not have the "cogent and persuasive" evidence necessary for it to agree to impose a limit on the right to freedom of expression by reference to section 7(2).

6. Declaration of Inconsistent Interpretation & referral to the Supreme Court

82. This section is only relevant if the Court finds it cannot interpret the offence of posting bills etc. and defacing property consistently with the Charter and that the limitation on freedom of expression is not justified by reference to section 7(2).
83. In this instance, the Supreme Court is empowered to make a declaration of inconsistent interpretation. The Magistrates' Court does not have this power. Should the Court reach this point the defence requests that the matter be referred to the Supreme Court pursuant to section 33 of the Charter for determination.
84. The leading case on this matter is *De Simone v Bevnol Constructions and Developments Pty Ltd & Ors* [2010] VSCA 231. This case suggests that section 33 referrals by Court's should only be made in circumstances where findings of fact have been made. This prevents the Court from dealing with theoretical questions.
85. The Court of Appeal also suggests that it would benefit from the reasons of a first instance decision maker.
86. Accordingly, prior to the referral being made the defence requests that the Court make findings of fact and law in relation to whether:

- a. My conduct constitutes expression under section 15(2) of the Charter
- b. My right to freedom expression is limited by section 15(3) of the Charter
- c. The law of criminal damage can be interpreted consistently with my right to freedom of expression
- d. The offence of criminal damage justifiably limits my right to freedom of expression by reference to section 7(2)

87. Having made those findings, the defence would seek an order under section 33 to the effect that:

Given the preceding findings, the following question is referred to the Supreme Court for determination pursuant to section 33 of the Charter of Human Rights and Responsibilities Act 2006:

“Can the offence of Posting Bills etc. and Defacing Property be consistently interpreted with the right to Freedom of Expression protected by section 15(2) of the Charter of Human Rights and Responsibilities Act 2006 and, if not, should the Supreme Court issue a Declaration of Inconsistent Interpretation”

Kyle Anthony Magee
The Accused
19 August 2013

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
TRIAL DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CR 2013.....

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 Criminal
Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 6"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 6**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____

this unsolicited and fundamentally offensive intrusion into public space and your mind (advertisement for profit-mad company) has been covered-over papier-mâché-style as a protest against the all-pervasive advertising of profit-driven entities in our public space and media.

i'll use this (re)appropriated space to attempt to explain, at least partially, the reasons for this objection – enjoy.

in the best-case scenario (where we assume advertising has no effect on individuals or the media it funds), the advertising 'industry' is a multi-billion dollar investment in the production of waste (both of human effort and of material resources).

in the much more likely case that advertising impacts on individuals, the media, and therefore society more generally – advertising is a multi-billion dollar industry for the corruption of democratic functions and faculties.

advertising corrupts the democratic function of the media that makes up our public sphere (which in turn negatively effects many other functions of the democratic system) and corrupts individual democratic faculties such as critical thinking, formation of agenda, enlightened understanding of important global issues, etc.

the money that is poured into corporate advertising, which flows through to corporate media companies, is ultimately a community expenditure on media that would prefer to exploit the community for profit than serve it.

when advertising is aimed at adults, we should find it insulting and intolerable – where it is aimed at children (who have had no chance to develop the critical skills necessary to defend themselves) it is nothing short of criminal.

corporate/capitalist organisations (c/c orgs) and their interests are a huge impediment to the further development of democracy – they are a global power that has huge influence over even the most powerful democratic nation-states.

we can either continue to suffer the illegitimate and destructive global power of the c/c orgs, or we can have effective global democratic co-operation that can bring the c/c orgs under control and properly distribute power amongst all national democracies.

this is to say: the power of the c/c orgs is dependant on the global democratic deficit, so it is in their interest to maintain/expand this democratic deficit.

to allow these c/c orgs almost total control of our public sphere (through the corporate/capitalist advertising/media system that dominates our mainstream media) is totally absurd – we are putting a central and critical process of democracy in the hands of those who have a depraved interest in the continued failure/limited power of national and global democracy.

the institutions that facilitate the operation of our public sphere should be mandated to serve liberal democratic principles, not be tailored to suit the desires of their c/c bosses and advertisers.

we need and deserve a quality mainstream media that will allow us (the people) to set the agenda, so that global justice and sustainability can replace the demands of the inhumane and profit-crazed future-eaters (the capitalist 'business community').

corporate/capitalist (c/c) advertising may be the achilles heel of the c/c media/advertising system.

c/c advertising is totally objectionable in itself - it is psychologically damaging (it exploits/creates feelings of inadequacy, it encourages materialism and over-consumption, it breeds mistrust and political cynicism, it alienates and disempowers, it is a soul-crushing perversion of art, it targets the vulnerable minds of children, etc.), it is wasteful, it serves no necessary function, it is anti-democratic, etc.

if a social movement could be mobilised against c/c advertising across the globe, and bans could be achieved, not only would we be rid of c/c advertising, but the c/c media would lose its main source of funding.



please visit

globalliberalmediaplease.net

for more

(text, photos, video, etc.)

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
TRIAL DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CR 2013.....

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 Criminal
Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 7"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 7**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.


Before me: _____

LFR01A
VP37152 CONST RICHARDS

LEAP - VICTORIA POLICE
CRIMINAL RECORD

20:08 20/06/2013
Page 1 of 4

* CONFIDENTIAL - Unlawful use or disclosure of this information could lead to prosecution. *

SIGNATURE:  NAME: L. RICHARDS RANK/NUMBER/TITLE: 037152

MNI: 10628893

Purpose: ACCUSED - PRIORS FOR COURT

Name: MAGEE, KYLE

Dob: 15/10/1983 Age: 29 Sex: MALE

ALIAS/

NICKNAME	SURNAME	GIVEN NAMES	DOB	SEX
ALIAS	MAGEE	KYLE ANTHONY	15/10/1983	MALE

COURT	DATE	DEGREE & CHARGE	COUNT	RESULT
MELBOURNE MAGISTRATES	14/02/11	INTENTIONALLY DAMAGE PROPERTY POSSESS ARTICLE FOR CRIMINAL DAMAGE		With conviction, fined an aggregate of \$500.00 Pay compensation \$40.17 With conviction, fined an aggregate of \$500.00 Forfeiture order made without consent Order following Property/s seized be forfeited and destroyed: 1 X BLACK BUCKET, CONTAINING A QTY WHITE PAINT; 1 X PAINT BRUSH; 1 X 'WET PAINT' SIGN.
MELBOURNE MAGISTRATES	22/12/09	INTENTIONALLY DAMAGE PROPERTY		28 DAYS imprisonment. Concurrent. Effective total State term imposed is 28 days Time held in custody, 28 days, reckoned as a period of imprisonment already served under this sentence. Pay compensation \$250.00 as MAGEE, KYLE ANTHONY
MELBOURNE MAGISTRATES	22/12/09	BREACH re 12/06/09 INTENTIONALLY DAMAGE PROPERTY		Suspended sentence wholly restored. The restored term to be served is 14 days . Effective total State term imposed is 14 days Time held in custody, 14

Continued next page

LFR01A
VP37152 CONST RICHARDS

LEAP - VICTORIA POLICE
CRIMINAL RECORD

20:08 20/06/2013
Page 2 of 4

* CONFIDENTIAL - Unlawful use or disclosure of this information could lead to prosecution. *

MNI: ~~10619828~~

Purpose: ACCUSED - PRIORS FOR COURT

Name: MAGEE, KYLE

Dob: 15/10/1983 Age: 29 Sex: MALE

COURT	DATE	DEGREE & CHARGE	COUNT	RESULT
Continued		See charges above		
MELBOURNE MAGISTRATES	22/12/09			days, reckoned as a period of imprisonment already served under this sentence. Cumulative upon State sentences presently being served and imposed prior to this day. Cumulative upon other State sentences imposed this day.
MELBOURNE MAGISTRATES	22/12/09	CRIMINAL DAMAGE (INTENT DAMAGE/DESTROY)		With conviction, fined an aggregate of \$1000.00 Forfeiture order made by consent Order all Property/s seized be forfeited and destroyed. Pay compensation \$750.00
		CRIMINAL DAMAGE (INTENT DAMAGE/DESTROY)	2	With conviction, fined an aggregate of \$1000.00
MELBOURNE MAGISTRATES	12/06/09	INTENTIONALLY DAMAGE PROPERTY		28 DAYS imprisonment. Concurrent. Sentence is partially suspended under S.27 of the Sentencing Act 1991. term to be served is 14 DAYS. Operational period is 6 MONTHS. Effective total State term imposed is 14 days Time held in custody, 7 days, reckoned as a period of imprisonment already served under this sentence.

LFR01A
VP37152 CONST RICHARDS

LEAP - VICTORIA POLICE
CRIMINAL RECORD

20:08 20/06/2013
Page 3 of 4

* CONFIDENTIAL - Unlawful use or disclosure of this information could lead to prosecution. *

MNI: ~~18619823~~

Purpose: ACCUSED - PRIORS FOR COURT

Name: MAGEE, KYLE

Dob: 15/10/1983 Age: 29 Sex: MALE

COURT	DATE	DEGREE & CHARGE	COUNT	RESULT
MELBOURNE MAGISTRATES	19/02/09	CRIMINAL DAMAGE (INTENT DAMAGE/DESTROY) POSSESS ARTICLE FOR CRIMINAL DAMAGE		+ Aggregate 46 DAYS imprisonment. Concurrent. Effective total State term imposed is 46 days Time held in custody, 1 day, reckoned as a period of imprisonment already served under this sentence.
NJC MAGISTRATES	18/12/08	CRIMINAL DAMAGE (INTENT DAMAGE/DESTROY) INTENTIONALLY DAMAGE PROPERTY	4 +	ON EACH CHARGE: Aggregate 1 MONTH imprisonment. Concurrent. Effective total State term imposed is 1 month Time held in custody, 2 days, reckoned as a period of imprisonment already served under this sentence. Forfeiture order made without consent Order all Property/s seized be forfeited and destroyed. Pay compensation \$1000.00
MELBOURNE MAGISTRATES	10/09/07	BREACH re 02/03/07 INTENTIONALLY DAMAGE PROPERTY CRIMINAL DAMAGE (INTENT DAMAGE/DESTROY)	13 +	BREACH OF SUSPENDED SENTENCE. SENTENCE PARTIALLY RE-INSTATED 27 DAYS.
MELBOURNE MAGISTRATES	10/09/07	CRIMINAL DAMAGE (INTENT DAMAGE/DESTROY) INTENTIONALLY DAMAGE PROPERTY	2 + 2	Aggregate 27 DAYS imprisonment. Concurrent. Effective total State term imposed is 27 days Time held in custody, 27 days, reckoned as a period of imprisonment already served under this sentence. Custody Management Issues

Continued next page

LFR01A
VP37152 CONST RICHARDS

LEAP - VICTORIA POLICE
CRIMINAL RECORD

20:08 20/06/2013
Page 4 of 4

* CONFIDENTIAL - Unlawful use or disclosure of this information could lead to prosecution. *

MNI: ~~10619823~~

Purpose: ACCUSED - PRIORS FOR COURT

Name: MAGEE, KYLE

Dob: 15/10/1983 Age: 29 Sex: MALE

COURT	DATE	DEGREE & CHARGE	COUNT	RESULT
Continued		See charges above		
MELBOURNE MAGISTRATES	10/09/07			The defendant may be at risk due to the following: Risk of self harm Psychiatric illness Undiagnosed disability/illness Other: YOUNG OFFENDER FIRST TIME IN CUSTODY - HAS RECORDE D TREATMENT THRU ORYGEN ADN PSYCHIATRIST DAN LUBM AN - COULD PRIORITY PLS BE GIVEN TO EARLY TRANSPOR T TO MAP FOR PSYCHIATRIC ASSESSMENT PLS REFER TO SENTENCE MANANGEMENT Recommend all reasonable assessment and supervision to ensure safe custody. as MAGEE, KYLE ANTHONY
MELBOURNE MAGISTRATES	02/03/07	INTENTIONALLY DAMAGE PROPERTY CRIMINAL DAMAGE (INTENT DAMAGE/DESTROY)	13 +	Aggregate 2 MONTHS imprisonment. Concurrent. Sentence is wholly suspended under S.27 of the Sentencing Act 1991. for 12 MONTHS. Forfeiture order made without consent Order all Property/s seized be forfeited and destroyed.

** END OF REPORT **

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
TRIAL DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CR 2013.....

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 Criminal
Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 8"

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 8**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____



VICTORIA POLICE

IN THE MAGISTRATES'
COURT OF VICTORIA
AT MELBOURNE

IN THE MATTER OF:

Constable Shayne WALLACE

Informant

And

Kyle MAGEE

Accused

SUBMISSIONS

Date of Document:	17 th September 2013
Filed on Behalf Of:	Constable Shayne WALLACE
Prepared by:	Senior Constable Suzanne BENSKIN 456 Lonsdale Street Melbourne Melbourne Prosecutions Unit Legal Services Department Victoria Police
Telephone:	8628-3200
Facsimile:	96705473
Email:	suzanne.benskin@police.vic.gov.au

INTRODUCTION

This matter commenced as a contested hearing on 20th Of August 2013.

The offence occurred on Friday 14th February 2013, the accused was at Southern Cross Railway Station placing black paper and typed documents upon an advertisement sign within the concourse of the Railway Station.

The accused is charged with one (1) count of Bill/Placard posting under section 10 (1) of the Summary Offences Act 1966.

Your Honour – I submit there are three real issues of law in this case. They are;

One – **Billposting:** Whether Your honour finds the accused committed the offence of billposting by placing the black paper and typed documents with a flour and water paste over the top of an advertisement board

Two – **Damage:** If your Honour finds the accused did commit the offence of Billposting, then the issue is whether the billposting caused damage if there was no restitution sought.

Three – **Freedom of expression:** If your honour finds that the offence of billposting is complete - issue is whether the accused had exercised his right as 'expression' to do so.

Issue One – Billposting: The issue is whether the accused billposted and if so, whether the accused had exercised his right as 'expression' to do so.

Billposting

Section 10 (1) of the Summary Offences Act 1966

'Any person who posts any placard bull sticker or other document on or writes or paints on or otherwise defaces any road bridge or footpath or any house building hoarding wall fence gate tree tree guard post pillar hydrant fire-alarm petrol pump or other structure whatsoever without the consent of the occupier or owner of the premises concerned or any person or body having authority to give such consent shall be guilty of an offence.'

Prosecution allege that the accused billposted an 'other document' being black paper and typed documents on an 'other structure' without consent of the 'body having authority to give such consent'

The Prosecution evidence of Constable WALLACE can be summarised as follows: Police were called to attend Southern Cross Railway Station by the security supervisor who had requested the accused to stop. WALLACE observes CCTV of the incident and when approaching the accused, further observes the accused continuing to paste paper to the advertisement board.

Prosecution tendered photographs of the advertisement wall and a close up of the typed documents during the time and date of the alleged offence.

The accused admitted under oath that he placed the black paper and typed documents with a flour and water paste over the top of an advertisement board and that he also did not have consent. The issue is whether the accused had exercised his right as 'expression' to do so. The accused did not dispute the alleged billposting of the black paper and typed documents being pasted onto an advertisement board.

Issue Two – Damage : If you Honour finds the accused did commit the offence of Billposting, then the issue is whether the billposting caused damage if there was no restitution sought.

Section 10 (6) of the Summary Offences Act 1966

'The court before which any person is convicted of an offence against this section may, in addition to imposing any penalty, order the accused to pay to any person named in the order the cost of removing or obliterating any thing written posted or painted without such consent as aforesaid and making good any damage done thereby and every amount so ordered to be paid shall for the purpose of enforcing the payment thereof be regarded as part of the penalty and be recoverable accordingly'

WALLACE gave evidence that he had not be provided with a quote for damage or restitution as a result of removal of the paper.

Prosecution would submit that damage is not an element of the offence of Billposting, and would concede that no damage was caused as the signs were taken down at the time of the offence and the paste had not had a chance to dry.

Issue Three – Three – Freedom of expression: If your honour finds that the offence of billposting is complete - issue is whether the accused had exercised his right as 'expression' to do so.

The accused stated this was a freedom of expression under the Charter of Human Rights and Responsibilities Act 2006

Human Rights

Section 7, (3) Part 2 Charter of Human Rights and Responsibilities Act 2006

Section 7 sets out Human rights, however, Prosecution would submit that subsection 3) *Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.*

Property Rights

Section 20 Part 2, Charter of Human Rights and Responsibilities Act 2006

'a person must not be deprived of his or her property other than in accordance with law'

The prosecution would submit that other human rights have been affected as a result of the accused actions. It is the advertising company and subsequently Southern Cross Railway Station right to place what advertising or structures up. Prosecution witness WALLACE stated that a lot of money would have been invested in the Advertisement board and its contents. The rights of the company being an entity, have been limited as a result of being covered in black paper.

Freedom of Expression

Section 15 Part 2 Charter of Human Rights and Responsibilities Act 2006

(2)

'Every person has the right to freedom of expression which includes the freedom to seek, receive, and impart information and ideas of all kinds whether within or outside Victoria and whether –

a) orally; or

b) in writing; or

c) in print; or

d) by way of art; or

e) in another medium chosen by him or her.

(3) *Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary –*

a) to respect the rights and reputations of other persons; or

b) for the protection of national security, public order, public health or public morally.

The Prosecution would submit that the accused has exercised his right of freedom of expression in print/writing, however, this expression is subject to the lawful restriction of the Summary Offences Act offence of Billposting. It is the Prosecutions submission that this offence is to ensure public order and the human/property rights of people, in this case the advertisement entity.

Those are the submissions for the Prosecution.

Sue BENSKIN

Senior Constable 33242

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
TRIAL DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CR 2013.....

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 Criminal
Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

Exhibit "KM - 9"

Date of document: 31 October 2013

Filed by the Appellant

Kyle Anthony Magee

Postal Address: Unit 4 5 Creswick Street
Hawthorn VIC 3122

Phone: 0417 669 971

Email: kyle@globalliberalmediaplease.net

This is the exhibit marked "**KM - 9**" referred to in the affidavit of **Kyle Magee**, affirmed at
Melbourne, in the State of Victoria, this **4th** day of **November 2013**.

Before me: _____

[Magistrate Capell] Well today is my decision in relation to this matter.

Mr. Magee is charged under section 10 subsection 1 of the Summary Offences Act 1966, that on the 14th of February this year, he posted a document on an advertising board at Southern Cross Railway Station, without consent of any person having authority to give consent.

Mr. Magee unashamedly admits that he placed black paper and typed documents upon an advertising sign within the concourse of the station.

They were pasted with a flour and water paste, Mr. Magee admits that his purpose was to obscure the message being conveyed on the advertising board, and that he did so without the consent of the appropriate authority, in the knowledge that consent was required.

Mr. Magee made it clear in both his evidence and his submissions, that his actions were part of his personal protest against the global advertising industry.

In his submissions he stated: "This expression is rational and intentional, I conducted this expression in the middle of the day, in a busy public location I knew to be surveilled by security staff, with the full expectation of being disturbed by police. I make no attempt to hide or get away with my expression as I am neither ashamed of my expression nor unwilling to defend it in a court of law. This expression is meant to be calm and peaceful, non-threatening to members of the public, as well as being totally unobtrusive to those uninterested in the expression, in contrast to the jarring imagery of modern advertising, that is clambering for the attention of passersby through any means available."

In other words, on the face of it, the charge has been made out, however Mr. Magee argues that his actions are protected under section 15 of the Charter of Human Rights and Responsibilities Act 2006, and his summary argues: "I hold a genuine belief that for-profit advertising has a detrimental effect on both individuals and democracy, and that intervention by the government to ban or regulate such advertising is required. My actions of posterising over advertisement panels inside Southern Cross Station are a symbolic, non-violent, non-damaging protest designed to express, in an artistic manner, that includes literal explanation, my logically justified objection to for-profit advertising. Section 15(2) of the charter protects expression of ideas, even where the form of expression is abstract, the practice previously relatively unknown and the action deemed unacceptable by police culturally conditioned to accept and protect the exclusive private domination of public space".

During the course of his evidence Mr. Magee tended his own prior convictions, indicating that I would find out about them anyway, given that he intended to rely, in his submissions, on the distinction between the facts of this case, and the decision of Mr. Justice Kyrou in *Magee v Delaney* reported at (2012) VSC 407, where he was the appellant in the Supreme Court of Victoria.

In that matter Mr. Magee was charged with criminal damage, and possessing materials for the purpose of damaging property, both offences being under the Crimes Act 1958.

In that matter Mr. Magee, like here, did not dispute committing the physical elements of the

offences, but contended that his acts engaged the right of freedom of expression, in section 15 subsection 2 of the Charter, and that the exercise of that right in furtherance of his philosophical opposition to advertising, constituted a lawful excuse for the purposes of those two provisions of the Crimes Act.

The facts of that matter were that Mr. Magee painted over an advertisement in a bus shelter owned by the City of Melbourne, whilst the advertisement was owned by a private company.

In the present case Mr. Magee argued that as much as Southern Cross Railway Station may be private property, that it is a railway station that is a very public area, and that one should be able to express oneself politically in such a public area, and that the limitation imposed by this provision under the Summary Offences Act cannot be justified within a free and democratic society.

During the course of argument at the hearing on the 18th of September, Mr. Magee agreed with me, that the circumstances of his behaviour were exactly the same in the other matter, save that a different method was used, his whole purpose was to be seen in a busy area and was to interfere with advertising which had been paid for and which was in a private place, freely used by the public.

Mr. Magee argued that the difference here was that he was not charged with damaging property and that was a significant reason why I could distinguish the matter from the decision of Mr. Justice Kyrou

Mr. Justice Kyrou approached his task by defining six main issues on the appeal, given his decision is binding on me, I intend to approach consideration of Mr. Magee's arguments the same way:

a. Was the pasting over of the advertisement capable of imparting information or ideas for the purposes of section 15 subsection 2 of the Victorian Charter?

Mr. Justice Kyrou found that the painting over of the advertisement was a means of imparting information and ideas.

By his expression in the current matter, Mr. Magee was doing exactly what was doing in the earlier matter, as Mr. Justice Kyrou said, at paragraph 65, those messages include that the person who performed the act was protesting about something, was protesting about advertisements in bus shelters, objected to the contents of the particular advertisement, or did not want the public to see the advertisement.

There is no doubt in the current matter that this expression is capable of expressing information or ideas for the purposes of section 15 subsection 2 of the Victorian Charter, those same comments can apply to the current facts, save that it was a train station and not a bus shelter.

Mr. Justice Kyrou dismissed the appeal under section 199 a) subsection 1 of the crimes act, at this point on the basis that the provision, or sorry the possession, of the items to effect the purpose was preparatory of conduct capable of imparting information or ideas.

The second question posed by Mr. Justice Kyrou was "does the imparting of information or ideas by means of damage to a third party's property engage the right to freedom of expression conferred by section 15 subsection 2 of the Victorian Charter?", in that case Mr.

Justice Kyrou said no.

Mr. Magee says that this is the point of difference between the previous matter and this matter, no restitution has been claimed and he has not been charged with an indictable offence, but rather a summary offence, he's not been charged with an offence involving damage.

In his written submissions Mr. Magee makes the point that criminal damage is not an element of the present charge, and that, and i quote from his written submission, paragraph 34: "the public policy limitation imposed by Justice Kyrou on expressions that involve damage has no application in this case".

At footnote 9, Mr. Magee makes reference to paragraph 97 of Mr. Justice Kyrou's decision to support that contention, it ignores that Mr. Justice Kyrou also said that would not apply to threat of such damage.

In other words, there does not actually have to be damage caused for there to be limitation on the expressive conduct.

Mr. Justice Kyrou then went on to say, that if he had been wrong, re. the dismissal of the section 199 charge at the earlier stage, the preparatory behaviour was akin to a threat of damage, and would be conduct which fell outside section 15 subsection 2.

I cannot read Mr. Justice Kyrou's decision as narrowly as Mr. Magee would like.

It is apparent in the further discussion around section 15 (3) a. and b. of the Charter that damage is just an example of a general principle that one has the right to own and enjoy one's property free from unlawful interference, damage is but just one example of such interference.

At paragraph 129 of the decision, Mr. Justice Kyrou says: "It follows that an absolute prohibition on intentional damage to the property of another without lawful excuse, such as that contained in section 197 of the crimes act, is a restriction that is reasonably necessary to respect the rights of property owners, the same applies to an absolute prohibition on being armed with materials for the purpose of damaging property without lawful excuse"

At paragraph 151: "Without limiting the lawful restrictions that may be reasonably necessary for the protection of public order, they obviously include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property".

In paragraph 156: "In the present case i've already held that Mr. Magee's conduct in painting over the advertisement, and being armed with materials for the purpose of painting over more advertisements did not engage the right to freedom of expression"

At paragraph 181: "The right to freedom of expression has never been treated as a license to ignore the criminal law, including laws designed to protect property rights".

In paragraph 192: "The mode of expression selected by Mr. Magee did not only effect the property rights of the City of Melbourne and Adshel, it also prevented other persons from exercising their right conferred by section 15 subsection 2 of the victorian charter"

Mr. Magee has been charged with posting a document on anothers property without consent,

sorry without consent of an authority.

Why does this law exist? It's to protect the property rights of another or others.

Why does the charge of criminal damage exist? it's to protect the property rights of another or others.

Mr. Magee argues he has no other means of communicating his message, hence he has to take the action he has, i disagree.

There are many ways one can communicate a message without it interfering with the property of another.

Further it is clear Mr. Magee himself has attempted to prevent members of the public receiving information, namely advertising, which of itself could be a breach of the Charter.

During the course of argument i raised with him whether he would interfere with a public health message at Southern Cross Railway Station, he said he would not, in itself this means Mr. Magee becomes the arbiter of what the public see and don't see, is that what is intended by the Charter? i don't believe so.

If one returns to the second question posed by Mr. Justice Kyrou, and and transposes it to the fact of this case, it reads: Does the imparting of information and ideas by means of interfering, by bill posting, with a third party's property engage the right to freedom of expression conferred by section 15 subsection 2 of the Victorian Charter? I am bound to follow the reason of Mr. Justice Kyrou, and the answer would have to be no.

Section 7 subsection 2 of the Charter sets out the relevant matters to consider when determining the circumstances in which a human right may be limited.

Here the owners of southern cross railway station are entitled to rent out space that they own to advertisers, advertisers who have rented that space are entitled to convey their message, as members of the public we can consider that message and accept or disard it, the public have that right, it is not for Mr. Magee to assume ownership of what we see or don't see by posting over that message.

For these reasons I am satisfied that restriction in section 10 subsection 1 of the Summary Offences Act constitutes a reasonable limitation on the right to freedom of expression referred to in section 15 of the charter, taking into account all the matters referred to in section 7 subsection 2 of the Charter.

Given those findings, there is no need to make a referral of this matter to the Supreme Court for a declaration of inconsistent interpretation.

I find the charge proven.

Yes, Mr. Magee, I think on the last occasion you said you had a psychological report?

[Mr. Magee] Yep, I've got that here.

[Magistrate Capell] May I have a look at that?

[Mr. Magee] Yep.

[Magistrate Capell] The prosecutor needs to read it first.

[Mr. magee] Oh, okay.

[Magistrate Capell] Yes, I've read that Mr. Magee, now, what do you want to say to me?

[Mr. Magee] Umm, I guess, one reason for giving you my criminal record was because you were going to find out anyway because of the Kyrour decision, but another reason was just to demonstrate that it's the only time that I've broken the law is to make this political expression, which um, apart from some damage, which would have been an imperceptible subtraction from the bottom line of a few advertising companies, it is ultimately victimless.

Um, apart from that, I don't know what a lawyer would say in this situation, there's my child, she'll get sad.

[Magistrate Capell] Arr, put it this way, I don't intend to jail you, because I've noticed this: "aside from a focus with regard to symptom management, treatment sessions have also provided a forum for Mr. Magee to discuss his philosophical views and underlying beliefs in a non-judgmental and supportive environment, while also attempting to challenge his avenue of social and political expression and related behaviours that have consistently resulted in detrimental outcomes with regard to his freedom, incarceration and his previous and ongoing legal involvement".

Um further, the fact that you are seeing someone where you can actually express those things, and discuss them, and philosophise over them.

Are you seeking a jail term?

[Prosecutor] No, your honour.

[Magistrate Capell] Further, um, I see the point that's made by the psychologist, it's obvious to anyone involved in the criminal justice system: "a custodial sentence would also most likely lead to Mr. Magee being unnecessarily exposed to a high concentration of criminal and antisocial elements within the prison system and to a culture of antisocial behaviour and violence that may potentially expose him to harm from inmates due to his political beliefs."

It also refers to you as having the positive role of a young daughter, um, overall positive and supportive family and social relationships, high level of functioning, high level of intelligence and insight, and your academic ability, you're not silly.

In other words, you'll work it out one day.

A lot of the political issues you raise are not lost on me I can assure you, the problem is I have to impose the law.

I think I mentioned during the hearing that I went to university in the 1970's where a lot of what you would argue was very much a part of the course that I did, and understand, but I've got to impose... er, apply the law.

Is there any forfeiture of the items sought?

[Prosecutor] Your honour all I have is the photograph in relation to the items.

[Mr. Magee] The items were taken from me on the day.

[Magistrate Capell] Yeah, that's why i thought there might be an application to destroy them.

[prosecutor] Your honour, perhaps, if your honour would be minded to make the order in relation to the paste and the, or the bucket and the, umm, from the photographs, it'd just be the paintbrush and the bucket your honour.

[Magistrate Capell] Well that property will be forfeited and destroyed.

Otherwise Mr. Magee I acknowledge your financial circumstances, that at the beginning of the hearing you advised me that you're not in any employment, I intend to convict you and fine you \$400.

[Prosecutor] As your honour pleases.

[Magistrate Capell] If you choose not to pay it, there are consequences, you know what they are.

I'll grant an initial stay of 3 months for payment for that amount, which is, until the 4th of January next year.

Yes, thank you.

[Clerk] Silence all stand please, the 20th division of the Melbourne Magistrates' Court is now adjourned.