

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

CASE NO. [D12096219](#)

IN THE MATTER OF

CONSTABLE PETER O'BRIEN

V.

KYLE MAGEE

DEFENCE SUBMISSIONS & AUTHORITIES

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

**14 November 2013
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1. Summary of Legal Argument

1. I, Kyle Magee, the accused, plead not guilty to the offence of Posting Bills under section 10(1) of the Summary Offences Act 1966. I accept the partial factual description of my actions on the 27th of February, 2013, as outlined in the summary, but do not accept the informant's recollection of my statements. I submit that my 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 for-profit advertising from public space and media is required;
 - b. My actions of postering over advertisement panels inside Flinders Street 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 in public space;
 - c. Section 15(2) of the Charter protects expression of ideas, even where the form of expression is abstract, the practice relatively uncommon, and the action initially deemed unacceptable by police.
 - 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 section 10(1) of the Summary Offences Act 1966 consistently with my right to freedom of expression it must consider whether the restriction on freedom of expression created by the offence of section 10(1) 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 human rights arguments such as this are unusual and that, therefore, this argument 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:

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.¹

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**². 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 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*.

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

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

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 Flinders Street Station. The documents cover, albeit very cursorily, my objection to for-profit 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 secondary structural effects on the content and ideological framework of the for-profit media companies, funded by for-profit advertising, that make up the bulk of our mainstream media -- this has a wholly negative impact on our supposed democratic system.
 - c. The interests of for-profit organisations are the largest impediment to global justice and democracy facing the modern world -- to allow these very same interests unrestricted and almost total dominance of our public spaces and media 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, politically and financially, and it would undermine the business model of the for-profit media that currently corrupts our democratic process to an untenable degree.
 - e. In place of the for-profit 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 with an adjoined police station, 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 -- in fact, defending this action in a court of law is a large part of the political expression I am making. This expression is deliberately designed 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 manipulative imagery of modern advertising that is clambering for the attention of the public by any available means). While making my expression I was observed by some interested passers-by, 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. The text documents containing an explanation of the protest were not mentioned by police, so included as evidence is a photograph showing an advertising panel covered in black paper with the text documents affixed on top. The photo also shows an interested member of the public who has stopped to read the documents.

11. I have turned to this avenue of expression through lack of effective alternative. In my evidence-in-chief I will explain to your honour why I believe this expression to be the only method capable of effectively raising this issue in the public sphere, and why I have therefore selected it -- but such an explanation is only to help your honour understand, if your honour is so inclined. Whether or not your honour accepts or rejects my reasoning for choosing this mode of expression is legally irrelevant. I have chosen this mode of expression and made this expression -- it is then the judiciary's role to determine if the method of expression I have chosen is lawful or not, in its own right, without questioning my choice of expression. That other unquestionably legal modes of expressing similar sentiments can be said to exist should in no way act to restrict my right to express my view in the particular way I have chosen. In the case of *Pointon v Police* [2012] NZHC 3208 Justice Heath stated at paragraph 50 that consideration of the availability of alternative modes of similar expression was "beside the point" in determining whether or not the action before the court is protected under freedom of expression.
12. I also submit as evidence my criminal record, which details numerous convictions and several short jail terms, all relating to convictions arising from peaceful demonstration against for-profit advertising. This is to demonstrate both my long-term commitment to this form of protest and also that I have not been charged or convicted for anything other than my protests against for-profit advertising. Before deciding to take this course in life I was a student at the University of Melbourne studying a Science/Engineering double degree. I didn't take the decision to involve myself in this protest lightly, it is a commitment I have made because of the importance I attach to this issue and a commitment that will most likely be life-long. This determination of mine should not be mistaken as insolence or disrespect on my behalf. With this postering approach I have tried to find a method which is both satisfactory to myself and capable of being ruled lawful -- so that a peaceful social movement can make a real issue out of for-profit advertising, placing it on the political agenda it has only stayed off of because it funds the for-profit media that frames of our political agenda.

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

13. 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.

14. 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 prohibition on advertising of for-profit companies in public space and public media.
15. 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 context 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 eligible for protection, it is not relevant to assign labels to this particular expression.
16. 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”.
17. There is Canadian authority for the proposition that freedom of expression includes postering.
18. In *Ramsden v Peterborough (City)*³ (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.
19. 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.”
20. 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

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

limits prescribed by law as can be demonstrably justified in a free and democratic society". He made the observation that :

“postering 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.”⁴

21. 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 expressive activity⁵.
22. 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 intervention via postering 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.
23. 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 25 and 58). 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.
24. 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”⁶
25. At paragraph 84 of that judgment the Court states that political expression “attracts a higher level of protection” than other expression.

4 Ramsden Case, page 16

5 Ramsden Case, page 17

6 At paragraph 69

26. 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 poster 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.
27. The opinions I express receive much support from highly qualified, intelligent and insightful 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

28. In the case of Magee v Delaney (2012) VSC 407 (**Magee v Delaney**), in which I was the appellant, Justice Kyrou made several findings on the interpretation of the Charter in regard to Freedom of Expression.
29. In Magee v Delaney Justice Kyrou 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 considerations⁷, over and above the specific limitations of the Charter itself. Central to Justice Kyrou's public policy limitation was that the political expression involved "damage to a third party's property or a threat of such damage".
30. The present charge concerns a charge of postering over an advertising structure. Unlike criminal damage, it is not an element of the present charge that damage occurred. The statement of the informant, Constable Peter O'Brien, states that "the paste was cleaned off the advertisement within the hour, with no damage to the display".
31. 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.
32. The expression also poses no threat of damage, as an act which is carried out fully as intended and which results in no damage cannot logically pose a threat of damage, as even if articles which can cause damage are carried, such as a hammer carried by a tradesperson, it is the

⁷ Magee v Delaney (2012) VSC 407, Paragraph 97

intention and use that these articles are put to that makes all the difference.

33. As no damage was caused by my expression, and no threat of damage can be posed by a non-damaging act, the public policy considerations raised by Justice Kyrou in relation to section 15(2) of the charter have no application in this case.
34. Justice Kyrou went on, after already having made his decision on public policy considerations citing the inadequacy of the limitations set out in the charter itself, to rule that the limitations within section 15(3) of the Charter itself were sufficient to limit the right to Freedom of Expression in that case, on both sections 15(3)(a) and 15(3)(b). As the magistrates court is bound to follow the interpretation of Justice Kyrou in relation to section 15(3), these findings will be addressed where relevant.

3.d. Magee v Delaney - concept of "interference"

35. At paragraph 128 Justice Kyrou speaks of "the right to own and enjoy one's property free from unlawful interference". He mentions "unlawful physical interference" with property at paragraphs 3(d), 151 and 153 as something which the criminal law must protect against. It is unclear if it is only damage that Justice Kyrou regards as interference, or if postering that prevents private property from projecting into public space could also be considered as interference proscribed by law.
36. It is important to note that interference with advertising is not in itself an offence. A person waiting for a train or tram may stand in front of an advertisement without committing an offence. A protester, if they had much spare time and patience, could erect a banner in the public space in front of an advertisement without committing an offence.
37. To determine whether or not the postering expression I have engaged in constitutes an "unlawful physical interference" it is necessary to first rule if the action is protected by the Charter. Any ruling that my postering constitutes an "unlawful physical interference", and can therefore be excluded from protection under section 15(2) of the Charter following the findings of Justice Kyrou, cannot be made before first ruling on whether or not the action is protected under section 15 of the charter by reference to the limitations set out in section 15(3). If it is ruled the action is not protected, then it can be classed as unlawful interference, but by that time it is not necessary to enter into the findings of Justice Kyrou, as I have no defence for the offence under the statutory provision, the facts of which I have freely admitted. If it is ruled that the action is protected under section 15 of the charter, then it is necessary to rule on whether or not the statutory provision can be interpreted consistently with the right -- and so on as per the test outlined in Momcilovic.
38. I further submit that the interference caused by my expression does not threaten the advertising corporations' ability to "own and enjoy" its property -- the property's ownership is never questioned or jeopardised, and the corporations' enjoyment of it's property cannot be compromised because the property was never intended for the visual enjoyment of the advertising corporation itself. The property is solely intended to enter public space and the minds of others. My expression does not affect the corporations' ownership or sensory enjoyment of their property and only prevents the property from fulfilling a function for which

there is no specific legal protection -- corporations have no right to freedom of expression, and nothing in property law grants corporations the right to use private property to project images into public space free of competing uses of that public space.

3.e Limitations on Section 15(2)

39. 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.
40. 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.
41. 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.f Limitations on Section 15(2): Section 15(3)(a)

42. 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].
43. Section 3 of the Charter carries the definition “‘person’ means a human being”.
44. Justice Kyrou found, in dictum, following the ratio of his decision on public policy considerations, that section 15(3)(a) of the Charter, when referring to the rights and reputations of other *persons*, was in fact referring to the rights and reputations of all non-natural legal persons⁸. Since the magistrates court is required to follow Justice Kyrou's findings, we must determine whether the rights of any legal entity have been infringed.
45. Justice Kyrou'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. Section 6(1) of the Charter states that “only persons have human rights” and further clarifies “Note: Corporations do not have human rights”. The rights which Justice Kyrou ruled were infringed, the only rights it could be argued have been infringed, were the corporations rights under criminal law to private property.
46. I expect it will be argued by the prosecution that my actions fail to respect the property rights of the multinational, multi-million-dollar advertising corporation JCDecaux. 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 free from

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

any interference, so the fact that the posters blocked such an image from reaching public space does not infringe the property rights of the advertising corporation either.

47. That JCDecaux would prefer that the posters erected in public space should be cleaned off, revealing once again the projections of their private property, is a matter of their discretion. I should not be held liable for any costs that their decision entails, in fact the cleaning itself could be regarded as an unlawful interference in my right to freedom of expression if the expression is ruled to be protected.
48. It could also be argued that as all persons have the right to receive information and ideas of all kinds under section 15(2) of the Charter, the fact that my postering expression blocks the advertisement hinders the right of other persons to receive the information and ideas contained in the advertisement. That the standard advertisement contains information or ideas at all, let alone information or ideas of political and cultural importance, is hard to establish. What is beyond doubt is that my expression is a political expression containing information and a detailed set of ideas. While my expression has a good argument for protection under the charter, the advertising of the corporation has none, as corporations do not have human rights, and as stated above, there is nothing in property law to establish a right for a corporation to project whatever image it likes into public space, completely free of any competing expressions. If a citizen has a right to receive information and ideas, then the information and ideas in my individual political expression are more important than any ideas or information that could be said to exist in a corporate advertisement. The fact that the Charter protects the right of citizens to receive information and ideas *of all kinds*, also suggests preferring to protect messages which are not readily available over those, such as corporate advertising's exhortations to consume, that are practically everywhere.
49. Section 15(3)(a) has no application in this case.

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

50. 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].
51. 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-profit advertising from our society is more likely to improve public morality -- lessening the materialistic scourge that for-profit advertising seeks to promote 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.
52. 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.

53. 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 prior convictions 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 far 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.
54. 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.
55. 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 prosecutions⁹. He continued to sing for 25 minutes before his arrest for declining to desist.
56. 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".
57. 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 order¹⁰.
58. 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.
 - 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"¹¹.
 - 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

9 Brooker's case, paragraphs 13-15

10 Brooker's case, paragraph 4

11 Brooker's case, paragraph 42-47

combination of both those factors”¹². 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”¹³.

- 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”¹⁴ 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”¹⁵.

59. 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.
60. 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 postering before leaning, and any paste that could have contacted a persons clothing would easily wash out, as it was only wheat-flour and water.
61. 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, in an area of the station where few people are likely to choose to linger.
62. 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 notified by Metro staff acting on their own initiative and members of the public only expressed interest by approaching, observing and reading the posters.
63. 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.
64. 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 the utility of private property purchased and rented exclusively for that end.

12 Brooker's case, paragraph 56

13 Brooker's case, paragraph 59

14 Brooker's case, paragraph 90

15 Brooker's case, paragraph 92

65. My actions do not jeopardise 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, free of competing messages from individual citizens who are legally excluded from communicating through fixed articles in 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 sole purpose of their private property is to project into public space. This inalienable '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 corporate 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.
66. The irritation caused to the advertising company by protests against their practice is not of great enough order to constitute a threat to public order so great as to limit my right to freedom of expression. Of course those being protested against find the protest unwelcome, perhaps even infuriating, but that shouldn't act to limit the right to express opposition on the basis of maintaining public order. In the words of the UK high court, the right to freedom of expression "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"¹⁶
67. 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).
68. My action is intended to push for a change in public order, defined in the broadest sense, as any political expression pushes for a change to a certain aspect of the current 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.

16 Sanders v Kingson [2005] EWHC 1154 (Admin), paragraph 69.

69. 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.h Conclusion

70. 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 postering can constitute protected expression.

71. It is submitted that as this expression involves no damage nor threat of damage, it is not excluded from protection by the public policy considerations outlined in *Magee v Delaney*. The "interference" to the projection into public space of images displayed by the advertising corporation does not constitute an unlawful interference, for the purposes of applying the findings in *Magee v Delaney*, if the expression is held to be otherwise protected following the test set out in *Momcilovic*.

72. 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 exists solely to project into public space is interfered with and 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.

73. This section of the submissions is only relevant if your honour has ruled that the expression under question is protected under section 15 of the Charter.

4.a How has section 32 been interpreted?

74. 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.¹⁷

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

75. 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).
76. 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.

77. The offence provides the defence of having been granted the consent of "any person or body

¹⁷ Momcilovic, paragraphs 102 - 103

having authority to give such consent".

78. 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.
79. 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"¹⁸, 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

80. 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.
81. A legitimate concern is that protecting this expression would open the flood-gates to postering 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 postering companies are openly pouring through the 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 out of business as they easily could. If anything, protecting only the postering expressions of human beings that have real political or cultural value, while clamping down on commercial poster advertising companies under existing laws (companies who, not being human beings, have no recourse to protection under freedom of expression), 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.
82. 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

18 Momcilovic, paragraph 103

only serve to democratically limit the illegitimate ability of non-natural corporations to project into public space from their thin slices of private property.

83. 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 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

84. 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.
85. 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.
86. 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.

87. 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 Warran 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'

88. This was quoted with apparent approval in the case of Momcilovic at paragraph 144.
89. 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 -- this in itself proves that the criminal justice system does not see postering as a significant problem that needs to be addressed by the criminal law.
90. 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 environment, the Court would need to be satisfied that using the criminal law to limit this expression, only to save billion-dollar advertising corporations like JCDcaux 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.
91. 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

92. 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).
93. 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.
94. 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.

95. The Court of Appeal also suggests that it would benefit from the reasons of a first instance decision maker.
96. 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)

97. 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