

**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
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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 postering 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 :

“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.”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 posting 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 posting 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 Kyrou made several findings on the interpretation of the Charter in regard to Freedom of Expression.
31. 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 considerations⁹, over and above the specific limitations of the Charter itself. Central to Justice Kyrou'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 postering 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 Kyrou on expressions that involve damage has no application in this case.
35. Justice Kyrou 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 Kyrou 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 Kyrou 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 Kyrou'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 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, as “only persons have human rights”. The rights which Justice Kyrou 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 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. 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 postering 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 is 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 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’

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