Brisbane City Council Advertising Law Review

Submission from the Outdoor Media Association

1 Introduction

The Outdoor Media Association (OMA) is the national industry body representing the majority of Australia's Out of Home (OOH) media display and media production companies, as well as some media display asset owners.

The OMA welcomes the opportunity to provide input to the new law proposed by Brisbane City Council (Council), the Advertising Local Law 2021 (the Proposed Law).

While we believe that greater clarification and more consistent application of current laws would be sufficient to deliver the desired outcomes, we understand Council's desire to consolidate the local laws and provide greater responsiveness through guidelines. We recognise the Council's commitment to consultation and transparency in this process and we appreciate the opportunity to provide feedback on the proposed law.

2 Key issues

Part 1 Preliminary

Section 2: Purpose and how it is to be achieved

The wording in this section focusses on perceived negative impacts of OOH and therefore communicates a bias that can shape the interpretation of the Proposed Law. An edit of the language would help to reduce bias and ensure more consistent application.

Suggested rewording:

> *The purpose of this local law is to ensure that advertising devices are located, designed and operated in a way that aligns with the character and function of the area in which they are situated and to complement or not unduly impact:*
>
> - *the established or planned characteristics of the site, streetscapes and neighbourhood; and*
> - *the natural environment; and*
> - *the cultural heritage significance of a heritage place, including any Aboriginal cultural values; and*
> - *essential standards of public safety including the safety and efficient operation of the transport network, including the movement of pedestrians, cyclists, vehicles and aircrafts.*

Sub-section (1c) of this section uses the word 'amenity' applied to 'the site, surrounding areas and the region'. This wording is very broad and highly subjective and leaves applicants with no recourse for decisions made based on 'amenity', with little to no explanation or justification.

- The word 'amenity' is used nine times throughout the proposed law and each time it is vague and open to interpretation. This negatively impacts the transparency and application of the Proposed Law.
- This wording was not used in the *Advertisements Local Law 2013*. While the term was used in the *Advertisements Subordinate Local Law 2005*, it was used in a more specific way to refer to "high scenic amenity" and the "amenity of other property owners".

A clear definition of amenity should be included within Schedule 2 of the proposed and the words "surrounding areas and the region", which are excessively broad, should be removed from this sub-section.

Suggested definition:

> *The qualities of a location in regard to lighting, daylight, glare and shade, freedom from hazard, and the uninterrupted ability to use and enjoy the land for the purpose it was designed, that may be affected by the location, luminance and operating hours of advertising devices on nearby sites.*

The OMA further proposes that other instances of the word "amenity" are replaced throughout the Proposed Law with less subjective, more transparent and specific terminology.

Section 3: Definitions

Please see comments under Schedule 2.

Part 2 Displaying advertising devices

Division 1 Prohibited advertising devices

Section 6: Prohibited advertising devices

This section includes heritage site restrictions that have been read across directly from the *Advertising Devices Local Interim Law 2020*. It creates two levels of restrictions depending on whether the site is inside or outside of the City Frame. The OMA has a number of concerns about this section of the Proposed Law including around a lack of clarity and consistency and around the anti-competitiveness of some measures.

- Under Section 6(2b), the Proposed Law assumes that all aspects of a heritage building has heritage significance. This is not the case. If the heritage significance of a building is only on its front façade, for example, there should be no restrictions to advertising devices that are only visible at the rear of the building.
- Under Section 6(2b), the Proposed Law doesn't allow for the fact that land, assumed to mean 'a site', may contain a number of buildings over a large space of land. Given the purpose of this section is to limit the perceived visual/aesthetic impact of a digital sign near a heritage building, it does not make sense for it to apply where the sign and the heritage building are not in close proximity, are located on a different frontage and/or do not obstruct or otherwise impact views of the heritage building.

- The restrictions relating to Commercial Character Building Overlay and Pre-1911 Building Overlay are unjustified, given the nature of these areas. Specifically, these overlays do not preclude the sites located within them from being used for commercial purposes and sites located in commercial areas are expected to be of a commercial nature. This means that advertising and advertising signs are an expected and an appropriate use. The standards Council intends to apply to determine prohibited signs is not aligned with the Planning Scheme's intent for commercial areas.

The OMA proposes:

1. Remove **Section 6(2b) sub-section (iA)** "on land improved by a building that is a heritage place".
2. Revise **Section 6(2b) sub-section (iB)** to say "within 50m of the visual aspect of heritage significance of a building that is a heritage place, where the proposed advertising device is located on the same road or roads as the visual aspect of heritage significance".
3. Revise **Section 6(2b) sub-section (iiA)** to say "on land improved by a building that is a heritage place if the advertising device would be within 50 metres of a visual aspect of heritage significance of that building".
4. Revise **Section 6(2b) subsections (iC), (iD) and (iiB)** to make clear that those restrictions do not apply in areas located in the following zones, as they exhibit commercial characteristics:
    - District Centre
    - Principal Centre
    - Industry (Low Impact, General Industry Special Industry, Industry Investigation)
    - Sport and Recreation
    - Mixed Use
    - Community Facilities (Major Health Care, Major Sports Venue, Cemetery, Community Purposes, Education Purposes, Emergency Services, Health Care Purposes)
    - Specialised Centre
    - Special Purposes
5. Update the examples provided within **Section 6(2b) sub-sections (iB)** and **(iD)** to align with the above changes.

It is further worth noting in relation to this Section that the construction of buildings only has heritage related restrictions if it is on a site adjacent to a heritage site, as opposed to within 50m of such a site or building. Given that a building built beside a heritage site is likely to be significantly larger and more impactful on the aesthetic of an area than an advertising sign would be, the disparity seems inappropriate.

The OMA therefore proposes that **Section 6(2b) sub-section (iB)** be further amended to make it clear that the 50m restriction from a heritage building only applies when an advertising device is situated on the same site as or an adjacent site to a site with a heritage building.

1. Revise **Section 6(2b) sub-section (iB)** to say "within 50m of the aspect of heritage significance of a building that is a heritage place, where the proposed advertising device is located on the same site or adjacent site on the same road as the significant heritage aspect".

Division 5 Obtaining and administering approvals

Section 11: Form of application & Section 12: Properly made applications

These sections relate to how an application should be made and what counts as a properly made application. However, there is a lack of clarity and seeming inconsistencies within the sections:

- **Section 11, sub-section (3)** affords Council the opportunity to give to an applicant an information notice requesting that the applicant provide further information or clarify information, documents or materials or matters included in the application.
- **Section 11, sub-section (4)** affords Council the opportunity to determine that the application has been withdrawn by the applicant where an applicant does not comply with the information notice.
- **Section 12, sub-section (b)** says that Council may accept an application as a properly made application even if the application does not comply with Section 11.

Given these sections, this section does not provide applicants certainty around the requirements of a properly made application or when an application is considered to be a properly made application. This allows for opportunities for applicants to be subject to unfair assessment processes.

The OMA therefore recommends that greater clarity is provided regarding what is considered to be a properly made application and what is not.

Section 14: Assessing applications

This section lays out that which Council *must* have regard to and that which Council *may* have regard to when considering an application.

The 'must have regard' criteria includes **sub-section (1b)** "the public interest" and provides examples of the public interest.

The OMA recommends including a further example to include economic contributions which are in the public interest.

Suggested wording:

> *whether revenue from the advertising device will, in part, contribute to local government income and/or the broader local economy.*

Under **sub-section (2),** which details criteria that Council "*may* have regard to" add:

> *the applicant's history of and demonstrated commitment to regulatory and statutory compliance with regard to the development and operation of third party outdoor advertising devices.*

Under **sub-section (2a),** the Council may have consideration of existing devices, approved but not yet constructed devices and current applications for devices.

Unlike with Development Application processes, in which the application and its outcome are made public, there is no way of applicants knowing what other applications have been submitted and/or approved. Preparing an application represents a significant expense for the applicant, it is therefore unreasonable for applications to be judged against other applications that are awaiting approval or already approved.

The OMA therefore proposes that a more transparent system be adopted whereby Council provides, upon request, locations of submitted or approved and not yet built applications for advertising devices. The person or organisation requesting the information should provide a location and all applications within a requested distance of that location should be disclosed, with only the specific location, size and orientation of the devices disclosed for each application.

The wording in **sub-section (2d)** states that Council may have regard to the "impact of the approval on the overall number of advertising devices in the Brisbane local government area".

This is vague and open to interpretation. It is unclear how the impact of an advertising approval on the overall number of advertising devices in the Brisbane local government area can be objectively determined, other than that it would potentially increase the number of advertising devices by one.

On the face of it, this sub-section is unnecessary as there are already requirements for distance between signs that are within the line of sight of each other.

However, the OMA's understanding is that this sub-section is intended to provide additional support for applications that propose replacing an old advertising device with a new one, therefore having a zero or less than zero net impact on the overall number of devices. If this is the case, then this should be made clearer in the language used.

The OMA therefore proposes changes the wording of **sub-section (2d)** to:

> *if the application is for an advertising device that will replace an already built advertising device/devices – eg consolidating three smaller signs in an area into one large sign*

Sub-section (2g), "the proposed content to be displayed on the advertising device", seems to refer to the intended advertising/promotional content of an advertising device. It is both impractical and inappropriate for Council to consider, as part of their assessment, the messaging content to be displayed on the advertising device.

However, the OMA understands that the intention of this sub-section is to allow the Council to consider the amount of third party (paid for) vs first party (self-promotion) content a mixed use sign would be permitted to display.

With that in mind, the OMA proposes changing the wording to make this clearer:

> *whether and in what proportion any predominantly first party (self promotion) advertising device will be used to display third party (paid for) content.*

Under **sub-section (3)** Council may "consult with and have regard to submissions made by the Commonwealth, the State or any public sector entity".

It is not clear in what capacity submissions would be provided or given regard to with reference to advertising sign applications. The OMA therefore suggests that either this sub-section be removed or greater clarity be provided around these submissions.

Section 17: Conditions of approval

Section 17(2a) refers to the completion of building work within the "time specified in section 18". See comments on Section 18 for feedback on this.

Section 17(2b) states that the advertising device must not "cause a significant or unreasonable distraction to vehicular or pedestrian traffic or otherwise create a road or traffic hazard".

This replaces the requirements in the current law which state that an advertisement must not:

- *obstruct the passage of pedestrians or vehicles*
- *obstruct a pedestrian's view of traffic, or a motorist's or cyclist's view of pedestrians, other traffic, or the road ahead.*
- *be distracting to drivers or cyclists.*

The new wording is less clear and more subjective. It is unclear what would count as an "unreasonable distraction" for pedestrian traffic and how Council would determine this if there was a complaint.

The previous wording, quoted above, was clearer and more effective. The OMA recommends reverting to this wording.

Section 17(3a) refers to restricting the amount of third party advertising content to be shown on a device. We understand that this intended to allow first party signs or signs permitted for some, but not exclusive, third party advertising (eg for schools, so that they can make some limited revenue from their signs). If this is the case, it should be made clear that such conditions should not be imposed where an application is for a fully or predominately third party advertising device. We suggest the following revised wording:

> *(a) for applications that are not for a fully or predominately third party advertising device, restrict or limit the amount of third party advertising content;*

Sub-section (3c) allows conditions to "regulate the positioning of the advertising device in relation to the boundaries of the land, or a building or structure on which the advertising device is situated". Sub-section (3d) allows for condition which "regulate the positioning of the advertising device in relation to any road or public space".

Clarity is required to confirm that conditions imposed in relation to the position of an advertising device should not differ significantly from what was applied for. This is essential to ensure the conditions of approval are consistent with the application.

Sub-section (3g) allows conditions to "require the removal of any advertising device on the land".

It is unclear why Council would determine that an approval condition should require the removal of any advertising device on the land except where an application has been made to Council to replace or upgrade an advertising device. The OMA therefore proposes that this sub-section be revised to make clear that such a requirement can only be made where removal of an existing advertising device is included within an application. Suggested revised wording:

> *where removal of an existing advertising device is included within an application, require the removal of any existing advertising device on the land;*

Section 20: Automatic renewal of approval

Under Section 20(2) an approval will automatically be renewed if the approval holder has paid the prescribed fee. Under Section 20(3) the approval will

automatically lapse if the approval holder has not paid the prescribed fee on or before the last date of the term of the approval.

The experience of OMA members is that renewal notices are either not received or are received late, making it difficult for fees to be paid on time.

The OMA would therefore suggest revising these sections to ensure that approval holders have 60 days from the receipt of the renewal notice to pay their fee and before a renewal would automatically lapse.

Section 18: Building work to be completed within 1 year

The OMA supports the proposed one year time limit for completing a build after an approval is granted.

We do not believe that a six month extension to that time limit should be required by an applicant, except in extenuating circumstances (such as the COVID-19 pandemic. Therefore, we propose that Sections 18(4), 18(5), 18(6), 18(7), 18(8), 18(9), 18(10), 18(11), 18(12), 18(14) and 18(15) be removed.

Further, Section 18(13) should be edited to say:

> *If Council has given an approval and the approval holder has not carried out building work in accordance with subsection (2) and (3), then Council may cancel the approval.*

However, the OMA believes that the Council should be able to extend build time limits on approved applications in the case of severe extenuating circumstances, such as following a natural disaster or during a pandemic that impacts businesses' ability to build signs within the deadline. Therefore, we propose a new sub-section be added to say:

> *Council can grant extensions to build times for approved signs in the case of severe extenuating circumstances if those extenuating circumstances are deemed to have a significant impact on the ability of applicants to meet the build time limit;*
>
> *Examples of extenuating circumstances include:*
>
> - *A city, state or country-wide event, such as a pandemic, that impacts access to workers, materials or sites.*
> - *A natural disaster that interrupts the ability of applicants to complete the build within the time limit.*

Section 23: Grounds for amending or cancelling an approval

Section 23 allows Council to amend or cancel an approval for a variety of reasons. Under sub-section (1g) an approval may be cancelled where previously approved advertising signs that are considered prohibited advertising signs under the Proposed Law, if they have had their approval renewed nine times.

It is unreasonable to restrict approval renewal opportunities for existing approved devices which have already undergone Council assessment, particularly as that assessment is often time consuming, resources intensive and expensive, on top of which is the investment and time in building the sign.

The OMA strongly recommends removing this sub-section.

If Council insists on retaining this sub-section, the OMA requests that it is applied only from the time of the Proposed Law coming into effect, meaning that any current sign would have the possibility of at least nine renewals from that time.

Under sub-section 23(1a)iii Council has the power to cancel an approval due to a perceived risk of loss of amenity. As discussed previously, amenity is a broad term and should be more clearly defined. In this instance, we would recommend that the term "loss of amenity" be either replaced with a more specific term or, preferably, removed entirely.

Under sub-section 23(1f) Council has the power to cancel an approval due to a perceived change in the character of an area. It is unclear what would constitute a change of character in an area, including what aspects of character or the extent of the perceived change. The subjective nature of this sub-section is also problematic as it provides a lack of transparency and could result in inconsistent application of the Proposed Law. The OMA suggests that this sub-section be removed entirely.

Part 7 Miscellaneous

Section 52 Information notice

This section requires an applicant to supply Council additional information within seven days, unless an extension to this period is requested and agreed to by Council.

Seven days, unless an extension is agreed to, does not necessarily provide applicants with sufficient time to coordinate and provide additional information to Council. Where an extension is requested, applicants will be dependent upon Council granting extensions in order to proceed with applications. This will be an unnecessary and unreasonable burden.

The OMA therefore proposes that this time be extended to 21 days to provide applicants with enough time to meet the requirements and make requests for extensions, particularly as the information required by Council may require the applicant to seek an expert report or other external feedback.

Part 8 Amendment, repeal and transitional provisions

Division 3 Transitional provisions

Section 68: Retrospective application of section 6(2)(b)

Section 68 allows the application of the proposed local law provisions to be applied to any application for approval of a high impact electronic display component sign which has not been decided by Council on or before the commencement of this local law.

The Council has a responsibility to draft local laws in accordance with the guidelines in the Legislative Standards Act 1992. It is noted that this includes adhering to the principles relating the legislation that underlie a parliamentary democracy based on the rule of law. These principles include the requirement for legislation to have sufficient regard to rights and liberties of individuals with respect to not adversely affecting the rights and liberties, or impose obligations, retrospectively.

With this in mind, the OMA recommends removing Section 68 to ensure that the Proposed Law is not applied retrospectively to applications that have already been submitted under the current rules.

Schedule 2 Definitions

The definition of 'advertising' is not sufficiently clear and we would recommend aligning it more closely with the definition used by the AANA. Suggested new wording:

> *Any published communication or material which is undertaken by, or on behalf of, an advertiser or marketer, that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.*

If the words amenity were to remain in the Proposed Law, which the OMA strongly believes it should not, then it should be clearly defined in relation to the Proposed Law.

Suggested wording for the definition of 'amenity' would be:

- *The qualities of a location with regard to lighting, daylight, glare and shade, freedom from hazard and the uninterrupted ability to use and enjoy the land for the purpose it was designed, that may be affected by the location, luminance and operating hours of advertising devices on nearby sites.*

3 Permitted Advertising Devices Rule

Under Part 3 – Types of permitted advertising devices and applicable conditions of the proposed Permitted Advertising Devices Rule document, there are requirements relating to 'Community infrastructure design'.

Community infrastructure sign A community infrastructure sign is an advertisement which is erected or installed in collaboration with Council for the purpose of facilitating the provision of desirable community facilities and infrastructure such as street furniture.		1) Not more than one community infrastructure sign having a maximum height of 5 m and a maximum area of 10 m² to any side, may be installed, erected or displayed per street frontage of a property. 2) A community infrastructure sign may be installed, erected or displayed along a frontage of a site in addition to any billboard or pylon sign. 3) By separate agreement or conditions, the advertiser must agree to assist with the provision of community infrastructure relating to the site on which the sign is situated.

These requirements appear to limit a community infrastructure sign to one sign per shelter per street frontage.

Brisbane City Council bus shelters presently have multiple advertising panels on the shelters (ie two double-sided signs) on a non-illuminate asset, all of which are approximately 2sqm or below.

This requirement also doesn't allow for large commercial developments and infrastructure such as hospitals and retail centres, where there may be more than one (non-adjoining) bus shelter on the street frontage of the same property.

This can occur where there are two separate bus lines along the same section (eg a City Glider service and a regular service) with stops located within 20 – 100m from each other on the street frontage of the same property.

Further, there are instances where there are two adjoining shelters (or almost adjoining) that currently contain advertising. This is demonstrated in Council's illustration above.

With these points in mind, we recommend that point one in this requirement be edited to say:

> *Not more than one item of community infrastructure featuring a sign or signs, each having a maximum height of 5m and a maximum area of 10m^2 to any side, maybe installed, erected or displayed per street frontage of a property, unless that property is a large commercial development with a street frontage of over 100m.*

4 Conclusion

The OMA thank Brisbane City Council for the opportunity to feed into this consultation process.

If you have any questions or would like to discuss any aspect of the OMA's consultation response, please contact Emma Carr, General Manager, Government Relations on 0450 539 11 or at emma.carr@oma.org.au