

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Odna Group Pty Ltd v Logan City Council* [2021] QPEC 41

PARTIES: **ODNA GROUP PTY LTD**  
(appellant)

v

**LOGAN CITY COUNCIL**  
(respondent)

FILE NO/S: 3218 of 2020

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 20 August 2021

DELIVERED AT: Brisbane

HEARING DATE: 21, 22 and 23 June, 12 and 13 July 2021

JUDGE: Rackemann DCJ

ORDER: **The appeal will be allowed. The respondent's decision will be set aside and replaced with one approving the application subject to conditions to be determined after hearing further from the parties.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against refusal of a development application for operational works for an electronic advertising device – whether the development conflicts with the advertising device code in the planning scheme – whether the advertising device would materially affect the safety of the movement network – whether the proposal complies with either the performance outcome or the purpose and overall outcome of the code, given the operation of the acceptable outcomes is excluded in relation to safety – whether the advertising device would materially adversely affect, rather than protect, the visual amenity of the surrounding area – whether the acceptable outcomes are met where, in part, they refer to standards for various signs, none of which fit the description of the proposal – whether the proposal meets the performance outcomes or the purpose and overall outcomes in relation to visual amenity – whether public benefit supports the favourable exercise of discretion

- CASES: *Comkey Pty Ltd v Caboolture Shire Council & Ors* [2006] QPELR 399  
*Jedfire Pty Ltd v Logan City Council* [1995] QPLR 41  
*Kenlynn Pty Ltd v Noosa Shire Council* [2020] QPELR 834
- LEGISLATION: *Planning Act* 2016 (Qld) ss 45(3), 60(2)  
*Planning and Environment Court Act* 2016 (Qld) ss 43, 45, 47
- COUNSEL: M Batty with R Yuen for the appellant  
R Traves QC with S Marsh for the respondent
- SOLICITORS: MacDonnells Law for the appellant  
Holding Redlich for the respondent

## Introduction

- [1] This appeal is against the respondent's refusal of an application for a development permit for operational works. The proposal is to erect an advertising device, with a single sided electronic display, on top of an existing three storey commercial building located at 3-5 Westmoreland Boulevard, Springwood. The sign, which would be 75m<sup>2</sup> in area (15m wide and 5m high) would be orientated so as to face southbound traffic on the nearby busy Pacific Motorway (the **Motorway**).
- [2] The development application was subject to code assessment. Accordingly, it was required to be assessed only against the matters in s 45(3) of the *Planning Act 2016 (Qld) (PA)*. They include the relevant assessment benchmarks in a categorising instrument. By reason of s 60(2) of the PA, the respondent, as assessment manager, after carrying out the assessment:
- (a) was required to approve the application to the extent it complied with all the assessment benchmarks for the development;
  - (b) had a discretion to approve the application even if there was non-compliance with some of the assessment benchmarks;
  - (c) had a discretion to impose conditions on any approval, and
  - (d) could refuse the application if there was non-compliance incapable of being remedied by the imposition of conditions.
- [3] In this appeal the Court effectively stands in the shoes of the assessment manager by conducting a hearing anew of the application for the development permit.<sup>1</sup> The Court may confirm or change the decision appealed against or set it aside and either replace it or remit the matter.<sup>2</sup> The appellant bears the onus in the appeal.<sup>3</sup>

## The Issues

- [4] The relevant categorising instrument is the Logan Planning Scheme 2015 version 7 (the **Planning Scheme**). The agreed list of issues in dispute may be summarised as follows:
- (1) Whether the development fails to comply with provisions in the Advertising Device Code (the **Code**) relating to:
    - (a) the safety of the movement network, and
    - (b) protecting the amenity, particularly the visual amenity, of the surrounding area.
  - (2) Whether any non-compliance can be remedied by the imposition of conditions.

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<sup>1</sup> s 43 of *Planning and Environment Court Act 2016 (Qld) (PECA)*.

<sup>2</sup> s 47 of PECA.

<sup>3</sup> s 45 of PECA.

- (3) Whether there are discretionary considerations that mean the application should be approved in any event.

[5] The first two of those issues will be dealt with together in the context of the issues of safety and amenity respectively.

### **The Advertising Device Code**

[6] The Advertising Device Code (the **Code**) is a performance based code. It has a familiar format that features a statement of purpose, overall outcomes and a series of performance outcomes and corresponding acceptable outcomes. The respondent relies upon asserted non-compliance with provisions falling into each of those categories. Section 5.3.3 of the Planning Scheme provides that code assessable development:

“that complies with:

- i. the purpose and overall outcomes of the code complies with the code;
- ii. the performance or acceptable outcomes complies with the purpose and overall outcomes of the code.”

[7] As was acknowledged in the respondent’s outline of submissions, this means that compliance can be achieved in three different ways, namely by:

- compliance with the purpose and overall outcomes (even if not with the performance outcomes or acceptable outcomes), or
- compliance with the performance outcomes, or
- adoption of the acceptable outcomes.

### **Safety**

[8] The substantive issue, with respect to safety, is whether the proposed advertising device, notwithstanding the imposition of conditions, would materially and adversely affect the safety of the movement network as a consequence of causing distraction to drivers. The respondent alleged non-compliance with the following provisions of the Code in this regard:

- sub-paragraph 1(b) of the statement of purpose, which provides as follows:

“The purpose of the code is to:

a. ...

b. maintain the safety of the movement network.”

- sub-paragraph 2(a)(ii) of the overall outcomes, which provides as follows:

“an advertising device is designed and located to:

(i) ...

(ii) not adversely affect the safe function and operation of the movement network.”

- performance outcomes 1(b) and (c). The relevant parts of the performance outcome and the whole of the acceptable outcome is as follows:

<p><b>PO1</b></p> <p>An advertising device is designed and located:</p> <p>a. ...</p> <p>b. to be safe for pedestrians, cyclists and vehicular traffic;</p> <p>c. to not distract motorists so as to cause a traffic hazard.</p>	<p><b>AO1.1</b></p> <p>An advertising device is designed and located to comply with Table 9.4.1.3.2 – Standards for signs.</p>
	<p><b>AO1.2</b></p> <p>An advertising device is not animated and does not revolve or flash.</p>
	<p><b>AO1.3</b></p> <p>An off-premises sign complies with Table 9.4.1.3.3 – Maximum face area of off-premises advertising devices in all zones or precincts.</p>
	<p><b>AO1.4</b></p> <p>An on-premises freestanding sign complies with Table 9.4.1.3.4 – Maximum face area for an on-premises freestanding sign.</p>

[9] Insofar as the acceptable outcome is concerned:

- (i) each of AO1.1 through to AO1.4 commence with a description of what that part of the acceptable outcome relates. In the case of AO1.1 and AO1.2 it is “an advertising device.” In the case of AO1.3 it is an “off-premises sign”. In the case of AO1.4 it is an “on-premises freestanding sign”.
- (ii) schedule 1 of the Planning Scheme contains definitions, including administrative definitions which are said to be “the definitions for the purposes of the planning scheme”. They “assist with the interpretation of the planning scheme”, but “do not have a specific meaning in relation to land use”.

- (iii) the administrative definitions include definitions for various types of signs. Those include the following:

<b>Advertising device</b>	Advertising device – a. means a permanent sign, structure or other device used, or intended to be used, for advertising; and b. includes a structure, or part of a building, the primary purpose for which is to support the sign, structure or device.
<b>On-premises sign</b>	An advertising device used for the exhibition or the display or advertising of a matter exclusively related to the predominant use of the premises.
<b>Off-premises sign</b>	An advertising device used for the exhibition or the display of advertising of a matter not exclusively related to the predominant use of the premises.

- (iv) the proposal is for an advertising device which would be an “off-premises sign”, because it is not to be used for the exhibition or display or advertising of a matter exclusively related to the predominant use of the premises.<sup>4</sup> AO1.1, AO1.2 and AO1.3 are therefore relevant. Those provisions are cumulative.
- (v) it is common ground that the proposal complies with AO1.2 but not with AO1.3 which, when read with table 9.4.1.3.3, would require the face area to be a maximum of 20m<sup>2</sup>. It is unnecessary to dwell on AO1.1 for this purpose, since the non-compliance with AO1.3 is enough to exclude the operation of the acceptable outcome. The identically worded AO2.1 is considered later in the context of the amenity issue.

[10] The next question is whether the proposal nevertheless complies either with the performance outcome or the purpose and overall outcomes of the Code insofar as they relate to the safety issue. That requires a consideration of the evidence in relation to any risk to safety.

[11] The safety issue is primarily concerned with the safety of motorists in the southbound lanes of the Pacific Motorway. These reasons deal with that first. That motorway is under the control of the State. In considering the subject application, the respondent sought advice from the Department of Transport and Main Roads (the **Department**). The Department advised that it objected to the proposal on the basis that it falls within two “device distraction areas” under Appendix C to the Department’s Roadside Advertising Manual (**RAM**). In particular it is within a “turbulence zone” ahead of the Watland Street exit to the south and 150m from an “important traffic sign”.

<sup>4</sup> see the definition in Ex 1 at pg 119.

[12] The RAM has no statutory force insofar as the assessment of this application is concerned. The provisions of the RAM relevant to the Department's advice were not referred to by the distraction experts or the traffic engineers in their joint reports but were put to Mr Bitzios (the traffic engineer called by the appellant) in the course of cross-examination. He dismissed them as having no basis in science or logic.<sup>5</sup> Mr Trevilyan (the traffic engineer called by the respondent) was not asked anything about them when he was called in the respondent's case. Accordingly, I give no weight to those provisions of the RAM relied upon in the Department's advice or to the Department's advice. I note that, in any event, if the sign, once constructed, were considered to create a danger to traffic, there is power under s 139 of the *Transport Operations (Road Use Management – Accreditation and Other Provisions) Regulation 2015* (Qld) to require the owner to modify or remove it. That does not, of course, absolve this Court of responsibility for considering the safety issue in this appeal.

[13] Before descending to the detail of the evidence concerning the safety implications of the proposed sign, the following observations may be made:

- (i) driving is not an absolutely safe, risk free activity and, accordingly, traffic safety is relative and not assessed in an absolute or utopian way.<sup>6</sup>
- (ii) whilst the safety risk said to be associated with the proposed sign relates to its potential to distract the attention of drivers:
  - (a) roadside (or near to roadside) advertising devices are, of their nature, designed to attract the attention of passing motorists, including drivers, to something that is not part of the driving task. To the extent they are successful in doing so, they may be said to have at least some potential to distract.<sup>7</sup> That does not mean however, that all such signs create a hazard or necessarily fall foul of the provisions of the Code in relation to safety. Such signs are a common feature, serve a valid commercial purpose and are contemplated by the Planning Scheme. The respondent did not suggest that the potential of a sign, including an electronic sign, to catch the eye of a passing driver necessarily makes such a sign inappropriate, on safety grounds in all circumstances. Indeed the respondent has recently approved another large electronic advertising device oriented to face the southbound lanes of the same motorway at a location a little further to the south.<sup>8</sup> The particular proposal must be assessed;

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<sup>5</sup> T2-45.

<sup>6</sup> *Jedfire Pty Ltd v Logan City Council* [1995] QPLR 41 at 43; *Kenlynn Pty Ltd v Noosa Shire Council* [2020] QPELR 834 at [31].

<sup>7</sup> Ex 4 para 14.

<sup>8</sup> Ex 7.

- (b) there are many causes or contributing causes of traffic accidents, of which driver distraction<sup>9</sup> is but one;
- (c) insofar as driver distraction is a factor in some traffic accidents, potentially risky distraction behaviours<sup>10</sup> internal to the motor vehicle (such as using a mobile phone or interacting with passengers) is much more common than extended glances to an object external to the vehicle;<sup>11</sup>
- (d) even where drivers engage in secondary tasks whilst driving, there is evidence that they tend to self-regulate their engagement with the secondary task, to minimise risk<sup>12</sup> although, as Dr Roberts acknowledged,<sup>13</sup> not all drivers modulate equally well<sup>14</sup> and there are some sub-populations of drivers (the young/inexperienced or elderly) who are generally less able and are at greater risk of distraction. Further, drivers can recognise things in their peripheral view as they glance (temporarily fixate on) an object such as a digital sign that does not require them to turn their head from the forward direction.<sup>15</sup> Accordingly, whilst digital billboards may create glances and thereby change driver behaviour (and performance) by attracting attention, they do not necessarily result in driver error or become causally linked to crashes,<sup>16</sup> and
- (e) there is, as yet, limited research on electronic billboards and their impact on driver behaviour, and crash risk such that the relationship between them is not well considered and, indeed, a causal connection (if any) between electronic billboards and motor vehicle crashes is, as yet, not well established,<sup>17</sup> including in relation to the kinds of digital billboards generally found in Australia.<sup>18</sup>

[14] Notwithstanding the above, Dr Roberts, a well qualified, knowledgeable and experienced expert in driver distraction,<sup>19</sup> particularly in relation to digital billboards, takes the position that:

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<sup>9</sup> conservatively estimated to be involved in 30% of crashes – Ex 9, T1-63.

<sup>10</sup> noting that distraction does not always equate to risk. Cognitive underload, for example, can itself be problematic. – T1-60.

<sup>11</sup> Ex 4 para 23, T1-50, T3-36, T2-78,79.

<sup>12</sup> Ex 4 section 4.1.6 and para 142, T1-58, 70.

<sup>13</sup> Ex 4 para 72, T1-36.

<sup>14</sup> T1-40.

<sup>15</sup> Ex 5 para 12, T2-5, T1-42.

<sup>16</sup> Ex 4 para 84, T1-38, 58.

<sup>17</sup> Ex 4 section 4.1.5, Ex 5 para 13.

<sup>18</sup> T1-37.

<sup>19</sup> and who holds a PhD in experimental psychology, formerly worked at the Australian Road Research Board and is also chair of the WA Chapter of the Australasia College of Road Safety, the Deputy



- (i) there is the potential for greater risk with electronic billboards;<sup>20</sup>
- (ii) there are scenarios in which electronic billboards could cause crashes;<sup>21</sup>
- (iii) a somewhat conservative approach should be taken,<sup>22</sup> and
- (iv) accordingly, proposals for electronic billboards should be subject to risk assessment of the particular sign at the particular location.<sup>23</sup>

- [15] In Dr Roberts' view it would not be prudent to design electronic billboards or place them in locations that might add cognitive demand to such an extent that appropriate attentional self-regulation would breakdown.<sup>24</sup> In particular he did not consider it prudent to place electronic billboards in locations that are inherently attention demanding, perceptually challenging or risky, or to give them operational characteristics that would make self-regulation difficult.<sup>25</sup> That is an appropriate approach. He does not for example, support such billboards where they are visible from complex intersections, uncontrolled U turns or pedestrian crossings nor does he support billboards that present multiple changes of images.<sup>26</sup>
- [16] Dr Roberts authored the Austroads<sup>27</sup> Research Report on the Impact of Roadside Advertising on Road Safety that was published in 2013. The project, which was designed to facilitate the harmonisation of agency criteria for the management of roadside advertising devices and promote improved and consistent practice by road agencies, involved, amongst other things, developing "best practice" guiding principles and guidelines for the placement of outdoor advertising signs. This resulted in the formulation of a number of criteria (the **criteria**) to facilitate a risk based assessment of proposed roadside electronic billboards. They assist in distinguishing between those design characteristics and locations that are risky and those that are not.<sup>28</sup> The approach is evidence based (that is, consideration of evidence led to the approach taken).<sup>29</sup> The criteria deal with factors including those that are peculiar to electronic billboards and which potentially make them more distracting.
- [17] Whilst not of any statutory force for the purposes of assessing the subject application, the criteria generally appear to be soundly based, serve as a useful guide, by reference to matters of relevance which have not been overtaken since

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Director of the WA Centre for Road Safety Research and occasional chair of the organising Committee of the Australian Road Safety Conference – Ex 4 pg 32, T1-27.

<sup>20</sup> T1-38 – although he does not think that is so for the particular sign.

<sup>21</sup> T1-47,48.

<sup>22</sup> T1-38.

<sup>23</sup> T1-38.

<sup>24</sup> Ex 4 para 84.

<sup>25</sup> Ex 4 para 135.

<sup>26</sup> Ex 4 para 52.

<sup>27</sup> The Austroads membership comprises transport authorities from Australia and New Zealand and are listed in Ex 8.

<sup>28</sup> Ex 4 paras 135, 136.

<sup>29</sup> T1-29.

their publication<sup>30</sup> and can be given weight on that basis, subject to the particular circumstances of the case.<sup>31</sup> They were addressed by the respective distraction experts, albeit that, in the course of her testimony, Dr Chevalier (the distraction expert called by the respondent) whilst accepting the importance of the Austroads document and acknowledging that it should be considered, said she did not regard the criteria as perfect or complete guidelines.<sup>32</sup>

[18] There are 17 criteria that relate to what may be described as 3 topics being:

- (i) the characteristics of the sign;<sup>33</sup>
- (ii) the location and orientation of the sign within its environment;<sup>34</sup> and
- (iii) the road environment in which the sign is to be located<sup>35</sup>

In Dr Roberts' view, the proposal will comply with the criteria, is very low risk and would not distract motorists so as to cause a traffic hazard.<sup>36</sup> In Dr Chevalier's view it complies with most, but not all of the criteria<sup>37</sup> however, she considers that it "seems risky" to introduce the proposal in the circumstances.<sup>38</sup>

[19] I am satisfied that the proposed sign will, subject to the imposition of conditions, have characteristics that are appropriate from the perspective of safety and such that it will not be unduly distracting. In that regard:

- It is not intended to, and can be conditioned so not to, contain animation, flashing, motion or any effect that creates the illusion of movement.<sup>39</sup>
- It is not intended to, and can be conditioned not to, contain flashing, blinking, revolving or intermittent lights.<sup>40</sup> There should also be a condition requiring the display to be black/dark blank or instantly turned off in the case of failure.<sup>41</sup>
- It is intended to, and can be conditioned to, have an appropriate dwell time (during which the display is to be static), to limit the message changes to which drivers are exposed. Dr Chevalier pointed out that exposure to message changes involves distraction risk. Mr Trevilyan

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<sup>30</sup> Ex 4 para 52, T1-49, 50.

<sup>31</sup> *Comkey Pty Ltd v Caboolture Shire Council & Ors* [2006] QPELR 399 at [103].

<sup>32</sup> T2-108, 109, T3-39.

<sup>33</sup> Table 1.

<sup>34</sup> Table 2.

<sup>35</sup> Table 2.

<sup>36</sup> Ex 4 para 136.

<sup>37</sup> Dr Chevalier confirmed that, save with respect to dwell time, she believed the proposal complied with the criteria in respect of which she made no comment on pgs 23 and 24 of Ex 4 - T3-13.

<sup>38</sup> Ex 4 para 148.

<sup>39</sup> see AO1.2 and criterion 1 (adopting sequential numbering of the criteria in the Austroads design criteria appearing in Ex 4 at pp 23, 24).

<sup>40</sup> Criterion 2.

<sup>41</sup> Ex 14 para 17Fcras(vi).

saw the “hazard” relating to digital signs as relating not just from their existence but more to the change in display in the driver’s view whilst the driver is trying to concentrate and make decisions about the movement of their vehicle.<sup>42</sup> The goal in the criterion is to “limit” the number of message changes that drivers are exposed to. Dr Roberts rightly pointed out<sup>43</sup> that whether exposure to a change involved a safety risk would depend upon whether it coincided with an attentionally demanding situation, so as to potentially precipitate a driving error. The determination of an appropriate dwell time takes account of the visibility distance and the speed environment. In theory the least possible risk from this perspective would be a dwell time calculated to achieve no change for any driver. That is not what the criterion suggests is necessary. Instead the criterion suggests that, “ideally”, the proportion of drivers who see even one change should be much less than one (ie 100%). Initially the appellant proposed a dwell time of 25 seconds, but in the course of the hearing volunteered a condition requiring a dwell time of at least 40 seconds, which, given the speed environment of the motorway (100kph speed limit) and the visibility distance (350m to the point from which drivers would likely first glance at the sign<sup>44</sup>) will comfortably meet the criteria. As the appellant pointed out, the Court could impose a condition requiring an even longer dwell time. Accordingly this is a matter that can, on any view, be conditioned appropriately. The change to a 40 second dwell time would achieve a static display (no change) for 70% of drivers at 100kph<sup>45</sup> which is equivalent to a scenario for the same speed in a driver simulation study where no negative effect on driver behaviour was found.<sup>46</sup> This included no variation in speed as a self-regulating response to the distraction. Whilst a higher proportion of drivers would be exposed to a change when vehicle speeds are lower,<sup>47</sup> the lower speed environment in those times also reduces the risks involved in crashes, by reducing the kinetic energy involved in any incident.<sup>48</sup> If the traffic on the motorway was jammed with traffic which was stopped or near stopped many would see a change, but crashes due to distraction from sign changes would not be expected.<sup>49</sup> In the circumstances I accept the evidence of Dr Roberts who characterised the adoption of a 40 second dwell time as effectively risk free given the circumstances of the site.<sup>50</sup> Dr Chevalier was still less than satisfied

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<sup>42</sup> Ex 5, para 19.

<sup>43</sup> T2-2, 3.

<sup>44</sup> Ex 5 para 26.

<sup>45</sup> at 90km/hr it would be static for 65% of drivers and 60% at 80km/hr – T2-2.

<sup>46</sup> Ex 4A pg 2 para 6, T1-60, 64-69.

<sup>47</sup> for a 350m visibility 40% would see a change at 80km/hr and 35% at 90km/hr – T2-2.

<sup>48</sup> T1-65, 66.

<sup>49</sup> T1-66.

<sup>50</sup> T2-10.

with the dwell time, but did not suggest any different time by reference to any different speed or proportion of drivers. She was focused on her opposition to the concept of a digital sign at the subject location.<sup>51</sup> Indeed she confirmed that she would not support even a static billboard in the proposed location.<sup>52</sup>

- A condition can be imposed to ensure an appropriate message transition by requiring the message change to be instantaneous (no fade, zoom or fly in effect or blank screen between messages).<sup>53</sup>
- A condition can be imposed to prohibit sequencing of messages.<sup>54</sup>
- Dr Roberts pointed out that the quantity of information displayed on an advertising sign is generally not an issue<sup>55</sup> (because advertisers want viewers to be able to apprehend the point very quickly).<sup>56</sup> Dr Chevalier did not disagree.
- A condition can be imposed to ensure that the device is not coloured like an official traffic sign or traffic signals.<sup>57</sup>
- A condition can also be imposed to ensure that the device does not display inappropriate content such as that which mimics traffic control devices or gives instructions to traffic.<sup>58</sup>
- A condition can be imposed to require the sign to operate with an ambient light sensor informing a control system,<sup>59</sup> such that there is an automatic adjustment of the luminance levels on the panel depending upon the ambient light conditions with the consequence that in the important (for brightness) night time period, the luminance level of the panel lowers, to an appropriate level, as the ambient light level lowers.<sup>60</sup> This is discussed in greater detail later in dealing with the evidence of the lighting experts.
- The advertising device is not shaped like an official traffic control device.<sup>61</sup>

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<sup>51</sup> T3-12.

<sup>52</sup> T3-36.

<sup>53</sup> Criterion 4.

<sup>54</sup> Criterion 5.

<sup>55</sup> Criterion 6 – T2-13, 14.

<sup>56</sup> T2-13.

<sup>57</sup> Criterion 7.

<sup>58</sup> Criterion 8 – the criterion also refers to threatening or provocative content. It might be more difficult to frame a condition with appropriate certainty that can deal with that. That is a matter that can be considered further in the formulation of conditions but is not, in my view, critical to the approval/refusal issue.

<sup>59</sup> photoelectric cells.

<sup>60</sup> Ex 14 para 16(vii) - Criterion 9.

<sup>61</sup> Criterion 10.

[20] Dr Chevalier pointed out that the “dimensions” criterion is deficient in not considering the size of the sign. In her view the considerable size of the subject sign will likely lead to drivers engaging with it to a greater degree than if it were a smaller sign. Dr Roberts accepted that, because the display of a larger sign is visible for a longer period of time than if the same sign was smaller.<sup>62</sup> I accept that, as did Dr Roberts, all other things being equal, the size of the sign adds to the potential for distraction,<sup>63</sup> but I also accept Dr Roberts’ evidence that that is not necessarily a major factor.<sup>64</sup> As he explained, small signs that are “very bright” can be problematic compared with large signs, the display of which are adjusted in accordance with the ambient conditions.<sup>65</sup> It does not necessarily follow from the size of the sign that there would be a material adverse effect on safety in this instance and the consideration of size does not, in the circumstances, alter my overall conclusion in relation to the sign proposed in the case.

[21] Leaving the criterion for longitudinal placement (considered later) to one side, I am also satisfied that the proposed sign would otherwise be located and orientated appropriately within its environment from a safety perspective. In that regard:

- The sign will be visible in the normal forward scanning window of the driver for the full approach distance such that drivers will not have to turn their heads or divert their gaze away from the roadway in order to comprehend the sign message.<sup>66</sup> That is a function of the straightness of the relevant section of the motorway and the proximity of the building (on which the sign is to sit) mimicking a road reserve placement. Dr Chevalier was concerned that the size and electronic nature of the sign might cause drivers to be more engaged with it to the point that they might tilt their heads up or to the side to view the sign. The criterion is concerned with whether the placement is such that drivers must divert their gaze, rather than with bare possibilities. In any event, Dr Chevalier appeared to overestimate the potential of the sign to “engage” the driver, or at least for it to do so to an extent that would provoke unusual behaviour. I have already dealt with the characteristics of the sign as appropriately conditioned. I accept the evidence of Dr Roberts to the effect that it is unlikely that drivers would perform otherwise unusual actions such as turning their heads at an acute angle to view the sign.<sup>67</sup>
- The proposed sign will be elevated above the “hazard viewing window,” that is, above the height of vehicles, pedestrians and traffic control devices, but not so high as to draw the gaze away from the

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<sup>62</sup> T2-14, 15 – although he added that small signs which are very bright can be problematic.

<sup>63</sup> T2-15.

<sup>64</sup> T2-14.

<sup>65</sup> T2-14.

<sup>66</sup> Criterion 12.

<sup>67</sup> T2-6,7.

roadway.<sup>68</sup> Whilst at the time of the joint report, Dr Chevalier considered that accurate sign depictions were required to fully determine the extent of visibility of the sign, the evidence, including the photomontage evidence and the evidence of Dr Roberts<sup>69</sup> satisfies me that the position of the sign, on top of the three-storey commercial building, would achieve this objective.

- The proposed sign is oriented to face the oncoming traffic. There was no dispute with respect to the criterion that a device be orientated to facilitate legibility from the maximum legibility distance and across the full approach distance.<sup>70</sup>
- There was no dispute with Dr Roberts' opinion (which I accept) to the effect that the sight distance to the sign would be sufficient for the sign to be comprehended.<sup>71</sup>

[22] The remaining three criteria relate to the risk profile of the road environment to which the electronic sign would present itself. In particular:

- (i) The criterion for longitudinal placement states, in part, that advertising devices should not be located so that they are visible at the approach to, or from, an intersection, pedestrian crossing, tram stop or in any location that is likely to be highly demanding of attention;
- (ii) The criterion on speed limit/speed environment is not, in substance, a criterion but rather a statement that "the speed environment on its own is likely to be less important than the overall risk profile of the road and driving demand characteristic of the road system which should be carefully reviewed". That is however, consistent with the speed environment being a factor in that overall assessment. Dr Chevalier cited the high (100 kmph) speed limit on the motorway as the reason for that being the road of primary concern to her, since speed affects the potential gravity of the consequences of a crash,<sup>72</sup> and
- (iii) The "other" criterion calls for a consideration of the overall risk profile of the road environment in question and the driver demand of the road section. Whilst it mentions, as examples, some potentially relevant matters (crash history, AUSRAP ratings, traffic volume, speed, complexity, clutter) and suggests, amongst other things, that highly cluttered road environments should be ruled out, the criterion is not prescriptive about the way in which the overall risk profile is to be assessed.

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<sup>68</sup> Criterion 13.

<sup>69</sup> Ex 4 pg 24 – commentary on the criterion.

<sup>70</sup> Criterion 14.

<sup>71</sup> Criterion 15.

<sup>72</sup> T3-13, see also Trevilyan Ex 5 para 33.

- [23] There was disagreement about the extent to which the road environment is already demanding such that the addition of the proposed sign would materially affect safety. Evidence about that was given by the distraction experts and the traffic engineers.
- [24] There was an attack on the credibility of Mr Bitzios' evidence. Three things were relied upon in the course of oral submissions. First, in the traffic engineering JER, Mr Bitzios made the point that traffic assessments should not define a situation as absolutely safe or unsafe, but should, instead, look at the extent to which changing the visual driving environment, by the introduction of a new digital sign, changes the probability of a crash.<sup>73</sup> That was set against his concession, in cross-examination, that such a change would be extremely difficult, if not impossible, to quantify by a calculation.<sup>74</sup> It was submitted that he had proposed a test that was impossible to satisfy. I do not agree. It seems to me that Mr Bitzios was simply making the same point made earlier in these reasons, that traffic safety is relative and it is illusionary to pretend otherwise. A test, the application of which does not admit of a calculation is not one that is impossible to apply or satisfy.
- [25] A more significant point was made about Mr Bitzios' views concerning the relationship between digital signs and crashes. In particular, he takes the view that there is a consensus that there is no casual link between digital signs and crash rates<sup>75</sup> and that, in his view, digital signs, in their own right, do not cause accidents.<sup>76</sup> It was submitted that this coloured his evidence. I have not acted on the basis that digital signs do not or cannot cause crashes or otherwise compromise safety. On the evidence, I consider the approach taken by Dr Roberts, in that regard, as the appropriate (albeit conservative) one. Accordingly I have analysed the evidence as it relates to the risk assessment of this particular proposed sign. I have been mindful that Mr Bitzios holds a stronger view, but that does not necessarily invalidate the rest of his evidence. He did not stop at the general proposition that digital signs do not cause crashes. In particular he assessed the crash history and rate in relation to the relevant part of the motorway in question and examined the issues raised in relation to the safety of the various components of the road environment as they relate to the proposal. That evidence remains of assistance.
- [26] The third point is related to the second. It is Mr Bitzios' view that there is little to be gained, in the assessment of digital signs, from an examination of a crash history. That issue is discussed further later in these reasons. That view seems to be influenced, in part by his view about the disconnect between digital signs and crashes. I do not accept his view about the potential relevance of crash histories (which may assist in assessing the existing risk profile of the road environment). Notwithstanding his view however, he undertook an examination of the history, which is dealt with in these reasons. The evidence in that regard was helpful.

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<sup>73</sup> Ex 5 para 4.

<sup>74</sup> T2-47.

<sup>75</sup> T2-54.

<sup>76</sup> T2-53.

- [27] In the course of oral submissions, reference was also made, in passing, to the fact that, in Court cases regarding electronic signs, Mr Bitzios has only been called by those seeking approval of such signs. When questioned about this in the course of cross-examination however, he referred to the fact that he is regularly retained by road authorities to review applications.
- [28] For the reasons given, I am not persuaded to put Mr Bitzios' evidence aside.
- [29] Dr Chevalier pointed out, in relation to the "other" criterion, that there is a deal of "clutter" in the form of numerous advertising signs visible from the motorway on other commercial sites fronting the eastern service road (Pacific Highway) leading up to the subject site. The perception of clutter varies according to the viewpoint and clutter is not, in this respect, to be avoided for its own sake. Dr Roberts explained<sup>77</sup> that the concern to which that section of the criterion is directed is visual confusion caused by a situation in which the viewer is presented with "a lot of information that you have to move your attention around to make sense of", such that attention is "scattered", which he described as not ideal, particularly if the driver's attention is being drawn away from the forward direction.<sup>78</sup> As Mr Bitzios said, clutter is relevant when you are looking for something within the clutter, otherwise it is just "background noise".<sup>79</sup> The Austroads Report refers to the presence of driving irrelevant material hindering the apprehension of driver relevant information.<sup>80</sup>
- [30] In this case the other signs said to constitute the clutter precede the proposed sign and so would not "background" it in the view of any driver and the preceding signage would not create visual complexity at the proposed sign.<sup>81</sup> Dr Roberts did not consider that there would be the impression of a "messy, complicated environment" when the driver focused on the proposed sign.<sup>82</sup> Whilst the proposed sign would be partly obscured by a "Hungry Jacks" sign in the foreground when viewed from 400 metres away. Dr Roberts evidence was that:<sup>83</sup>
- That viewpoint, whilst giving an impression of moderate clutter, is still not cluttered to a point that produces the effect in the relevant research.<sup>84</sup>
  - In the view from 345 metres away<sup>85</sup> the proposed sign would not be obscured by the Hungry Jacks sign but that view to it is less cluttered.

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<sup>77</sup> T2-19, 21, 22.

<sup>78</sup> T2-19.

<sup>79</sup> T2-54.

<sup>80</sup> Ex 8 pg 13, s 4.3.2.

<sup>81</sup> T2-19, 22.

<sup>82</sup> T2-18.

<sup>83</sup> Ex 6B p 9.

<sup>84</sup> T2-22, T2-24.

<sup>85</sup> Ex 6B p 11, T2-22, T2-24.



- The view to the sign from 275 metres away and closer is not cluttered.<sup>86</sup>

His view was therefore, that the proposed sign would not have the effect of scattering attention, because by the time the driver is in a position to properly view the sign, it is not viewed in the context of all the preceding clutter.<sup>87</sup>

[31] That evidence of Dr Roberts (which I accept) ought be viewed in the context of the observation of Mr Bitzios<sup>88</sup> that, from a position 420 metres away, the contents of the sign would be unrecognisable. The sight distance of 350 metres used by Dr Roberts is, in my view, more realistic. I am satisfied, on the basis of Dr Roberts' evidence that the proposed site is not unsuitable on safety grounds by reason of clutter in the environment.

[32] Mr Trevilyan (the traffic engineer called by the respondent) said, in the traffic engineering JER that:

“At points on the road where cognitive load on drivers is relatively low and where vehicles are not crossing the intended travel paths of other vehicles or interacting with pedestrians, it is reasonable that advertising signs could reasonably be permitted. This constitutes perhaps 90% of the road network.”

On the other hand, he also said<sup>89</sup>:

“prudent engineering dictates that a factor of safety should be in place to ensure confidence in design. In this specific instance, that factor of safety is to be sceptical of permitting signage at locations on the road network where drivers must make important decisions about changes to speed, displacement and direction.”

[33] Against that background, it is evident that the southbound lanes of the motorway in the section where the proposed sign would be viewed does not constitute a particularly complex road environment. In that regard it:

- is a wide, spacious, one-way, four-lane road;
- is relatively straight and flat;
- has a consistent speed limit;
- has no intersections or crossings;
- has no interactions with pedestrians, and
- has no on or off-ramps. The nearest on-ramp is 500 metres to the north (Logan Road). The nearest off-ramp is 350 metres to the south

<sup>86</sup> Ex 6B p 13 and 15, T2-22.

<sup>87</sup> T2-22.

<sup>88</sup> Ex 5 para 26(a).

<sup>89</sup> Ex 5 para 23.

(Watland Street) - although there is, within the section of the motorway where the proposed sign would be visible, a road sign advising of that upcoming exit.

- [34] Mr Trevilyan acknowledged that, for a straight section of the motorway, with no nearby on or off-ramps, a sign as proposed would likely not be an issue. It is the “endemic congestion” that he sees here by reason of vehicles changing lanes and speed in association with the earlier or planned later use of the respective ramps as well as slowing, at times, by reason of general congestion and the need of drivers to be attentive to that, which, in his view, causes an issue.<sup>90</sup> Dr Chevalier expressed a similar view<sup>91</sup> about the cause of concern in relation to the motorway.
- [35] Mr Bitzios, on the other hand, maintained that the relevant part of the motorway is not a complex road environment and does not impart a high cognitive load on drivers. He did not dispute that there might be changes of speed and lane position, but did not see that as extraordinary or unusual in terms of what drivers are required to do on most motorways and did not see justification for applying Mr Trevilyan’s “sceptical approach” in this instance.<sup>92</sup> He distinguished the situation from, for example, a busy intersection with multiple unpredictable movements of vehicles, pedestrians and cyclists where drivers are motivated to make immediate assessments of what they see. In contrast, drivers in the relevant section of the motorway have relatively few observations to make in order to make driving decisions.<sup>93</sup>
- [36] Dr Roberts also saw the driver demand on the relevant section of the motorway as low, with no “decision points” in the vicinity of the proposed sign. In his individual report he clarified what he meant by “decision points”. He uses the expression, in the context of considering cognitive load, as referring to a change in road layout requiring the driver to decide between competing possible actions. In cross-examination<sup>94</sup> he referred to situations where there is a significant amount of attention required in order to safely complete a manoeuvre. In his individual report he explained that being required to think about aspects of one’s driving and plan what you are going to do is simply part of the baseline cognitive load. He considered it significant that there are no “acute load points” from changed vehicle controls (e.g. a merge or give-way) in the section of the motorway from where the proposed sign would be viewed.<sup>95</sup>
- [37] In cross-examination Dr Roberts explained that whilst, in the relevant section of the motorway, drivers might be making decisions to, for example, change lanes (either because they have used the Logan Road on-ramp or plan to use the Watland Street off-ramp), those are decisions they can make and execute safely when the moment

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<sup>90</sup> Exhibit 5 para 41, T2-70-72, T5-40, 41.

<sup>91</sup> T3-40, 41.

<sup>92</sup> T2-63.

<sup>93</sup> Exhibit 5A para 2 and 5.

<sup>94</sup> T2-3.

<sup>95</sup> Exhibit 4A para 5.

arises, as opposed to being forced to do something at a merge point. Further, whilst this is an area where traffic sometimes slows due to congestion, that is a commonly encountered circumstance on freeways. Those are not things which place a high cognitive load on the driver, such that a glance to the proposed sign is a safety issue.<sup>96</sup> In this regard, and in response to another scenario, he explained that, in glancing at the sign, the driver's visual attention will still be in the forward direction and the driver will still be taking in the road.<sup>97</sup> I accept his evidence (and that of Mr Bitzios), including his evidence that, given the extent to which the sign is visible on the approach along the motorway, it is unlikely that a driver would turn his/her head to look at it at an acute angle as they passed by.<sup>98</sup>

[38] The experts had recourse to the crash data for the relevant section of the motorway, but drew different things from it. Mr Bitzios does not put much weight upon historical crash rates as an indicator of the likely impact of a proposed digital sign because of the range of variables that contribute to crashes and what he regards as the small crash risk associated with such devices.<sup>99</sup> He nevertheless addressed the crash history and risk in a number of ways in his report that accompanied the development application. He adopted that part of his report in the course of his testimony.<sup>100</sup> I accept, consistently with Mr Trevilyan's view, that the crash history is something that should be considered although, as he acknowledged,<sup>101</sup> it is not necessarily determinative of safety and one must be mindful that crashes will occur on otherwise acceptably safe roads.

[39] Mr Bitzios looked at the crash history in three ways in the development application report. The first was by reference to the Traffic Accident Remedial Program (**TARP**) data. That looks at a one kilometre rolling section of road to see whether the crash rate for different types of crashes, in that section, is greater than the "critical rate" defined by the Department. The result, in this case, was that the crash rate is lower for both serious and casualty crash types. There were no fatal crash types.

[40] The second assessment utilised crash data for the last five years for the section of the motorway from 400 m before to 100 m after the proposed sign in order to do a crash rate analysis in accordance with the Department's Manual of Uniform Traffic Control Devices (**MUTCD**) so as to derive a crash risk rating (**CRR**). Crash data is kept for those crashes that result in fatalities, hospitalisations, minor injury or medical treatment. The data considered by Mr Bitzios showed 10 crashes over a 5 year period, most of which were rear-end collisions. The analysis resulted in a low

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<sup>96</sup> T2-3.

<sup>97</sup> T2-5.

<sup>98</sup> T2-6,7.

<sup>99</sup> Ex 5 para 28, T2-55.

<sup>100</sup> T2-56-59, para 29 of the JER also referred to part of it.

<sup>101</sup> Ex 5 para 32.

CRR. Dr Roberts, in referring to a low crash rate, relied on the information presented by Mr Bitzios.<sup>102</sup>

- [41] The third assessment utilised the Queensland Risk Assessment Model (**QRAM**), which is a tool used by the Department to identify and prioritise locations of high safety risk. A revision to the RAM contains a statement which opposes advertising devices in road sections with a high risk rating. The analysis revealed only a medium plus rating.
- [42] Having regard to his assessment, Mr Bitzios is understandably of the view that, for a section of roadway that carries 80,000 vehicles per day, “we are in a relatively low crash rate environment”.<sup>103</sup> He considers that the presence of the proposed sign would not reasonably change the likelihood or consequence of crashes in this location.<sup>104</sup>
- [43] In the traffic JER Mr Trevilyan presented crash data for the last five years that was generally consistent with that presented by Mr Bitzios for the slightly different five-year period in the report accompanying the development application. Mr Bitzios confirmed there was no meaningful inconsistency.<sup>105</sup> That showed that in the southbound lanes of the motorway within 350 metres of the subject site, there were 11 reported crashes distributed along that section in the five-year period. One of those appears to have been the result of a vehicle losing its load, which can be disregarded for present purposes. That leaves 10 crashes at an average of two per year. They were mostly rear-end collisions with unknown causes. There were no fatalities, three hospitalisations, one “minor injury” with the balance resulting in “medical treatment”.
- [44] Mr Trevilyan saw the data as suggesting a high propensity for rear-end collisions in the relevant section of the motorway. He saw that as significant because collisions tend to aggregate around areas where decisions are made<sup>106</sup> and rear end collisions are often distraction related,<sup>107</sup> although the actual causes of the particular crashes in the crash history is unknown. He also said that there are routinely more crashes closer to interchanges and less crashes on straight sections of a highway where there are no other distracting influences.<sup>108</sup>
- [45] The crash history and resulting rate, of two per year, needs to be seen in context, including the fact that the motorway carries approximately 80,000 vehicles per day. Volume affects the probability of crash occurrence.<sup>109</sup> As Mr Trevilyan conceded,<sup>110</sup> the number of crashes, when compared with the number of vehicles that use the

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<sup>102</sup> T2-31.

<sup>103</sup> T2-60.

<sup>104</sup> Ex 5 para 29.

<sup>105</sup> T2-37.

<sup>106</sup> T2-72.

<sup>107</sup> Ex 5 para 38.

<sup>108</sup> T2-76.

<sup>109</sup> T2-73.

<sup>110</sup> T2-76.

road each day is “a very small number”. In the course of his testimony<sup>111</sup> Mr Trevilyan referred, for the first time, to a “metric” of three crashes in the five-year period as being a “flag.”<sup>112</sup> As he acknowledged however, that suffers from the problem that it does not take account of the traffic volume. It also does not take account of the length of the section of the road that is being considered.<sup>113</sup>

- [46] I prefer the evidence of Mr Bitzios in relation to the analysis of the crash history and crash rate. His consideration of multiple assessments, as set out in his earlier report in support of the development application, set against the volume of traffic provides an appropriate and a persuasive foundation for regarding the crash risk as low and crash history as insignificant in the circumstances.
- [47] Mr Bitzios did not consider that the presence of the proposed sign would measurably change the likelihood or consequence of rear-end crashes in this location in any event.<sup>114</sup> Insofar as rear-end collisions are caused by distraction, Mr Bitzios pointed out that if a driver is looking forwards the probability of rear-end crashes is reduced. Distraction situations associated with looking sideways or downwards (within the vehicle) are much greater contributors to rear-end crashes than looking forwards, as a driver glancing towards the proposed sign would do.<sup>115</sup> Similarly, when the scenario of a distracted (by the sign) driver failing to react to a vehicle stopped in front of them was put to Dr Roberts, he responded that it was a very unlikely scenario, given that the hypothetical driver is looking in the forward direction to the sign. He added that the scenario typically happens when someone looks down at their mobile phone.<sup>116</sup> I accept that evidence.
- [48] Dr Chevalier, in the distraction JER, listed a number of hypothetical scenarios in which crashes could possibly occur on the relevant section of the motorway in the future if a driver was distracted by the proposed sign.<sup>117</sup> As Dr Roberts pointed out however,<sup>118</sup> the question is not whether there is a theoretical risk, since there are theoretical risks for any driving situation. It is a matter of assessing the level of risk by a detailed risk assessment, as has been done.
- [49] I found the evidence of Dr Roberts, supported in material respects by the evidence of Mr Bitzios, to be particularly persuasive. It was thorough and carefully considered, but balanced, practical and realistic evidence from a well credentialed, knowledgeable and experienced person in this particular area. I prefer it to the evidence of Dr Chevalier who, in my view, took an overly conservative and

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<sup>111</sup> T2-73.

<sup>112</sup> I note that, in his report accompanying the development application, Mr Bitzios referred to a provision of the RAM which suggested restrictions may be applicable where three or more KS1 crashes have occurred at an intersection. There is however, no intersection in the relevant part of the motorway – Exhibit 5B, p 9.

<sup>113</sup> T2-73.

<sup>114</sup> Exhibit 5 para 29.

<sup>115</sup> Ex 5, para 38, Exhibit 5A para 6.

<sup>116</sup> T1-66.

<sup>117</sup> Ex 4 para 104.

<sup>118</sup> Ex 4 para 106.

theoretical approach. For the reasons already given I also preferred the evidence of Mr Bitzios to Mr Trevilyan in relation to the traffic environment.

- [50] I accept that the relevant section of the motorway is one in which vehicles from time to time alter speed and change lanes and accordingly, is not a place where drivers can be completely inattentive. The evidence, particularly that of Dr Roberts and Mr Bitzios however, persuades me that it is not a particularly complex environment and places a relatively low cognitive demand upon drivers, is relatively safe, has no significant safety issue and, in particular, none that would be meaningfully exacerbated by the proposal. The road environment does not have an inappropriate risk profile for the proposed sign.
- [51] Given my findings in relation to the characteristics of the sign, its location and orientation within its environment and the existing risk profile of the environment, I am satisfied that the sign is proposed to be located and can be conditioned to operate, such that it is unlikely to have any material adverse safety consequence for motorists on the motorway.
- [52] There are two other roads from which the sign would be able to be seen, namely the eastern service road (Pacific Highway) and the western service road. For the reasons that follow neither of those are cause for any significant concern.
- [53] The proposed sign would be observable, in the distance, by drivers on Barrina Street about to turn onto the western service road at an unsignalised T intersection. There is no crash history at that intersection. Dr Roberts did not consider that the visibility of the sign from that point would be cognitively relevant.<sup>119</sup> Mr Bitzios cannot envisage a situation where a reasonable driver would be so distracted by the proposed sign that they fail to look left or right to observe a gap in the traffic in order to make the turn safely. I accept that evidence. Mr Trevilyan did not express a contrary view in the traffic JER. In the course of cross-examination Mr Trevilyan confirmed that he is not concerned about it.<sup>120</sup>
- [54] The sign would also be visible, in the distance, on the approach to the Moss Street signalised intersection, but a site visit by Dr Roberts confirmed that the sign would not “background” the traffic signals.<sup>121</sup> The signals otherwise create a low demand environment because they eliminate decision making.<sup>122</sup> For some reason Dr Chevalier held on to a concern about the Moss Street junction if the sign was in a position that confused a driver about the traffic signals.<sup>123</sup> She did not pretend to have established that it would have that effect or to have a basis to doubt the result of Dr Roberts’ site inspection. This is perhaps another example of the extent of her highly conservative, if not sceptical or even nervous approach.

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<sup>119</sup> Ex 4 para 128.

<sup>120</sup> T2-101, 18.

<sup>121</sup> Ex 4 para 125.

<sup>122</sup> Ex 4 para 124.

<sup>123</sup> T3-16.

- [55] The respondent did not address impact on the western service road in its submissions. I am satisfied that the proposal would have no adverse effect on the safety of the western service road.
- [56] The proposed sign would also be visible to drivers travelling south on some parts of the eastern service road. Mr Trevilyan<sup>124</sup> and Dr Chevalier<sup>125</sup> acknowledged that any concern, in this regard, is at a lower level, compared with the motorway (in respect of which I have already found that the proposal would have no material adverse effect), because the lower speed environment diminishes the severity of any crashes. In reality there is no significant cause for concern.
- [57] Before dealing with the south bound drivers, I should dispose of the concern raised by Dr Chevalier, in the distraction JER, that the sign might affect northbound drivers by impairing or distracting their vision via reflected light in their rear view mirrors. She had no basis for concluding that there was any real likelihood of that or of any material adverse effect on safety as a consequence. Insofar as the level of light from the sign is concerned Dr Roberts referred to the proposal for that to adjust with the ambient conditions. Mr Trevilyan did not take up this concern. It was not the subject of submissions by the respondent. I do not accept that there is any significant likelihood of safety being materially affected in this way.
- [58] There are two relevant roundabouts in the service road. One is directly in front of the subject site at the intersection of Westmoreland Boulevard and the service road. The other is at the intersection of Dennis Road and the service road to the north. As Mr Trevilyan noted, roundabouts tend to lower speed and, consequently, the impact of any crashes.
- [59] On approach to the Dennis Road roundabout, the view to the top of the building, where the sign would be, is currently obscured by established palm trees in front of the Hungry Jacks carpark. There was some debate as to whether the view is obscured until one gets through the roundabout or not, but in any case, as Mr Bitzios pointed out, the sign would not be readily discernible from there.<sup>126</sup>
- [60] Once readily in view, the sign would be visible in the normal forward viewing window, (albeit sometimes occluded) and would become increasingly prominent, as one approached, before disappearing behind the vehicle roofline somewhere near the Westmoreland Boulevard roundabout. That roundabout prioritises southbound traffic.<sup>127</sup> In a part of the traffic engineering JER to which Mr Trevilyan was taken in re-examination<sup>128</sup> in order to enlarge upon his reasons for holding the view that this matter does not turn on the eastern service road, he expressed the view that the safety of the Westmoreland Boulevard intersection would not be impacted because “the sign would not be in view to any vehicles required to give way”. I accept that is

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<sup>124</sup> T2-101.

<sup>125</sup> T3-19, 20.

<sup>126</sup> Ex 5 para 53.

<sup>127</sup> Ex 4 para 107, Ex 5 para 44.

<sup>128</sup> Ex 5 para 52, T2-103.

so even though, perhaps unsurprising given her approach, Dr Chevalier, in the distraction JER, expressed concerns about the intersection notwithstanding the priority to southbound traffic.<sup>129</sup>

- [61] In between the roundabouts there are no decision points, as Dr Roberts describes them.<sup>130</sup> Whilst vehicles may be entering or exiting the service road from driveways, Mr Bitzios pointed out that, because the sign would be in front of driver, a glance to it will not prevent the driver from recognising other vehicles and taking necessary action in what is a relatively low speed environment. I accept that is so.
- [62] I am satisfied, on the basis of the evidence of Dr Roberts and Mr Bitzios, that the proposal would not materially affect the safety of the eastern service road.
- [63] Given my findings in relation to the relevant components of the movement network, I am satisfied that the proposal:
- (i) would not materially adversely affect the safety of the movement network;
  - (ii) complies with sub-paragraph 1(b) of the purpose and sub-paragraph 2(a)(ii) of the overall outcomes of the Code, and
  - (iii) complies with PO1 (b) and (c) of the Code (although that is an unnecessary finding given my findings in relation to the purpose and overall outcomes).

## **Lighting**

- [64] I have already observed, in dealing with the safety issue, that conditions can be imposed to require the proposed device to be operated with an ambient light sensor so as to adjust the luminance of the sign relative to the ambient conditions. This part of the reasons discusses the evidence in that regard and augments the reasons for my findings in relation to safety.
- [65] The luminance of the proposed sign was one of the factors that Dr Chevalier pointed to as making it likely to capture the attention of road users and potentially increase crash risk.<sup>131</sup> Mr Trevilyan thought the sign would be more prominent at night and in inclement weather.<sup>132</sup> Dr Roberts accepted that if the sign was “very bright” and was in a location that was very demanding of attention then it would be problematic.<sup>133</sup> He gave evidence however, that the display of a sign can readily be adjusted so that it is not too bright.<sup>134</sup> He was supportive of the proposal to fit the device with a sensor, so that it automatically adjusts with the ambient light conditions so that it is not so bright.

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<sup>129</sup> Ex 4 para 113.

<sup>130</sup> Ex 4 para 108.

<sup>131</sup> Ex 4 pg 14 para 94.

<sup>132</sup> Ex 5 para 40.

<sup>133</sup> T1-44.

<sup>134</sup> Ex 5 para 40.



- [66] The ambient light conditions and the likely luminance or “brightness” of the display was examined by the lighting experts (Mr King called by the appellant and Ms Adams called by the respondent) who produced a joint report and were called to testify. They agreed that there is no concern during the daytime.<sup>135</sup>
- [67] The experts were unable to access the roof of the building to take a measurement at night time, but agreed that the ambient light in the location would be at least in the range of 0-10 lux at night and adopted that range. The experts then referred to a table from the RAM which suggests luminance maximums for electronic billboards for varying ambient lighting conditions as follows:

<b>Illuminance (ambient light levels) lux</b>	<b>Luminance levels on electronic billboard or panel (cd/m<sup>2</sup>)</b>
0-10	150
11-40	200
41-100	250
101-400	400
401-1000	700
1001-4000	1500
4001-10000	2300
10001-40000	4000
40001-100000	6000

- [68] As can be seen, the luminance levels for the panel increase or decrease relative to an increase or decrease in the ambient light levels. It should be noted that the levels are maximums at any point across the display.<sup>136</sup>
- [69] The sign could be set to conform with those ranges by adjusting the luminance relative to the ambient light conditions. Accordingly at night, adopting the same range as the lighting experts (0-10), the luminance level would adjust down to 150cd/m<sup>2</sup>.<sup>137</sup> There are, obviously, a range of ambient conditions. The screen would adjust as required as the ambient levels vary from one range to another.
- [70] This is a more responsive approach than that taken for billboards without sensors. In those circumstances, luminance can be adjusted, but by a time clock control, irrespective of prevailing ambient conditions. That is the case for the sign to the

<sup>135</sup> Ex 14 paras 16(ii), 19(ii), T4-30.

<sup>136</sup> T4-24, 25.

<sup>137</sup> Ex 14 pg 98.

south recently approved by the respondent which is subject to the following condition:

“3.1.1.11 Luminance levels are to be at a maximum as follows:

3.1.1.11.1 Daytime – 6000cd/m<sup>2</sup>

3.1.1.11.2 Dawn/dusk – 600cd/m<sup>2</sup>

3.1.1.11.3 Night – 300cd/m<sup>2</sup>”

- [71] Mr King’s evidence was that, in his experience, conditions of approval of digital billboards generally have applied that approach, with maximum levels commonly being 300 or 350cd/m<sup>2</sup> for the evening, 650cd/m<sup>2</sup> for the dawn/dusk and 6500cd/m<sup>2</sup> for daytime. He would be satisfied with a condition linked to the table in the RAM because he is confident that it provides an appropriate range within which for the sign to operate and also provides a far better level of control and a lower level of luminance than the conditions typically applied in his experience.<sup>138</sup>
- [72] The lighting experts agreed that roadside LED signs can operate at low levels of luminance and be both visible and legible.<sup>139</sup> They inspected a sign at Camp Hill which had a measured maximum luminance of 115cd/m<sup>2</sup> but was still fulfilling its function of being visible and legible. There was some disagreement over whether they would subjectively call it “bright”.
- [73] Ms Adams did not suggest any different standard for setting the luminance levels on the panel by reference to the ambient light levels. Indeed she confirmed that she had agreed with Mr King that the table may be appropriate in this particular case as consideration for what can, indeed, be conditioned and applied.<sup>140</sup> She considered however, that under low ambient light conditions the large sign, seen against a dark background would be conspicuous and perceived as bright in contrast to the dark tone of the night sky background and the building on which it is to be located.<sup>141</sup> Mr King on the other hand, considered that the sign, whilst visible and legible, will operate at a luminance level relative to the ambient lighting environment and so not be seen as being in such contrast as to be unduly “bright” in context.<sup>142</sup>
- [74] I have no doubt that the panel on the sign will, at night, stand in contrast to the darkness of the night sky or the unlit building on which it is to sit. That does not mean however, that it is unduly bright (a matter in relation to which I prefer the evidence of Mr King) or so bright as to cause such distraction as to cause a safety issue. The lighting JER and the testimony of the lighting experts came after the distraction experts and traffic engineers had given their evidence. However those

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<sup>138</sup> T4-24.

<sup>139</sup> Ex 14 pg 99.

<sup>140</sup> T4-34.

<sup>141</sup> Ex 14 para 21.

<sup>142</sup> Ex 14 para 22.

experts gave supplementary reports to the effect that the lighting JER did not alter their opinions. In the case of Dr Roberts he said:

- his evidence remained unaltered;
- the requirement for the sign to automatically adjust to ambient light conditions is unchallenging;
- he agrees with Mr King's views about that sign being able to be operated and controlled to be visible and legible but relative to the ambient lighting environment and not being perceived as being in such contrast to the ambient lighting environment that it would be "bright" in the context of the locality, and
- in his experience other billboards so controlled are not perceptibly different to conventional paper billboards and pose no additional driver distraction.

Although Senior Counsel for the respondent initially indicated that he may wish to further cross-examine Dr Roberts,<sup>143</sup> he elected not to do so. He was not required for further cross-examination.

[75] It was submitted that there was a "gap" or "discordancy" in the evidence, because Dr Roberts (and, for that matter, Mr Bitzios) was shown, for the purposes of preparing his supplementary report, a lighting JER which did not, in terms, identify a particular level at which the sign was to operate (e.g. 150cd/m<sup>2</sup> at night) or demonstrate its effect. I do not accept that there is a "gap" or "discordancy" of any significance.

[76] Whilst the lighting JER referenced the table, with its series of maxima that are dependent upon the measurement of the ambient light level, the concept of using a system of automatic adjustment by reference to the reading of a light sensor (which Dr Roberts always supported) involves the maximum luminance for the panel varying according to the band within which the ambient light falls from time to time. As Mr King explained in re-examination,<sup>144</sup> he did not specify a set night time figure, because, as the lighting JER disclosed, the experts were unable to take a measurement themselves. The report however, disclosed what, in their professional opinion, they thought the ambient light range would be. That allowed the reader to see the luminance maximum that would apply in that event and how the luminance would vary in relation to different ambient conditions. Dr Roberts has confirmed that, given that information, he adheres to his view and was able to make the further observations in his supplementary report about which he was not cross-examined.

[77] In view of the evidence of Mr King and the supplementary reports, particularly that of Dr Roberts, I am satisfied that the luminance of the sign or its perceived

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<sup>143</sup> T4-3.

<sup>144</sup> T2-26.

brightness will, subject to the imposition of approval conditions, not cause or materially contribute to an adverse safety issue.

### Visual Amenity

[78] The substantive issue, with respect to amenity, is whether the advertising device, notwithstanding the imposition of conditions, would materially adversely affect, rather than protect, the visual amenity of the surrounding area. The respondent alleged non-compliance with the following:

- sub-paragraph 1(a) of the purpose of the Code, which provides as follows:

“The purpose of the code is to:

(a) protect the amenity of the surrounding area”.

- sub-paragraph 2(a)(i) of the overall outcomes which provides as follows:

“an advertising device is designed and located to:

(i) protect the visual amenity of the surrounding area”.

- PO1 a, which provides that “an advertising device is designed and located to be compatible and visually integrate with the built form and streetscape”.
- PO2, which provides that “an advertising device does not cause visual clutter”.

[79] Both PO1 and PO2 have corresponding acceptable outcomes. It has already been observed that the appellant cannot bring its proposal within the acceptable outcome for PO1. It was contended however, that it could do so in relation to the acceptable outcome for PO2. That acceptable outcome is as follows:

#### **AO2.1**

An advertising device is designed and located to comply with Table 9.4.1.3.2– Standards for signs.

#### **AO2.2**

No more than two free standing advertising devices are erected per 100 metre road frontage of a premises:

- a. where in:
  - i. the Centre zone, other than in the Neighbourhood centre precinct;
  - ii. the Low impact industry zone;
  - iii. the Medium impact industry zone;
  - iv. the Mixed use zone;
  - v. the Specialised centre zone;
- b. with a separation distance of at least 60 metres from another freestanding

sign on the same road frontage, or 200 metres if either sign has an electronic component.
<p><b>AO2.3</b></p> <p>An off-premises sign is not located within 500 metres of another existing or approved off-premises sign, with a maximum of three off-premises signs in the same direction of travel in any five kilometres in:</p> <ol style="list-style-type: none"> <li>a. the Community facilities zone;</li> <li>b. the Emerging community zone;</li> <li>c. the Environmental management and conservation zone;</li> <li>d. the Recreation and open space zone;</li> <li>e. land in a residential zone category;</li> <li>f. the Rural zone;</li> <li>g. the Rural residential zone.</li> </ol>
<p><b>AO2.4</b></p> <p>An advertising device does not include bunting.</p>

- [80] The proposed sign is an off-premises sign, but not a free standing sign. The relevant parts of the acceptable outcome are therefore AO2.1, AO2.2 and AO2.4, which are cumulative. The only one in controversy was AO2.1 which requires, for compliance with the acceptable outcome, an advertising device to be designed and located to comply with table 9.4.1.3.2 which, in turn, sets out standards for an array of different signs, none of which appear to be of the kind proposed in this case. It is on the basis that the table sets no standards for this type of sign, that the appellant claims compliance with the acceptable outcome.
- [81] A feature of the Planning Scheme, insofar as it relates to advertising devices, is that most definitions of particular signs are types of on-premises signs. In particular above awning, directional, horizontal projecting wall, vertical projecting wall, portable and roof signs are all defined as types of on-premises signs. Accordingly, at least for those signs, the type of sign depends as much on the content of what is advertised as on its other characteristics, such as where it is situated. The definitions of a banner sign and a free standing sign are not dependant on whether the sign is an on-premises or off-premises sign. There are no particular defined sign types for off-premises signs otherwise. Accordingly, the Planning Scheme does not attribute a particular description to every possible kind of sign. There would be a range of off-premises signs (of which the subject is an example) that are not given a particular description and corresponding definition.
- [82] The table sets out standards by reference to particular types of advertising devices. Those specified in the table are mostly<sup>145</sup> particular types of signs defined in the administrative definitions. There is no entry dealing with off-premises signs generally. The consequence is that, interpreted with the assistance of the administrative definitions, the table:

- (i) predominantly specifies standards for various on-premises signs;

<sup>145</sup> for a sales office sign and roadside stall sign.

- (ii) specifies standards for some types of signs which may be either on-premises or off-premises signs;
- (iii) does not specify standards for off-premises signs more generally, and
- (iv) does not cover the field in relation to the range of possible advertising devices.

[83] It was submitted, for the respondent, that a purposive approach to interpretation ought be used to avoid the conclusion that signs such as the subject proposal are left “unregulated” by reason of the content of their advertising. It was contended that the proposed sign is “ostensibly” a roof sign and should be regarded as such for the purposes of PO1 and PO2, notwithstanding that it is an off-premises sign.

[84] I do not consider that the above justifies interpreting the description of types of advertising devices in the table in the Code as if they were a reference to those terms as defined, but shorn of any qualification as to whether they are on-premises or off-premises signs. In that regard:

- (a) the table uses terms that are defined in the administrative definitions.
- (b) the Planning Scheme provides that the administrative definitions assist in the interpretation of the Planning Scheme.
- (c) the Planning Scheme has drawn a clear distinction between what it calls on-premises signs and what it calls off-premises signs. That distinction is drawn on the basis of the content of what is advertised.
- (d) the Planning Scheme distinguishes, by the administrative definitions, between particular advertising device types which are, in part, dictated by the content of their advertising (the on-premises sign types) and others which are not. There is no basis to assume that was other than deliberate, as was the decision to pick up those terms, as defined, in the table in the Code.
- (e) the provisions of the Code, including the table, otherwise reveal a sensitivity to the distinction between on-premises signs and off-premises signs and a willingness to apply different standards on the basis of that distinction. In that regard:
  - (i) AO1.4 singles out on-premises freestanding signs which it subjects to the provisions of table 9.4.1.3.4 dealing with maximum face area, whereas off-premises freestanding signs fall within AO1.3 which makes table 9.4.1.3.3 relevant for determining the maximum face area for off-premises advertising devices.
  - (ii) AO2.3 makes particular provision for the separation distance between off-premises signs that does not apply to on-premises

signs. It might be noted that the standards for various types of on-premises signs contains a limit of one sign per tenancy.

- (iii) The table itself, in specifying the standards for a freestanding sign, includes a 4m standard for maximum width which expressly only applies where the freestanding sign is an on-premises sign.

- [85] The table is simply silent in relation to standards for those signs, including what would be the various kinds of off-premises signs (of which the subject proposal is but one example) which do not fall within the description of any of the signs specified in the table. It does not follow however, that there is compliance with the acceptable outcome.
- [86] AO2.1 requires an advertising device to be designed and located to comply with the table. The design and location of the subject advertising device cannot be designed and located to comply with the table because there is nothing in the table about the design and location of the type of device proposed in this case. That does not suggest that the proposal has a table compliant design and location, rather it suggests that the Planning Scheme does not provide an acceptable outcome for advertising devices beyond those specified in the table.
- [87] That is not a troubling proposition. There is no imperative for codes to provide acceptable outcomes with respect to all performance outcomes let alone acceptable outcomes that can be met by all types of development to which the relevant code applies. The consequence of there being no acceptable outcome for the type of sign here proposed, is that the applicant is thrown back on establishing compliance in another way which, under this Planning Scheme, may be by addressing the performance outcome or the purpose and overall outcomes. That might well be an appropriate planning strategy in relation to the assessment of advertising devices beyond those for which the respondent has devised particular standards in the table. That is, in any event, the effect of the provisions.
- [88] My conclusion, in that regard, is consistent with the alternative submission made on behalf of the respondent. In the course of oral submissions I questioned the correctness of that because I was initially under the impression that the table did not extend to any off-premises signs. In that event the conclusion I have come to would have deprived AO2.3 (which only applies to off-premises signs) of any potential operation. As Counsel for the appellant pointed out however, there are at least some types of sign for which standards are stipulated in the table which may take the form of an off-premises sign. Accordingly my conclusion that AO2.1 effectively constrains the scope of the types of advertising devices that can meet the acceptable outcome, to those for which standards are stipulated in the table, does not rob AO2.3 of utility.

- [89] The remaining question is whether the proposal nevertheless complies with the Code by meeting the relevant PO's or statements of purpose and overall outcomes. That requires consideration of the evidence.
- [90] The relevant parts of both the statement of purpose and the overall outcomes direct attention to the surrounding area and the protection of its amenity, or more particularly, its visual amenity. An assessment of the existing visual amenity and the likely impact on that by reason of the proposal involves both observations of fact and assessments or judgments that are inherently somewhat subjective in nature. In this regard the Court had the benefit of the evidence of two experts, namely Mr Curtis (called by the appellant) and Dr McGowan (called by the respondent).
- [91] To determine whether the approval of the proposal would be consistent with the protection of the visual amenity of the surrounding area first requires an assessment of the visual amenity of the surrounding area.
- [92] Neither the surrounding area nor its visual amenity area are homogenous. The surrounding area was described in the visual amenity JER as follows:<sup>146</sup>

“The Site’s immediate locality is generally dominated by the presence of the Pacific Motorway and the commercial development that extends along it to the northwest and southeast. Notably, beyond the motorway to the east of the site the commercial development abruptly transitions to suburban residential development.”

It should be noted that the commercial development fronts the service roads that, in turn, extend along the sides of the motorway.

- [93] It is then necessary to assess those components of the surrounding area. The dominant feature of the locality is the motorway and the commercial development (and its associated signage) extending along its eastern and western service roads. The motorway itself is a heavily trafficked major piece of infrastructure with its own signage.<sup>147</sup> The commercial buildings are, as Mr Curtis pointed out,<sup>148</sup> generally of a perfunctory design, with simple forms, bright colours and prominent signage visible from the motorway.
- [94] The visual amenity JER maps the numerous existing signs on the eastern side of the motorway (and eastern service road). Dr McGowan fairly described the signage as “prolific”.<sup>149</sup> As Mr Curtis said, the signage is a conspicuous element in what is a complex streetscape without much cohesion.<sup>150</sup> The existing visual amenity to the side of the motorway is heavily commercialised and influenced, as Mr Curtis pointed out,<sup>151</sup> by the juxtaposition of different forms, including different built

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<sup>146</sup> Ex 6 para 20.

<sup>147</sup> Ex 6 figures 15, 18.

<sup>148</sup> Ex 6 para 26.

<sup>149</sup> Ex 6 pg 35.

<sup>150</sup> T4-57.

<sup>151</sup> T4-57.



forms and signage and different colours in what he described as a somewhat chaotic environment. It is, of course, understandable and unsurprising that a commercial development pattern extending in a linear fashion beside a major motorway carrying heavy volumes of traffic would produce development, including signage, that overtly presents itself to that motorway.

- [95] The subject site fronts the southern side of the roundabout where the eastern service road meets the residential streets of Westmoreland Boulevard and Wenlock Crescent. It should be noted that, from the motorway, no houses in those streets can be seen. There is a modest local park adjoining the roundabout to the north. The site is therefore separated, by a short distance, from the rest of the commercial development fronting the eastern service road. Dr McGowan described the site as sitting at the western end of an enclave of residential development,<sup>152</sup> but as Mr Curtis pointed out<sup>153</sup> the residential enclave is not visible from the motorway. In the course of testimony however, Dr McGowan described his observation, in this respect, as a “secondary observation” and acknowledged that the proposed sign would predominately be seen in the context of the signage along the highway<sup>154</sup> and that he did not mean to suggest that there “is some vastly separated and distinct visual environment that will be contaminated with a sign, certainly not when its seen from the highway”. I accept Mr Curtis’ evidence that there is no legible break in the continuum.<sup>155</sup>
- [96] The residential streets to which I referred are comprised primarily of single storey detached dwellings. Those dwellings are typically set some 6m from the street frontages behind fenced or open landscaped front yards. Those located at the western end are proximate to the roundabout and the commercial building on the subject site.
- [97] The local park has an elongated shape. In the southern corner of the park, there is a mown area near the roundabout. The remainder of the park features a relatively dense covering of trees. There is an area, towards the north east end, where there is a cluster of park furniture and a children’s playground located beneath the trees and which forms the focus of the park.<sup>156</sup>
- [98] West of the park, the eastern service road extends north of the roundabout. To the west of the park lies the rear of commercial development. To the north, lies the rear of what appears to be an industrial development. Residential development lies across the street in Wenlock Crescent.<sup>157</sup>
- [99] The site itself features a three storey commercial building that would serve as the base upon which the proposed sign would sit. The building presents a dark glazed

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<sup>152</sup> Ex 6 para 72.

<sup>153</sup> Ex 6 para 64(e).

<sup>154</sup> T4-80.

<sup>155</sup> Ex 6 para 64(e).

<sup>156</sup> Ex 6 paras 25, 63(f), Ex 6C.

<sup>157</sup> Ex 6B pg 7, Ex 6C.

curtain wall cladding to both of its frontages. The glazing of the western façade is interrupted by a dark concrete frame.<sup>158</sup> The carpark at the rear end of the building is largely screened, by landscaping, from the Westmoreland Boulevard frontage, but is more highly visible along the Pacific Highway frontage.<sup>159</sup> As Mr Curtis pointed out,<sup>160</sup> the building presents as a dark coloured relatively neutral, featureless, “object like” building of abstract appearance.

- [100] There was, in the course of the evidence on visual amenity, a deal of focus on whether the proposed sign would be compatible and visually integrate with the built form of the existing building on the subject site and whether the proposed sign would create or exacerbate visual clutter. That was, no doubt, because of the provisions of PO1 and PO2 of the Code. Those provisions however do not need to be satisfied in order to demonstrate compliance with the Code so long as satisfaction of the purpose and overall outcomes can nevertheless be demonstrated. For the reasons given herein, that is so here.
- [101] Dr McGowan considered that the sign would not be compatible or integrate with the existing building in the sense that he did not see it as having any harmonious relationship with it, having no points of reference that would relate one to the other. The sign does not replicate or imitate a feature of the existing building, but compatibility does not require that. There are many well known examples of contrasting built form, or elements thereof, that are compatible.
- [102] Mr Curtis, on the other hand, considered that the proposal would integrate and be compatible with the building. As he pointed out, the proposal is to convert the existing building from a purely commercial office function to also function as the base for the proposed advertising sign. He sees those two elements as sitting comfortably together to read as a base and a cap which are brought together, without obscuring or competing with each other, to constitute a whole modified form.<sup>161</sup> He pointed out that it is not uncommon for a sign to cap a building.
- [103] What assists in allowing the sign to achieve compatibility with the existing building is the relatively featureless, neutral object-like presentation of the existing building, which allows it to read as a simple base.<sup>162</sup> As Mr Curtis explained,<sup>163</sup> it is not like a complex familiar building of more traditional character where there might be features of the building and its elements (e.g. windows, doors, roof, overhangs, etc) and materials with which the sign would be in competition from a visual perspective. Mr Curtis said<sup>164</sup> that the building reflects the way he would design an office building if it were intended to serve as the base for an advertising sign.

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<sup>158</sup> Ex 6 para 9.

<sup>159</sup> Ex 6 para 12.

<sup>160</sup> Ex 6 paras 45, 46, T4-45, 48.

<sup>161</sup> Exhibit 6 para 47 – see also the comparison with a conventional office building at para 45 of Ex 6.

<sup>162</sup> T4-48.

<sup>163</sup> T4-45, 47 and 48.

<sup>164</sup> T4-43.

- [104] Whilst this is a matter of judgement in relation to which reasonable minds may differ, I prefer the evidence of Mr Curtis which, in my view, better recognises the effect of the form of the existing building in assisting the proposed sign to achieve compatibility. Further, and in any event, given the visual presentation of the built form otherwise,<sup>165</sup> particularly along the eastern service road, it is difficult to see (and I do not accept) that the extent to which the sign might be thought to lack the harmony Dr McGowan was looking for has any meaningful adverse impact on the visual amenity of the surrounding area.
- [105] The issue of clutter is somewhat vexed, not least because the Code does not make it clear as to the point from which clutter is to be assessed. It is, of course, possible to create visual clutter on a single development site. Such clutter might arise by reason of a multiplicity of signs, including a multiplicity of signs of the same kind, in relation to one or more businesses on a site. The Code appears to address that, at least to some extent, in the standards and the table referenced in the acceptable outcomes. The standards for most types of signs in the table contain a limit of one such sign per tenancy. The proposed sign would not create any visual clutter on the subject site.
- [106] The next question becomes whether clutter is to be judged from viewing points removed from the subject site and, if so, from how far away. The Code does not assist. In this case, the viewpoint from 145 metres north<sup>166</sup> shows no advertising signs north of the proposed subject sign. The proposal would not create clutter in that view. As one moves further north, more signs, from other commercial premises located further to the north along the service road, come within view such that progressively the view becomes cluttered from the visual perspective. That occurs at least by the time the viewer is about 345 metres away.<sup>167</sup> That is a function of the linear pattern of commercial development, with its associated signage.
- [107] Mr Curtis did not think the proposal to be “true” clutter, because he looked at the question by reference to whether the proposal created clutter no matter the viewing point (i.e. without having to rely on the parallax effect, viewing from a distance, to create the impression of clutter), whilst Dr McGowan took a contrary approach. Counsel for the appellant submitted that, at worst for the appellant, his client was being accused of exacerbating clutter, when the PO was concerned only with creating it.
- [108] It is unnecessary for me resolve the question of the point from which clutter is to be judged because, in my view, any contribution to clutter, or further clutter, the proposal might be said to make is too minor in the circumstances to materially adversely affect the visual amenity of the surrounding area (discussed further below) and does not affect the proposal’s consistency with the purpose and overall outcomes of the Code.

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<sup>165</sup> Ex 6A para 10.

<sup>166</sup> Exhibit 6B, p 14.

<sup>167</sup> Exhibit 6B, p 11.

[109] I will next turn to an assessment of the likely impact of the proposal on the visual amenity of each of the components of the surrounding area. There were some areas in respect of which there was no substantial controversy between the visual amenity experts. In that regard Dr McGowan accepted that:

- (i) There would be no impact on the western side of the motorway.
- (ii) Impacts on the visual amenity of nearby residents would be minor.
- (iii) The sign would not have significant visual impacts on the streetscapes of West Moreland Boulevard or Wenlock Crescent.

[110] Insofar as the residents are concerned:

- (iv) Dr McGowan suggested a condition of approval to ensure no glare from the display. I note that the lighting experts did not consider that there would be adverse lighting impacts on nearby residents.<sup>168</sup> Whether a condition is required can be determined prior to any final order; and
- (v) Mr Curtis suggested a condition requiring deletion of the decorative pattern of angled stripes on the rear of the panel.<sup>169</sup>

Subject to the imposition of appropriate conditions I am satisfied that the proposal would have no material adverse effect on the visual amenity of those components of the surrounding area.

[111] Dr McGowan characterised the proposed sign as an obvious and immediate visual intrusion into the amenity of the local park. Whilst, at its closest point, the park is a little over 50 metres from the proposal, it has already been observed that the focus of the park is centred on the cluster of the park furniture and children's playground located beneath the trees at a distance of about 110 metres from the proposal. Within its confines, the park has an open space and vegetated character. Beyond its borders however, the character abruptly changes.

[112] If one is in the park and chooses to so position oneself to be able to look to the north beyond the park, one is confronted with the rear of an industrial site.<sup>170</sup> If such a person chooses to position themselves to look out from the park across Wenlock Crescent, they take in the urban residential development across that street.<sup>171</sup> If such a person were to so position themselves and look out from the park towards the subject site, they are confronted with the existing dark three-storied commercial building on the subject site and, beyond that, to part of the development on the western side of the motorway.<sup>172</sup> It is evident that the park is something of an island of open space, focused on the facilities within it, but surrounded by development of

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<sup>168</sup> T4-15, T4-37.

<sup>169</sup> T4-54, 55.

<sup>170</sup> Exhibit 6C, p 3, T4-71, 78.

<sup>171</sup> Exhibit 6C, p 1.

<sup>172</sup> Exhibit 6C, p 2 and T4-71.

a much different visual character which is visible from parts of the park should those enjoying the park choose to focus their attention beyond its confines.

[113] In that context whilst, as Mr Curtis acknowledged, the sign is not of the same character as the park,<sup>173</sup> the fact that it will be possible to see the sign, or part of it, from the park:

- (i) on top of the three-storey commercial building that is already in view;
- (ii) angled towards the motorway and hence at an acute angle to the park, and
- (iii) at a substantial distance from the facilities that provide the focus of the park

will not have an appreciable adverse effect on the visual amenity of park users.<sup>174</sup> In that regard I prefer the opinion of Mr Curtis, who gave appropriate weight to the factors to which I have referred.

[114] The remaining components are the motorway and the eastern service road, which can be considered together. Dr McGowan considered that the proposed site would have adverse impacts of some significance insofar as it would not be compatible with or visually integrated with the visual environment and would contribute to cluttering of advertising devices along the eastern side of the motorway being a conspicuous addition to and extension of that proliferation of signage. In particular it would be more conspicuous than other signs, being larger and more elevated than other signs and having an electronic display. It would also sit within a “discrete context” that is separate to and different from the context of other signs. In that regard however:

- (i) I have already rejected the proposition that there is a “discrete context” of any significance.
- (ii) In contending that the proposed sign would be particularly conspicuous, Dr McGowan pointed to the fact that it would display off-premises advertisements which he said were often more informative in nature and may therefore hold the viewer’s attention for longer and consequently be more memorable/obvious. As Mr Curtis pointed out however,<sup>175</sup> on-premises signs can include things beyond just a name and/or logo. An obvious example is service station signage which frequently includes information about competitive fuel prices. I also note that the distraction experts raised no issue with respect to the criteria dealing with the quantity of information.

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<sup>173</sup> T4-62.

<sup>174</sup> Ex 6 para 86(b).

<sup>175</sup> Exhibit 6, para 64(d).

- (iii) reference has already been made to the proposal for the sign to be conditioned such that its luminance will be varied with the ambient light conditions to ensure that it is not too bright.
- (iv) a review of photomontages in Dr McGowan's individual report demonstrate that the sign would not present as being greatly elevated compared with the other signage.
- (v) whilst the sign is large, it is, as Mr Curtis said, proportionate to its context.<sup>176</sup>

[115] In Mr Curtis' view, the proposed advertising sign will be compatible with the general commercialised appearance of the streetscape and will become an integrated part of its existing identity. The overall modified form of the existing building will have a similar relationship to the streetscape as it currently does and its existing degree of integration will not be changed. I readily accept that evidence, which sits comfortably with the photomontage evidence. I do not consider that the proposal would have any material adverse affect on the visual amenity of the motorway or eastern service road.

[116] In light of my findings in relation to the visual amenity of the various components of the surrounding area, I find that:

- (i) the proposed sign would not materially adversely affect the visual amenity of the surrounding area and is consistent with the protection of the visual amenity of that area; and
- (ii) the proposal complies with paragraph 1a of the purpose and paragraph 2a(i) of the overall outcomes of the Code.

It is unnecessary for me to reach a conclusion with respect to the PO's, although it will be evident from the reasons given, that I am satisfied that the proposal complies with at least PO1.

### **Conclusion on Compliance**

[117] For the reasons given I am satisfied that, subject to the imposition of conditions, the proposal complies with the relevant provisions of the Code.

### **Public Benefit**

[118] There is a discretion to approve a code assessable development application even where it does not comply with all of the relevant assessment benchmarks. The appellant contended that any non-compliance in this case would be minor and not of a kind to warrant refusal of the application having regard to all the circumstances, including that the proposed sign would provide a public benefit, in that it would be

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<sup>176</sup> Ex 6 para 64(b).

available for the display of government-type warnings in the case of emergency.<sup>177</sup> It is unnecessary for me to consider that because I have found compliance. The identified public benefit element is however, not something that would have persuaded me to allow the appeal had I, for example, found that the proposal, even with the imposition of conditions, was likely to have a significant adverse effect on safety.

### **Conclusion**

[119] For the reasons given, I am satisfied that the appellant has discharged its onus and that the appeal ought be allowed. The respondent's decision will be replaced with one approval of the development application subject to conditions. I will hear from the parties in relation to the content of those conditions.

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<sup>177</sup> T2-102.