

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-302  
[2025] NZHC 609

BETWEEN DEANNA MERANIA ROA, DON GRANT  
TAINUI ROA AND LYNEOSA TUIQERE  
Applicants

AND WELLINGTON CITY COUNCIL  
First Respondent

NEW ZEALAND TRANSPORT AGENCY  
WAKA KOTAHI  
Second Respondent

Hearing: 17–18 February 2025

Appearances: M Chen and C J Saunders for Applicants  
N M H Whittington and K Lee for First Respondent  
M Majeed and T Gordon O’Meara for Second Respondent

Judgment: 21 March 2025

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**JUDGMENT OF McHERRON J**

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[1] The applicants are three “concerned Wellington ratepayers” seeking judicial review of the Wellington City Council’s installation and maintenance of the colourful paint strips commonly known as the “rainbow crossing” on Dixon Street, Wellington, where it joins with the Cuba Street pedestrian mall. The applicants:

- (a) allege that the rainbow crossing is contrary to the Land Transport Rule: Traffic Control Devices 2004 (TCD Rule)<sup>1</sup> and seek a declaration to that effect.
- (b) seek a declaration that a determination made on 25 August 2021 by a delegate of the Director of Land Transport (Director) that the crossing did not contravene the TCD Rule (as it had by then been amended) was unlawful.
- (c) ask the Court to direct the New Zealand Transport Agency | Waka Kotahi (Waka Kotahi) to reconsider the Director’s 25 August 2021 determination, taking into account the Court’s declarations.

[2] One of the applicants provided an affidavit explaining their motivation for this challenge. The affidavit refers to concerns about the safety of road users, especially the confusion the crossing causes for pedestrians and drivers “as the markings painted on the road look like a pedestrian crossing, even though it is not one and the intersection is controlled by lights”. These concerns were amplified by the applicants’ senior counsel Ms Chen, who referred to the large number of vehicles that have been recorded exceeding the speed limit through the crossing area, and the danger that poses to pedestrians there.

[3] A complication in the present case is that the TDC Rule was amended in 2020, two years after the crossing was installed by the Council in October 2018.<sup>2</sup> From the outset, Waka Kotahi had struggled to accommodate the crossing within the existing regulatory framework. The 2020 amendments were its legislative response. However, at the hearing, its senior counsel Ms Majeed candidly accepted that the Council did

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<sup>1</sup> These rules are made under Land Transport Act 1998.

<sup>2</sup> Land Transport Rule Traffic Control Devices Amendment 2020.

not need to obtain Waka Kotahi’s approval for the crossing under the TCD Rule as it stood in 2018. Ms Majeed also accepted that the 2020 amendments as they concerned “roadway art” did not apply to the crossing as it had already been installed under the previous law as it was in 2018.

[4] Much of the relevant discussion in the present proceeding was directed towards the TCD Rule as it was amended in 2020. Moreover, much of the consideration given to the crossing by officials at Waka Kotahi concerned whether the rainbow crossing would have been lawful under the Amended TCD Rule. However, as the preceding paragraphs suggest, an important preliminary issue for the Court to determine is the extent (if any) to which the Amended TCD Rule applies to a consideration of the lawfulness of the crossing as installed in 2018.

[5] Guiding the Court in its decision on this aspect is one of the important principles of the rule of law, that laws must be prospective (applicable to future behaviour).<sup>3</sup> This principle has been given effect by Parliament, most recently in s 12 of the Legislation Act 2019, which provides that legislation does not have retrospective effect. Because of this principle, the Court must decide whether new provisions relating to “roadway art” that were introduced in 2020 have any relevance to the Court’s decision, or whether the lawfulness of the rainbow crossing is to be determined solely by reference to the law that applied in 2018 when the crossing was installed.

[6] Before I set out the relevant legislative provisions, it will be helpful to set out a chronological narrative of events surrounding the installation of the rainbow crossing.

### **Chronological narrative**

[7] The Council began considering a rainbow crossing in August 2017. It emailed Waka Kotahi some examples of different types of crossings and asked for Waka Kotahi’s advice on their legality.

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<sup>3</sup> See, for example Lon Fuller, *The Morality of Law: Revised Edition* (2nd ed, Yale University Press, New Haven, 1969) at 51–62.

[8] On 21 August 2017, Waka Kotahi responded that there would be some legal impediments to the Council's intentions. First, Waka Kotahi pointed out that the TCD Rule requires pedestrian crossings to be reflectorised white markings on a contrasting background surface.<sup>4</sup> Waka Kotahi also referred the Council to the general prohibition on marking the road for advertising or other purpose not connected with the use of the road.<sup>5</sup>

[9] The Council was not deterred by Waka Kotahi's concerns. It did not intend the rainbow crossing to be a pedestrian crossing. There was no need for that, as the Dixon Street crossing already had pedestrian traffic signals. On 27 November 2017, the Council emailed Waka Kotahi to inform it of the option it had chosen for implementation on Dixon Street the following year.

[10] Waka Kotahi responded that the proposed markings would not comply with the TCD Rule and would be a risk to the safety of road users. Waka Kotahi threatened enforcement action if the Council proceeded to install the crossing.<sup>6</sup>

[11] The Council then provided Waka Kotahi an amended design, but this was still unsatisfactory to Waka Kotahi. On 13 February 2018, Waka Kotahi's Director of Safety and Environment wrote to the Council:

Markings that are as different from standard markings as the proposed rainbow marking could distract, confuse or be misinterpreted by drivers, cyclists or pedestrians resulting in unsafe behaviour. All road markings are required to contribute to the safe and effective control of traffic. The proposed rainbow marking does not do that.

The traffic control devices rule allows as much independence as possible for road controlling authorities to manage their road networks, but that does not extend to invention of non-standard traffic control devices to satisfy public or political enthusiasm for objectives that are irrelevant to safe traffic management.

[12] Waka Kotahi and the Council continued to discuss options throughout 2018. In April 2018, it offered to give the Council a "ruling" on whether the proposed rainbow markings would be a "traffic control device".

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<sup>4</sup> Land Transport Rule: Traffic Control Devices 2004, cls 8.2(3) and 8.2(3A) (TCD Rule).

<sup>5</sup> Clause 5.5.

<sup>6</sup> Under cl 13.8.

[13] In August 2018, after reviewing Council’s designs, Waka Kotahi emailed the Council stating:

Our position on the legality of what is proposed has not changed therefore, to proceed, we will need to issue an exemption notice.

[14] This reference to an exemption notice relates to the power in s 166 (now repealed) of the Land Transport Act 1998 to exempt a person from a specified requirement in a rule. Waka Kotahi remained concerned about the apparent resemblance between the proposed rainbow stripes and a pedestrian crossing.

[15] On 9 October 2018, the Council installed the rainbow crossing. It comprises six painted bands of colour, running parallel to the kerbs adjoining the Cuba Street pedestrian mall. The rainbow painted stripes are co-located between two pre-existing sets of pedestrian traffic signals.<sup>7</sup>



<sup>7</sup> Wikipedia contributors “Cuba Street rainbow crossing” (3 December 2024) Wikipedia The Free Encyclopedia<[https://en.wikipedia.org/w/index.php?title=Cuba\\_Street\\_rainbow\\_crossing&oldid=1260956389](https://en.wikipedia.org/w/index.php?title=Cuba_Street_rainbow_crossing&oldid=1260956389)>, photograph taken on 1 January 2019 by Gareth Watkins; looking down Dixon Street from East to West, just beyond the first set of pedestrian traffic signals, which are out of picture, towards the second set of pedestrian traffic signals.

[16] On 23 January 2019, the Council contacted Waka Kotahi to provide it with the results of a safety review. The Council advised that the new installation had not created or increased any negative safety risks to pedestrians. Further, the Council advised that the installation of a speed cushion for vehicles approaching the crossing had created larger gaps and slower speeds in the vehicular flow, which was also beneficial from a safety perspective. The Council sought “formal exemption of this treatment at NZTA’s earliest convenience.”

[17] No evidence was produced of any response from Waka Kotahi to the Council’s January 2019 exemption request, either to grant or decline it.

[18] In July 2019, the Council supplied Waka Kotahi with results of surveys of pedestrians crossing at the rainbow crossing, recording percentages of pedestrians at various times of the day crossing with the “green walking human figure signal”<sup>8</sup> as opposed to crossing on the flashing or steady “red standing human figure signal”.<sup>9</sup>

[19] Waka Kotahi responded to this information in August 2019, in a letter inviting the Council to formally apply for an exemption to the TCD Rule. In its letter, Waka Kotahi summarised the compliance data that had been provided by the Council as recording a “very poor” outcome recorded in December 2019, but with improvements in January and July 2019, “though generally not returning to the same compliance levels as in the before state”. The worst result appeared to be in the late afternoon (4.30 pm to 5.00 pm) analysis where in July 2019, the data showed roughly a 10 per cent adverse change compared to the pre-installation data in September 2018. Waka Kotahi’s letter explained that in its view an exemption from the TCD Rule was required because the rainbow crossing did not meet the prescriptive requirements in the TCD Rule relating to a pedestrian crossing. In its invitation to the Council to seek an exemption, Waka Kotahi indicated it would be helpful to have a road safety audit undertaken by an independent expert, agreed to by Waka Kotahi.

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<sup>8</sup> TCD Rule, cl 6.6(4)(a). The Dixon St/Cuba St pedestrian traffic signals are at one of four Cuba Street intersections where, in 2016, the “green walking human figure signal” was altered to show a green silhouette of Carmen Rupe, a trailblazing transgender woman and entertainer, a larger-than-life personality, sex worker, and celebrated LGBTQIA+ icon (Dictionary of New Zealand Biography | Ngā Tāngata Taumata Rau <teara.govt.nz>).

<sup>9</sup> Clause 6.6(4)(a) and (b).

[20] The Council responded in December 2019 pointing out it did not consider the rainbow marking to be a pedestrian crossing as defined in the TCD Rule. Rather, the Council pointed out that the pedestrian crossing facility continues to be controlled by pedestrian traffic signals. The Council pointed out that this signalised pedestrian facility maintained a safe and effective control of the crossing. There had been no crashes involving pedestrians at this location since 2014. The Council pointed out that, as the rainbow crossing is not a pedestrian crossing, the requirements for a pedestrian crossing in cl 8.2 of the TCD Rule did not apply. The Council referred to its speed survey which indicated the mean vehicle speed on Dixon Street prior to approaching the rainbow marking is within the range of 20–25km/h during the pedestrian survey periods. The Council also advised that its visual observations showed the vehicle gaps had increased because of the speed cushion. In relation to pedestrian non-compliance, the Council indicated it was confident the percentage would be trending towards pre-installation levels, as suggested by the two most recent pedestrian surveys in 2019.

[21] Officials from the Council and Waka Kotahi met in March 2020. At this meeting, Waka Kotahi presented a range of alternative options to the rainbow crossing for discussion. These suggestions ranged from new paint treatment and speed humps to removal of the crossing, replacing it (oddly) with a picture of dinosaurs, or replacing the pedestrian traffic signals with a “compliant” pedestrian crossing associated with a rainbow design. The notes from this workshop indicate Waka Kotahi was aware of its limited capacity to enforce its interpretation of the TCD Rule:

Ultimately the most NZTA could do as the regulator is issue a notice advising that the street art/crossing in (sic) non-compliant and must be removed. Cannot compel removal and has no right in “or authority” to undertake removal itself.

[22] The Council and Waka Kotahi agreed that the Council would initiate a speed study to determine the speed through the crossing area. Waka Kotahi had indicated that any likely solution involving exemption would require evidence of a:

...speed environment of 30km/h max through the crossing area (noting that 30km/h max has a reasonableness test applied in that someone “hooning” and trying hard to go fast is not the problem we are trying to resolve).

[23] In July 2021, the Council provided Waka Kotahi with speed data taken in September 2020 and March 2021. Both sets of data showed that the mean speed in the vicinity of the crossing was 19km/h and the 85th percentile speed was 24km/h.

[24] Draft internal Waka Kotahi documents from mid-2021 suggest that staff advice was to decline the exemption on the basis that the speed data showed a large number of vehicles exceeding 30km/h, some by quite a significant margin. At that time, Waka Kotahi considered that the TCD Rule, as amended in 2020, precluded “road art” resembling pedestrian crossing markings.

#### *Amended TCD Rule*

[25] In August 2020, almost two years after the crossing was installed, the TCD Rule was amended by Order in Council (Amended TCD Rule).<sup>10</sup> The objective of the Amended TCD Rule was to “allow for the lawful installation on a roadway of markings that are not traffic control devices in particular circumstances”.<sup>11</sup>

[26] The Amended TCD Rule introduced the concept of “roadway art”. This concept was not separately defined in the Amended TCD Rule itself. It appears to cover markings on a roadway that fall outside the general requirements provided for markings and that are permissible where there is a “lower risk environment” as provided in the Amended TCD Rule.

[27] After the Amended TCD Rule was made, Waka Kotahi renewed its call for the Council to apply for an exemption in respect of the Dixon St rainbow crossing.

#### *Stantec safety report*

[28] The Council commissioned Stantec New Zealand to carry out a safety assessment and user behaviour study of the rainbow crossing. Stantec’s report was completed in late 2020. The report noted:

... a significant reduction in crashes [in Dixon Street], from 11 to 5, post implementation, indicating that the calming measures installed have so far been successful in reducing crashes.... with no crashes recorded for the

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<sup>10</sup> Land Transport Rule: Traffic Control Devices Amendment 2020.

<sup>11</sup> Clause 1.4.



immediate vicinity of the Cuba Mall crossing. Furthermore, there were no crashes that involved pedestrians.

[29] Stantec's report noted that the red bollards (visible in the photograph at [15] above) are "visually very dominant and indicate to the pedestrian that there is a change in normal use/environment at the crossing." In addition, [t]he arrangement of stone planters in the Cuba Mall:

... already filter pedestrians to the sides directing them to use the designated cross points, and acted as a visual barrier, minimising the risk of a faster moving pedestrian and users of e-devices/skateboards/bikes from traversing directly onto the crossing point.

[30] Stantec observed that at least 75 per cent of all crossing movements occurred to the outside of the rainbow markings, that is on the signalised crossing points.

[31] In relation to the pedestrian traffic signals, Stantec's report noted that "[t]he signal aspects were well located and guided the user to each end for the crossing movement". Stantec's report detailed the phasing of the pedestrian traffic signals and described observed pedestrian behaviour as follows:

...most users had very little wait time. Those that did arrive on a red pedestrian phase also knew that a call would arrive soon, and often did not touch the call button, choosing to either wait for the call, or cross if there were no vehicles approaching. This again gave evidence to the pedestrian users being fully aware of the operation of the crossing.

It was observed that many pedestrians are very familiar with the operation of the crossing, with them commencing the cross on the red man, immediately after they have observed the first vehicle stopping at the limit line....

It was further noted that pedestrians had an intimate knowledge of the crossing point, with a proportion walking up to the crossing, checking in the direction of the approaching traffic and commencing a cross movement if the way was clear, without actually calling the crossing phase. Observing peoples behaviours, it was evident that they considered that the narrowness of the vehicle traffic lane, slow speed of the traffic, and the gaps created by the upstream traffic signals gave sufficient confidence that they could cross without the signals. It was further clear that they knew how the signalised pedestrian crossing operated.

[32] These observations led Stantec to conclude that "the Rainbow Crossing markings do not influence the use of the signalised crossing".

[33] The Council provided this report to Waka Kotahi. Waka Kotahi's 22 December 2020 email to the Council asserted that the safety report did not show that the crossing met the threshold for roadway art because the relevant speed measurements on Dixon St showed more than 15 per cent of traffic exceeding 30km/h permissible under the Amended TCD Rule. Waka Kotahi asserted that under the rule "all traffic must be below 30 kilometres per hour for any road[way] art to be allowable".

[34] The second issue identified by Waka Kotahi was that the crossing did not comply with cl 5.6(1)(b) of the Amended TCD Rule which, according to Waka Kotahi, "precludes any road art where lines are parallel to the curb line across a road surface". Waka Kotahi's email indicated that this was the matter in respect of which the Council would need to apply for an exemption. Waka Kotahi referred to a rainbow crossing in New Plymouth which, in its view was "a version of road art ... that meets the requirements of the rule so far as the artwork is concerned". The New Plymouth installation is depicted below:<sup>12</sup>



[35] The Council applied again to Waka Kotahi for an exemption in respect of the Dixon St crossing in March 2021. The Council's exemption application:

- (a) noted that the rainbow markings had been in place since October 2018 and subsequent surveys and data showed the intersection continued to

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<sup>12</sup> A link to a story on Stuff.co.nz was included in Waka Kotahi's email to the Council dated 22 December 2020. This photograph, showing the newly installed rainbow crossing in New Plymouth, was part of the story: Blanton Smith "Rainbow crossing a sign of 'acceptance for LGBTQIA+ community'" *Stuff.co.nz* (online ed, Taranaki, 16 December 2020).

display “an excellent safety record with operational speeds at the crossing within the latest criteria included in the TCD amendment 2020”.

- (b) referred to the safety audit undertaken by Stantec which stated that “anecdotal evidence and observations of behaviour from site would suggest that the rainbow crossing is not being confused as a pedestrian crossing.”
- (c) described additional safety features added prior to installation, including a speed cushion in the lead up to the crossing and extra signage.
- (d) referred to Council’s original proposal that included alternate designs without horizontal stripes, which Waka Kotahi had indicated prior to installation would be unsuitable. That was why Council proceeded with its original flag design based on its own in-house transport advice.
- (e) referred to the installation of two additional speed cushions by Waka Kotahi in March 2020 and Stantec’s independent safety audit.
- (f) noted Stantec’s conclusions that there has been a significant reduction in crashes post-implementation, that there were no crashes recorded for the immediate vicinity of the Cuba Street crossing and no crashes involving pedestrians. Stantec also recorded there had been no crashes at the crossing during the three years prior to installation or the two years following installation, highlighting “the high level of safety at this busy CBD location”.
- (g) recorded the Council’s disappointment at the lack of consultation regarding the development of the Amended TCD Rule.
- (h) requested Waka Kotahi grant a special exemption under the TCD Rule for the existing rainbow markings.

[36] The response dated 25 August 2021 to the Council’s exemption request was issued on Waka Kotahi letterhead but was issued in the name of the Deputy-Director of Land Transport, acting under delegation from the Director of Land Transport. In her oral submissions on behalf of Waka Kotahi, Ms Majeed emphasised the Director’s statutory independence from Waka Kotahi.<sup>13</sup>

[37] The Deputy-Director stated:

This notice is provided ... for the specific purpose of exercising the Director’s powers in relation to the roadway art installed by the Wellington City Council at the Cuba St – Dixon St intersection, commonly referred to as the Rainbow Crossing (the roadway art).

...

I have determined that the subject location meets the definition of a ‘*lower risk environment*’ for the purposes of the Land Transport Rule: Traffic Control Devices 2004 (the Rule) specifically, that the roadway art complies with Rule 5.6(1) which sets out the requirements for roadway art.

[38] However, the Deputy-Director qualified his determination by noting that the aim of having an operating speed of vehicles of not more than 30km/h “has not yet been achieved”. The Deputy-Director stated that he was “satisfied that Council has a reasonable basis to believe the outcome will be achieved (per Rule 5.6(2)(b))”. The Deputy-Director requested Council confirm its commitment to achieving that outcome and undertake that it would take all necessary steps to do so without delay. The Deputy-Director requested Council to provide him with updated traffic speed data at the end of each quarter through to December 2022, after which he would make a reassessment. Otherwise, the Deputy-Director warned, “the Director of Land Transport (acting through me) may require Council to take further action to achieve that outcome and issue a notice under Rule 5.8”.

[39] In September 2021, the Council confirmed to Waka Kotahi that it had taken all necessary steps to ensure the operating speed of vehicles through the area of the crossing is not more than 30km/h and that it would organise and provide updated traffic speed data at the end of each quarter through to December 2022. The Council progressively obtained the following data:

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<sup>13</sup> As a result of reforms introduced under the Regulatory Systems (Transport) Amendment Act 2021.

- (a) October 2021: 85th percentile speed of 26km/h and a mean speed of 20.3km/h.
- (b) January 2022: the 85th percentile speed had reduced to 24km/h and the mean speed had reduced slightly to 20.1km/h.
- (c) April 2022: 85th percentile speed of 24km/h and a mean speed of 19.8km/h.
- (d) July 2022: data was very similar, showing a minuscule reduction in mean speed to 19.7km/h with the 85th percentile speed maintained at 24km/h.
- (e) September 2022: data again recorded an 85th percentile speed of 24km/h with a mean speed of 19.5km/h.
- (f) October 2022: data was very similar with a slight difference in mean speed to 19.7km/h.
- (g) December 2022: maintains the 85th percentile speed at 24km/h with a mean speed of 19.6km/h.

[40] After the last recorded set of speed data in December 2022, the Council has installed two additional speed cushions in the approach to the crossing. While no further speed data has been taken, senior counsel for the Council, Mr Whittington, submitted that it is a reasonable assumption that the operating speed remains below 30km/h, whether measured on an 85th percentile basis or a mean speed basis, and that the additional two speed humps would have introduced further downward pressure on the speeds travelled.

### **Legislative scheme**

[41] Land transport subordinate legislation is provided for in pt 11 of the Land Transport Act. Under that part, the Minister of Transport may make rules for a range of land transport related purposes including, under s 157(g), to “provide for the design,

construction, maintenance, and operation of traffic control devices”. These devices are defined in s 2 of the Land Transport Act:

**traffic control device** includes any—

- (a) sign, signal, or notice; or
- (b) traffic calming device; or
- (c) marking or road surface treatment—

used on a road for the purpose of traffic control

[42] The original TCD Rule came into force on 27 February 2005. Its objective, set out in cl 1.3, is:

... to contribute to a safe and effective roading environment for all road users by ensuring that traffic is controlled by means of traffic control devices that are safe, appropriate, effective, uniform and consistently applied.

[43] A slightly different definition of “traffic control device” is used in the TCD Rule from that contained in the Land Transport Act. In the Rule, the definition makes clear that a traffic control device “means a device used on a road for the purpose of traffic control”. It then includes the same paras (a)–(c) as in the Land Transport Act definition. Arguably, therefore, the definition in the TCD Rule is narrower than that in the Act, as it is tied to the “purpose of traffic control”. “Traffic control” is not defined. Nor is “traffic”.

[44] Clause 2.1 of the TCD Rule sets out the role of road controlling authorities in respect of traffic control devices:

## *Section 2*

### *Role of road controlling authorities*

2.1(1) A road controlling authority must:

- (a) authorise and, as appropriate, install or operate traffic control devices:
  - (i) if required by or under this rule or other enactment; or
  - (ii) to instruct road users of a prohibition or requirement that it has made concerning traffic on a road under its control;  
or

- (iii) to warn road users of a hazard; and
- (b) remove a traffic control device if required by or under this rule or other enactment.

[45] Clause 2.1 creates an obligation on a road controlling authority in respect of certain traffic control devices and a discretionary power in respect of other traffic control devices if desirable for guidance or to provide information. Based on this discretionary power, Mr Whittington argued that while prescriptive in many respects, the TCD Rule also provides considerable latitude to the Council as a road controlling authority in respect of particular markings that it can install on the roadway.

[46] Clause 3.1 sets out some general safety requirements for traffic control devices:

### *Section 3*

#### *General requirements for traffic control devices*

##### 3.1 General safety requirements for traffic control devices

Traffic control devices, whether used singly or in combination, must contribute to the safe and effective control of traffic, and must:

- (a) be safe and appropriate for the road, its environment or the use of the road; and
- (b) not dazzle, distract or mislead road users; and
- (c) convey a clear and consistent message to road users; and
- (d) be placed so as to:
  - (i) be visible to road users; and
  - (ii) be legible to road users, if of a type that includes written words or symbols; and
  - (iii) allow adequate time for the intended response from road users; and
- (e) comply with the relevant requirements in Schedules 1, 2 and 3; and
- (f) be maintained in good repair.

[47] The requirements in paras (a)–(c) are relevant to whether the rainbow crossing contributed to the safe and effective control of traffic and therefore whether it was contrary to the objective of the TCD Rule in cl 1.4.

[48] Clause 3.2(5) prohibits a person from installing a device that is not a traffic control device but that may be mistaken for a traffic control device. This provision is relevant to the applicants' argument that the rainbow crossing may be mistaken for a pedestrian crossing. I discuss this argument further below.

[49] Section 5 of the TCD Rule concerns markings. A marking is defined in pt 2:

**Marking** means a line, symbol, pattern, message, numeral, pavement marker or other device set in the roadway or applied or attached to the road surface.

[50] Clause 5.1 is headed "Purposes of markings" but then goes on to describe a marking as having "one of the following *functions*" (emphasis added), namely "regulatory", "warning" or "advisory". The description of "advisory" markings has some relevance to the present case: "it provides road users with information or guidance in the intended use of the road".<sup>14</sup>

[51] A road controlling authority may provide markings if "necessary or desirable for the guidance of traffic or to draw attention to a requirement that controls traffic".<sup>15</sup> Markings may consist of paint or "contrasting surface texture or colour defining an area of road that is used for a specific purpose and that may supplement but not replace, a regulatory marking or sign".<sup>16</sup> Markings must comply with relevant specifications in sch 2.<sup>17</sup> However, counsel accepted that this rule does not preclude other markings not referred to in sch 2.

[52] The second aspect of cl 5.5 was a particular focus of the parties' submissions:

### **5.5 Markings intended for advertising purposes**

A person must not install, on a roadway, a marking that is intended to be used for the purpose of advertising *or other purpose not connected with the use of the road*.

*(emphasis added)*.

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<sup>14</sup> TCD Rule, cl 5.1(c).

<sup>15</sup> Clause 5.2(3).

<sup>16</sup> Clause 5.3.

<sup>17</sup> Clause 5.4(1).



[53] As I will explain later in this judgment, cl 5.5 was amended and supplemented in the Amended TCD Rule. The Council’s position expressed in its written submissions was that whether the rainbow crossing was lawful under the iteration of the TCD Rule in 2018 is “moot”, the relevant requirements having been replaced in 2020. The Council did note even if the TCD Rule as at 2018 is not moot, the rainbow crossing is “in fact compliant with it”. However, in response to my questions at the hearing, Mr Whittington modified his approach and advanced the proposition that if the rainbow crossing was lawful under the TCD Rule in 2018, then the principle of non-retrospectivity in s 12 of the Legislation Act counts against retrospectively rendering the rainbow crossing unlawful under the Amended TCD Rule.

[54] The principle of non-retrospectivity does not mean that a traffic control device cannot be changed if the law underpinning it changes. For example, if speed limits change, provision exists for the road controlling authority to be directed to change the signage accordingly.<sup>18</sup> Some rules relating to pedestrian crossings in the TCD Rule, give deadlines for compliance, indicating an intention that existing crossings were required to be brought up to date.<sup>19</sup> Carefully drawn transitional and savings provisions can be employed in legislation to specify the interaction between an old law, and the law amending it, to eliminate doubt about retrospective operation.<sup>20</sup> Yet none of these devices were used in respect of the Amended TCD Rule provisions concerning roadway art.

[55] Rather, the new requirements for roadway art are permissively expressed as powers of a road controlling authority to “install” such markings. In the absence of more specific wording making it clear that such powers also include a prohibition on already installed road markings that complied with the TCD Rule as in force in 2018, I interpret these permissive rules concerning installation of roadway art to be prospective only, in that they apply to new installations, but not markings that have already been installed.

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<sup>18</sup> Land Transport Rule: Setting of Speed Limits 2024, cls 8.1(1) and 8.4.

<sup>19</sup> For example, TCD Rule, cls 8.2(4) and (5).

<sup>20</sup> Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 834.

[56] Accordingly, the position under the TCD Rule (as in 2018), with which Mr Whittington said the rainbow crossing complies, is not moot. Rather, it remains relevant to an assessment of the lawfulness of the rainbow crossing.

[57] Nevertheless, Mr Whittington went on to analyse the rainbow crossing in terms of the requirements introduced in 2020. I will address those requirements in due course. But, for now, my focus is on the compliance of the crossing with the rule as it was in 2018.

[58] Provision headings can be considered as part of the text of legislation from which its meaning must be ascertained in light of its purpose and its context.<sup>21</sup> The heading in the 2018 iteration of the TCD Rule refers only to markings intended for advertising purposes. The rule itself is broader than the heading, extending the prohibition on installation of markings on a roadway to those markings intended to be used for the purpose of advertising *or other purpose not connected with the use of the road*. The intended purpose(s) of the rainbow crossing marking is a matter that needs to be explored further in the context of the relevant rules. Also to be considered is whether cl 5.5 permits multiple purposes, only one of which must be connected with the use of the road. Relevant to my assessment of this question is the general principle of administrative law that a power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.<sup>22</sup>

[59] To apply this principle to the context of the present case, the LGBTQIA+ pride purpose of the markings may be permitted if that does not compromise the objectives of the TCD Rule and the markings have another purpose that is more directly connected with the use of the road.

[60] The effect of s 6 of the New Zealand Bill of Rights Act 1990 is that if cl 5.5 can have different meanings then that which is consistent with the rights and freedoms contained in the Bill of Rights Act “shall be preferred”. Relevantly, s 14 of the Bill of

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<sup>21</sup> Legislation Act 2019, s 10(3), (4).

<sup>22</sup> *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. A rainbow crossing can be seen as a manifestation of freedom of expression.

[61] Section 8 of the Bill of Rights Act (the right to life) could also be relevant, where the dangers inherent in crossing Dixon Street are in play. Ms Chen squarely focused her arguments at the hearing on safety concerns. Accordingly, the balancing of these two rights may assist to resolve whether an additional purpose is permissible under cl 5.5.

[62] Clause 6.6 of the TCD Rule governs pedestrian displays of the kind that were already operating at the crossing before the rainbow markings were installed. There is nothing of relevance in cl 6.6 as to any markings that must or may be installed, or which may not be installed, in conjunction with a pedestrian display.

[63] Section 8 of the TCD Rule includes rules relating to pedestrian crossings and other pedestrian facilities. Clause 8.1 concerns the provision of traffic control devices for pedestrians. There are three possible means of controlling traffic when requiring drivers to stop their vehicles while pedestrians cross a roadway:

- (a) pedestrian crossings;
- (b) school patrols; and
- (c) pedestrian traffic signals.

[64] There is no pedestrian crossing at the Dixon Street rainbow crossing. Clause 8.2 and the prescribed markings in sch 2 set out the specific markings applicable to pedestrian crossings, which are tightly prescribed. These take the form of the traditional zebra stripes in reflectorised white which conform with the precise dimensions specified in sch 2 of the TCD Rule. In these specifications there must be a clear contrast between the marked white stripes and the unmarked roadway in between each stripe, such that resurfacing or marking of the roadway may be required

to ensure sufficient contrast.<sup>23</sup> In addition, as was emphasised by Mr Whittington in his oral submissions, pedestrian crossings must be illuminated, marked by poles of the prescribed width, height and coloration and topped with globes or reflectorised orange disks. The prescribed warning signs must also be placed before the crossing together with limit lines and diamond shaped warning markings.<sup>24</sup>

[65] The Dixon Street rainbow crossing involves the use of pedestrian traffic signals. Clause 8.5 governs pedestrian traffic signals, which can be installed at an intersection controlled by traffic signals or at locations other than intersections.<sup>25</sup> It is not permissible to mark a pedestrian crossing in an area controlled by traffic signals.<sup>26</sup> However, markings must be installed to guide the movement of pedestrians.<sup>27</sup> Markings can be used as a means of assisting pedestrians to cross a roadway.<sup>28</sup>

[66] Finally, under the heading “Other pedestrian facilities”, the TCD Rule provides that a road controlling authority may provide signs, markings, surface texture or raised platforms or curve extensions or traffic islands or other techniques to guide a pedestrian to a place at which to cross a roadway.<sup>29</sup> These devices must convey a clear and consistent message to road users.<sup>30</sup>

[67] Certain responsibilities of all persons are set out in cl 13.7 including, relevantly, a prohibition on a person marking or installing a sign, device or object that appears to be a traffic control device but is not. The applicants submit this provision applies because the rainbow crossing appears to be a pedestrian crossing but is not.<sup>31</sup>

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<sup>23</sup> Clause 8.2(3A) of the TCD Rule.

<sup>24</sup> Clause 8.2.

<sup>25</sup> Clauses 8.5(1) and 8.5(3). There was some discussion at the hearing as to whether the Dixon Street rainbow crossing is installed at an intersection. An intersection is defined by reference to intersecting roadways and roadway is itself defined in terms of a portion of road used or reasonably useable for the time being for vehicular traffic in general. As the portion of Cuba Street where the rainbow crossing begins is not used for vehicular traffic in general, being a pedestrian mall, the question as to whether it is a roadway arises. It was not necessary to resolve this question for the purposes of the present dispute.

<sup>26</sup> Clause 8.5(2A).

<sup>27</sup> Clause 8.5(2).

<sup>28</sup> Clause 8.1(2)(b)(ii). Surface texture or raised platforms can also be used: cl 8.1(2)(b)(iii).

<sup>29</sup> Clause 8.8(4).

<sup>30</sup> Clause 8.8(5).

<sup>31</sup> Clause 13.7(c).

[68] Further, cl 13.7(d) prohibits installing a traffic control device that bears a logo, monogram, sign of sponsorship, sign indicating an association with a business, or any information other than that specified in the TCD Rule.<sup>32</sup> Although this clause did not feature in argument, it aligns with the TCD Rule's prohibition of advertising. The applicants did not argue that the rainbow paint scheme was a logo or monogram. In general usage, a logo is a symbol or design identifying a company, organisation or product to help people recognise and identify a brand. As such it has commercial connotations or at least links to a particular organisation. A monogram is a motif from overlapping or combining letters to form a symbol that does not seem appropriate to describe the rainbow design used in the Dixon Street crossing.

[69] Finally, cl 13.8 sets out certain functions and powers of Waka Kotahi to do certain things in connection with traffic control devices, none of which it purported to invoke in the present case.

### **My assessment of the rainbow crossing's compliance with the TCD Rule as at 2018**

[70] As I have indicated, I do not accept that the question of the Dixon Street crossing's compliance with the TCD Rule at the time of its installation in 2018 is moot. It was the applicable rule at the time the rainbow crossing was installed. Counsel did not refer me to any provision in the 2020 Amendments indicating they were intended to be retrospective. Nor did counsel refer me to any empowering provision in the Land Transport Act authorising the making of retrospective rules. I proceed on the basis that the TCD Rule as it was in 2018 when the rainbow crossing was installed is the applicable rule against which the rainbow crossing's lawfulness is to be assessed.

[71] The applicants' expert witness, Donald McKenzie,<sup>33</sup> was only asked to assess the rainbow crossing against the Amended TCD Rule. In his affidavit, he omitted any analysis of whether the rainbow markings were connected with the use of the road. Apparently he assumed they were not. The fact he was not asked to expressly consider this important threshold question lessens the helpfulness of his assessment.

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<sup>32</sup> Clause 13.7(d).

<sup>33</sup> Mr McKenzie is an experienced traffic engineer who runs a traffic engineering and transportation planning consultancy practice.

[72] In relation to pedestrian traffic signals, the TCD Rule expressly provides that markings must be installed to guide the movement of pedestrians.<sup>34</sup> These include lines to guide pedestrians at pedestrian traffic signals.<sup>35</sup> They also include markings, surface texture or other techniques to guide a pedestrian to a place at which to cross a roadway.<sup>36</sup> The six coloured painted stripes that comprise the rainbow crossing are markings that guide the movement of pedestrians. They delineate an area between the two sets of pedestrian traffic signals where it is also safe to cross the road (at the appropriate signal phase).

[73] The naming of the crossing as a “rainbow crossing” is also a good indication that crossing is permitted on the rainbow markings. Therefore the name of the rainbow crossing itself is a guide to pedestrians that where they see the rainbow marked on the roadway, they may cross there when permitted to do so by the pedestrian traffic signals. This purpose is supported by the Stantec report which noted that although 80–90 per cent of people observed used the designated pedestrian traffic signal crossing points, “if the movement was busy, people would fan out and cross over the rainbow crossing on a diagonal from the signal poles on each side.” Therefore, I consider the rainbow markings guide pedestrians to the place at which they can cross Dixon Street, both at and in between the crossing points designated by the pedestrian traffic signals. I note that Mr McKenzie also considers a purpose of the rainbow crossing is “encouraging movement across the coloured markings”.

[74] Accordingly, in terms of cl 5.5, I accept the purpose of the rainbow marking is connected with the use of the road. The marking is to be used by pedestrians to guide them when crossing as permitted by the pedestrian traffic signals.

[75] There is, of course, another purpose of the rainbow crossing, namely to demonstrate support and pride for Wellington’s LGBTQIA+ community past and present. To assess whether this additional purpose is permissible, it is necessary to consider whether it compromises the objective of the TCD Rule, namely to contribute to a safe and efficient roading environment. Accordingly, if the rainbow markings

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<sup>34</sup> TCD Rule, Clause 8.5(2A).

<sup>35</sup> Clause 6.3(3)(b).

<sup>36</sup> Clause 8.8(4).

were not safe and appropriate for the road and its use, or the markings dazzled, distracted or misled road users or failed to convey a clear and consistent message to them, then the additional purpose conveyed by the rainbow markings could be impermissible.<sup>37</sup>

[76] Here, the primary issues are whether the rainbow markings (because the applicants say they resemble the white stripes of a pedestrian crossing) are likely to:

- (a) mislead pedestrians that they have the right to cross the road, and
- (b) that traffic on Dixon Street must give way to them when they do so.

regardless of whether they are permitted to do so by the pedestrian traffic signals.

[77] The issue of resemblance to other markings arises specifically in the context of the requirements for roadway art in the Amended TCD Rule. “Resemblance” does not expressly arise in the TCD Rule as it was in 2018, except as far as it can be considered in the context of whether a road marking is misleading.

[78] I am not persuaded either as a matter of law or from the available evidence that the rainbow markings mislead pedestrians into the mistaken conclusion that the crossing is a pedestrian crossing at which they always have the right of way.

[79] Although there was evidence of pedestrian non-compliance (jay-walking across the crossing when the lights had not changed), there was little evidence that pedestrians did so because they were misled into thinking they had the right of way under a pedestrian crossing. Rather, the Stantec report concluded

...the pedestrians were generally very conversant with how the facility operated, with a very high percentage of users waiting until they saw the first vehicle stop for the signals, with the pedestrians advancing across the crossing in advance of the pedestrian signals going green.

Often the crossing had cleared by the time the crossing signal was green (maybe to the annoyance of drivers). A lot of people anticipate the green man [sic] and cross directly after the traffic light is at red.”

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<sup>37</sup> Clause 3.1(a)–(c).

[80] Ms Chen sought to put the onus to adduce evidence that pedestrians have not been misled by the rainbow crossing on the respondents, particularly the Council. But I consider that in accordance with the conventional onus in civil litigation such as the present case that it is for the applicants to establish their case, then that it a gap which her clients needed to fill in order to challenge effectively the evidence the Council obtained.

[81] Mr McKenzie deposes that in his “professional opinion, the Cuba Street Crossing does resemble a pedestrian or zebra crossing as it consists of lines parallel to the kerb”. As a result, he says it could mislead road users as to the:

...meaning and required actions to be taken relating to the adjacent pedestrian traffic signals. These Cuba Street road users could consider the Crossing is in fact a pedestrian crossing where pedestrians can cross at will (subject to checking the way is clear) and where vehicles are required to give way to pedestrians and other road users on the Crossing over Dixon Street (rather than having to wait for the traffic signal display of the “green man” [sic])

[82] Other factors Mr McKenzie relies on to conclude that the crossing is misleading include:

- (a) Other crossings in different parts of Cuba Street do not have “alternative markings”
- (b) The Handbook for Tactical Urbanism in Aotearoa Guidance: Roadway Art states stripes painted parallel to the kerblines are not permissible in New Zealand as they could be misinterpreted as a zebra crossing or be misleading to road users.
- (c) Traffic experts in Waka Kotahi thought the rainbow crossing resembled a pedestrian crossing and/or was misleading.
- (d) His observations of some people crossing the road when not authorised to do so by the pedestrian traffic signals.



- (e) Assumptions that the painted signs at the kerb advising pedestrians to look left or right (depending on the direction of traffic) implies that pedestrians can cross at will after looking for cars.

[83] However, completely absent from Mr McKenzie's report was any solid evidence that people have been misled that the rainbow crossing is a pedestrian crossing. Such evidence could perhaps have been obtained by interviewing pedestrians, using a suitably scientific method. But no attempt was made to obtain such evidence.

[84] Significantly, Stantec's report from late 2020 concluded based on anecdotal evidence and observations of behaviour from the site that "the Rainbow Crossing is not being confused as a pedestrian crossing". Its assessment of pedestrian behaviour was that much of the crossing against the signals occurred when there was no traffic, or the traffic had stopped at the lights but before the crossing signals had crossed to green. Stantec also considered that "under general use, as observed, the frequency of crash would likely be infrequent. Similarly, a resulting death or serious injury based upon observed behaviour, would be unlikely" giving the crossing a safety concern of "minor".

[85] I therefore proceed on the basis that there is insufficient evidence to establish that pedestrians in general (as distinct from the applicants themselves) have been misled into thinking that the Dixon St rainbow crossing is a pedestrian crossing at which they have the right of way.

[86] In addition, there are many points of distinction between the rainbow crossing and a pedestrian crossing, most of which I have outlined already. To summarise:

- (a) The rectangles in a pedestrian crossing must be painted white with reflectorised paint of 300 millimetres in width with non-painted gaps of 600 millimetres between each which stripe.
- (b) There is a requirement for poles painted black and white with either globes or reflectorised orange disks, whereas at the pedestrian traffic

light system in which the rainbow markings are painted, the requirement is that the poles holding the traffic lights are painted orange.

- (c) At the rainbow crossing there are pedestrian crossing signals with associated pedestrian control buttons and green Carmen Rupe silhouettes appear when it is safe and authorised to cross, with red figures indicating when crossing is prohibited.

[87] The absence of accidents over a long period and Stantec's conclusions drawn from its study and analysis reassure me that even someone who is not intimately acquainted with these technical legal requirements, is likely to have enough familiarity with pedestrian crossings that they could easily and safely distinguish between the rainbow crossing and a pedestrian crossing.

[88] Other relevant features of the rainbow crossing are its narrow span, making it easy for pedestrians to get from one side to the other quickly. Further there is a significant set back between the crossing and the limit line at which vehicles must stop when controlled by the traffic lights. This allows for a safe stopping distance if a pedestrian were to be on the crossing at an inappropriate time when traffic had the right of way.

[89] In addition, as I will explain further below, the Council has taken steps to manage and reduce the speed of vehicle traffic approaching the crossing by installing speed cushions at regular intervals from Taranaki Street through to the intersection of Dixon and Cuba Streets where the crossing is located. As well, since 2014 the speed limit in the area has been 30km/h.

[90] Some of these additional factors are relevant to the additional controls applying post-2020 in relation to roadway art to which I will turn shortly.

[91] The post-installation safety data that has been collected indicates there have been no accidents in the immediate vicinity of the crossing since its installation. There

were three crashes a short distance away from the crossing. However, these incidents involved vehicles being rear-ended by other vehicles. No pedestrians were involved.

[92] In summary, there have been no reported accidents involving pedestrians and no pedestrian injuries since the rainbow crossing was installed in 2018.

[93] For these reasons I conclude that the additional LGBTQIA+ pride related purpose of the rainbow markings is not inconsistent with the objective of the TCD Rule as it does not compromise the objective of the TCD Rule, namely to contribute to a safe and efficient roading environment. This was also the conclusion of the Deputy-Director of Land Transport in his “notice” of 25 August 2021, in which he concluded:

I believe the outcome meets the relevant regulatory requirements, promotes the spirit of Tū ake Tū māia<sup>38</sup> and contributes to our statutory purpose of a safe, efficient and effective land transport system in the public interest.

[94] As the rainbow markings also have a purpose related to the use of the road (to guide pedestrians to the area of the roadway that they can cross if the lights permit them to do so), I do not consider the rainbow markings contravene cl 5.5 of the TCD Rule.

[95] Therefore, no approval from Waka Kotahi was required to permit the Council as a road controlling authority to install additional markings at the pedestrian traffic signals on Dixon Street, as long as they were not inconsistent with required markings or any other provision in the rule. The rainbow crossing was lawful under the TCD Rule as it was in 2018.

[96] I have concluded that the 2020 Amendments to the TCD were not retrospective, and that the rainbow crossing was lawful according to the requirements in the TCD Rule in place at the time it was installed.

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<sup>38</sup> Waka Kotahi’s Regulatory Strategy 2023–2032.

[97] However, for completeness, and with respect to counsel’s arguments which were largely based on the 2020 Amended TCD Rule, I will now turn to briefly consider the effect of the amendments to the TCD Rule in 2020.

### **What happened to the TCD Rule in 2020?**

[98] In 2020, the TCD Rule was amended.<sup>39</sup> The objective of the amendment was to “allow for the lawful installation on a roadway of markings that are not traffic control devices in particular circumstances”.<sup>40</sup> The concept of roadway art was included in the Amended TCD Rule though, perhaps unhelpfully, there is no definition of “roadway art”. The most significant amendments for the purposes of the present case are to cl 5.5 and the insertion of a new cl 5.6 with examples. I set out both clauses and the examples below, using square brackets in cl 5.5 to indicate the changes that were made in 2020 in the Amended TCD Rule:

#### **5.5 Markings intended for advertising purposes [or not connected with use of a road]**

A person must not install, on a roadway, a marking that is intended to be used for the purpose of advertising or other purpose not connected with the use of the road [unless it is roadway art installed in accordance with 5.6(1)].

#### **5.6 Requirements for roadway art**

5.6(1) Despite anything in 5.4, a road controlling authority may install any marking on a roadway (**roadway art**) if the roadway art:

- (a) is installed in a lower risk environment; and
- (b) does not resemble and is not similar to a marking described in this Rule; and
- (c) does not mislead road users about the meaning of any traffic control device; and
- (d) is not part of or visually integrated into a marking specified in Schedule 2.

5.6(2) In this Rule, **lower risk environment** means an area—

- (a) where the road controlling authority manages speeds, through the use of any combination of traffic control devices, roadside developments, roadway art and other changes in the road environment, with the aim to achieve an outcome where the

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<sup>39</sup> Land Transport Rule: Traffic Control Devices Amendment 2020.

<sup>40</sup> Clause 1.4.

operating speed of vehicles (except in emergency situations) is not more than 30km/h (whether or not the speed limit for the area is 30km/h); and

- (b) in relation to which it is reasonable for the road controlling authority to believe that outcome has been or will be achieved.

**Example 1:**

On a wide urban street with a 50km/h speed limit and that has a wide-angle intersection with another street, a road controlling authority has narrowed the roadway by installing planter boxes and removing car parks. It also paints an assortment of coloured circles on the roadway. The shapes do not resemble and are not similar to any markings described in this Rule, and are also not part of or visually integrated into any markings specified in *Schedule 2*.

Those measures will achieve an outcome where the operating speed of vehicles (except in emergency situations) is not more than 30km/h. The relevant area is a lower risk environment.

These painted circles are roadway art installed in accordance with *5.6(1)*.

**Example 2:**

A series of long rectangles are painted on the road, parallel to the kerb and perpendicular to oncoming vehicle traffic. These either resemble or are similar to markings for a pedestrian crossing, which are described in this Rule (see M1-1 in *Schedule 2*), so cannot be installed as roadway art under *5.6(1)*.

**Example 3:**

On a wide urban street that has a wide-angle intersection with another street, a road controlling authority has installed a sign advising to slow for pedestrians, with the aim of achieving an outcome where the operating speed of vehicles (except in emergency situations) is not more than 30km/h. However, it can be regularly observed that vehicles travel through the area at more than 30km/h. It is not reasonable to believe the outcome has been or will be achieved if nothing more is done. The relevant area is not a lower risk environment. Accordingly, roadway art cannot be installed in the area.

[99] The Amended TCD Rule also conferred additional powers on the Transport Agency in respect of markings and lower risk environments, but I do not intend to set these out in full here.

[100] Waka Kotahi considered that the new requirements for roadway art in the amendment were applicable to the Dixon Street rainbow crossing. As will be apparent from my judgment so far, I disagree with this interpretation and at the hearing Waka

Kotahi resiled from it. Rather, I have found that the Council was entitled to install the rainbow crossing when it did under the law applicable in 2018. At the hearing, Counsel for both of the respondents agreed with this approach.

[101] It follows that the Council did not need Waka Kotahi's permission to install the rainbow crossing. Nor was there any suggestion by Waka Kotahi post-2020 that it was exercising its remedial powers in cl 5.8 to require the Council to make changes in the road environment to make it a lower risk environment.

[102] Rather, Waka Kotahi incorrectly assessed the rainbow crossing under the new requirements promulgated in 2020, as if the crossing were yet to be installed. Waka Kotahi then incorrectly advised the Council that it would need to seek an exemption under the Land Transport Act.<sup>41</sup>

[103] For the avoidance of doubt, I record my opinion that repainting and or maintenance of the crossing, as occurred in January 2022, does not constitute installing the crossing, such that any action that returns the crossing to the state it was in in 2018, or makes minor cosmetic alterations, is also to be assessed by reference to the original TCD Rule. In contrast, installing a different design entirely, such as painting the stripes vertically, would need to comply with the Amended TCD Rule.

[104] In the event that my primary conclusion, that the rainbow crossing was lawful under the TCD Rule as it was in 2018, is wrong, I will evaluate the crossing's compliance with the roadway art provisions enacted in 2020. But first, I will set out some further factual context relating to the dialogue between the Council and Waka Kotahi occurring post-installation.

[105] The applicants' primary argument that the rainbow crossing does not comply with the Amended TCD Rule concerned the rainbow crossing's compliance with paras (a)–(c) of new cl 5.6(1), namely whether the rainbow crossing is “installed in a lower risk environment”, resembles or is similar to a marking described in the Rule, or misleads road users about the meaning of a traffic control device.

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<sup>41</sup> Land Transport Act, s 168D.

*Lower risk environment*

[106] The definition of lower risk environment is set out in cl 5.6(2) which is set out above. In short, the applicants challenged the Council's achievement of "an outcome where the operating speed of vehicles (except in emergency situations) is not more than 30km/h". Here, the competing arguments were whether this requires every vehicle to travel at 30km/h or less or whether there is a tolerance level applied to recognise the impracticability of achievement of 100 per cent compliance.

[107] The applicants took the view that the text of cl 5.6(2) considered in light of the purpose of the TCD Rule, required adoption of the former approach, namely every (or practically every)<sup>42</sup> vehicle must be recorded as travelling at 30km/h or less. In this regard, the applicants and their expert relied on a document entitled "Handbook for Tactical Urbanism in Aotearoa Guidance: Roadway Art". This document was dated September 2020 and never proceeded beyond the stage of being a draft. There is, therefore, a significant question as to whether it can be relied on as a reliable indicator of the meaning of the legislation. Nevertheless, the applicants relied on a portion of this document stating that "operating speeds" is expected to apply to "practically all traffic, i.e. the operating speed of all traffic should be 30km/h or less (acknowledging human nature and the impracticalities of achieving 100 per cent compliance)."

[108] I do not find Mr McKenzie's assessment helpful in this regard. In paragraph 42, he appears to have misread the definition of "lower risk environment" as requiring the operating speed of "all vehicles" (Mr McKenzie's underlining) where he has inserted the word "all", a word which does not appear in the relevant part of cl 5.6(2)(a) itself.

[109] By contrast, the Council relied upon the Traffic Control Devices Manual as a guide to industry good practice. It contains a definition of "operating speed" as the 85th percentile speed of vehicles on a section of road. 85th percentile was, in turn, defined as "[t]he value at which 85% of the sample is included. Only 15% of the sample will exceed the 85th percentile. In speed sample analysis, 85% of the vehicles surveyed will travel at or below the 85th percentile speed."

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<sup>42</sup> An exception was acknowledged for emergency vehicles on their way to attend an emergency.

[110] Unhelpfully, the term operating speed is not defined in the Amended TCD Rule itself. Nevertheless, I am persuaded that the use of the 85th percentile as contained in the Traffic Control Devices Manual is the correct meaning as used in the Amended TCD Rule. To begin with, I accept Mr Whittington's characterisation of vehicle speed as a proxy for risk. The clear intention behind the concept of lower risk environment in the Amended TCD Rule was to provide a means for assurance that a particular level of risk was met such as to permit the use of roadway art.

[111] My assessment of the Minister's intention was to encourage and permit roadway art, not to provide an excuse for and means of prohibiting roadway art. This meaning is also inherent in the use of the relative term *lower* risk environment (my emphasis) as opposed to low or zero risk environment. Further, the Amended TCD Rule does not require an absolute achievement of the required operating speed before roadway art can be installed. Rather, roadway art can be installed even on the basis of a reasonable belief that the outcome will be achieved. Further, it is noteworthy that the expression "operating speed of vehicles" is used as opposed to the operating speed of *each* vehicle (or "all" vehicles as Mr McKenzie has misread the provision). I accept Mr Whittington's characterisation of this as a "bringing together, a combined assessment". All these points suggest that some kind of statistical analysis or averaging of vehicle speeds is what is intended in the Amended TCD Rule. I also accept Mr Whittington's submission that the Traffic Control Devices Manual is a better representation of accepted industry standards in relation to speed sample analysis than the draft Handbook for Tactical Urbanism.

[112] Accordingly, I accept that a lower risk environment requires an outcome where the operating speed of vehicles (except in emergency situations) measured in accordance with the 85th percentile is not more than 30km/h. I reject the applicants' submission that a percentage closer to 100 per cent such as 97 per cent is required to establish a lower risk environment. I consider such a strict requirement would be practically unworkable and would largely preclude roadway art from being authorised.

[113] Assessing the speed data supplied by the Council to Waka Kotahi, the 85th percentile of vehicle speeds through the Dixon Street rainbow crossing trended down



post-installation and, by December 2022 (the last of the speed assessments) had plateaued at 24km/h, well beneath the requirement in cl 5.6(2).

[114] Therefore, this data allows me to conclude that the area where the rainbow crossing is installed is appropriately considered a lower risk environment for the purposes of the Amended TCD Rule.

*Does not resemble and is not similar to a marking described in this Rule*

[115] The applicants' argument under this paragraph is that the rainbow crossing resembles a "zebra" pedestrian crossing. Above at [86], I outline the salient differences between the two that lead me to conclude the rainbow crossing does not resemble a pedestrian crossing as described in the TCD Rule, including due to its colouration, lack of gaps between the bands, lack of other features associated with a pedestrian crossing, and proximity to pedestrian traffic signals. To my mind, these differences outweigh the identified similarities (principally the use of stripes, arranged horizontally) so that overall, the rainbow crossing cannot fairly be described as resembling or similar to a pedestrian crossing. My conclusion here also disposes of any argument that Example 2 in the Amended TCD Rule captures the rainbow crossing. The second sentence of that example qualifies the first sentence. So it is not all long painted parallel rectangles that are caught by cl 5.6, only those that resemble or are similar to markings for a pedestrian crossing.

*Does not mislead road users about the meaning of any traffic control devices*

[116] Consistent with my conclusion on the crossing's compliance with the TCD Rule, I do not consider the rainbow crossing misleads road users; in contrast I find the opposite. Vehicles are guided by the traffic signals. There is no evidence that pedestrians are misled that they have an automatic right of way. Rather, the available evidence, as principally set out in the Stantec report leads to the opposite conclusion.

## **Result**

[117] The applicants' claim is dismissed.

## **Costs**

[118] Both respondents sought costs in the event they were successful. At the end of the hearing, Ms Chen sought to be heard on costs.

[119] If the parties are unable to resolve questions of costs between themselves then they may file and serve memoranda (no more than three pages) in accordance with the following timetable:

- (a) Respondents by **3 April 2025**;
- (b) Applicants by **17 April 2025**.

**McHerron J**

Solicitors:

Edwards Law, Auckland for Applicants

Hawkestone Chambers, Wellington for First Respondent

Dentons Kensington Swan, Wellington for Second Respondent