

## Before the Electrical Workers Registration Board

CE No. 22451  
Electrical Worker: Chyle Keil (the Respondent)  
Registration Number: E 251095  
Electrical Worker Number: EW 109854  
Registration Class: Electrician

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### Decision of the Board in Respect of the Conduct of an Electrical Worker Under section 147G and 147M of the Electricity Act 1992

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Hearing Location: Napier  
Hearing Type: In Person  
Hearing and Decision Date: 20 October 2022

#### Board Members Present:

Mr M Orange, Barrister (Presiding)  
Mr R Keys, Registered Inspector  
Ms M Kershaw, Registered Electrician  
Ms J Davel, Lay Member  
Ms A Yan, Registered Electrical Engineer  
Mr M Perry, Registered Electrician

Appearances: M Denyer for the Investigator

#### Procedure:

The matter was considered by the Electrical Workers Registration Board (the Board) under the provisions of Part 11 of the Electricity Act 1992 (the Act), the Electricity (Safety) Regulations 2010 (the Regulations) and the Board's Disciplinary Hearing Rules.

#### Board Decision:

The Respondent **has** committed disciplinary offences under sections 143(a)(ii) and 143(f) of the Act.

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### Summary of the Board’s Decision

- [1] The Respondent carried out prescribed electrical work in a manner that was contrary to an enactment and provided a false or misleading return. He is fined \$350 and ordered to pay costs of \$250. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

### Introduction

- [2] The hearing resulted from a complaint about the conduct of the Respondent and a report under section 147G(1) of the Act from the Investigator that the complaint should be considered by the Board.
- [3] The Respondent was served with a notice setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. They were:

#### First Alleged Disciplinary Offence

- On or around 12 June 2021 at [OMITTED], Mr Chyle Keil has carried out or caused to be carried out prescribed electrical work in a manner contrary to any enactment relating to prescribed electrical work that was in force at the time the work was done being an offence under section 143(a)(ii) of the Act, IN THAT, he:
  - Failed to bury an underground cable at the correct depth; and/or
  - Failed to install underground marker (warning) tape; and/or

- (c) Left sections of an underground wiring system exposed at the time of connection.

In breach of regulations 59(1) of the Electricity (Safety) Regulations 2010.

Or in the Alternative

- 2. On or around 12 June 2021 at [OMITTED], Mr Chyle Keil has carried out or caused to be carried out prescribed electrical work in a negligent or incompetent manner being an offence under section 143(a)(i) of the Act, IN THAT, he:
  - a. Failed to bury an underground cable at the correct depth; and/or
  - b. Failed to install underground marker (warning) tape; and/or
  - c. Left sections of an underground wiring system exposed at the time of connection.

### **Second Alleged Disciplinary Offence**

- 3. On or around 12 June 2021 at [OMITTED], Mr Chyle Keil has provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he certified prescribed electrical work that had not been carried out lawfully.

- [4] Prior to the hearing, the Respondent and the Board were provided with all of the documents the Investigator had in their power or possession.
- [5] No Board Members declared any conflicts of interest in relation to the matters under consideration.

### **Function of Disciplinary Action**

- [6] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>1</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>2</sup>.
- [7] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,<sup>3</sup> Collins J. noted that:

*“... the disciplinary process does not exist to appease those who are dissatisfied ... . The disciplinary process ... exists to ensure professional standards are*

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<sup>1</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</sup> [2016] HZHC 2276 at para 164

*maintained in order to protect clients, the profession and the broader community.”*

- [8] The Board can only inquire into “the conduct of an electrical worker” with respect to the grounds for discipline set out in section 143 of the Act. It does not have any jurisdiction over contractual matters.

### **Procedure**

- [9] The matter proceeded on the basis of an Agreed Statement of Facts.

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. The Board notes, as regards evidence in proceedings before it, that the provisions of section 147W of the Act apply. This section states:

*In all proceedings under this Part, the Board may, subject to section 156, receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matter before it, whether or not it would be admissible as evidence in a court of law.*

- [11] The Board heard from the Respondent prior to it making a decision.
- [12] As noted, the matter proceeded on the basis of an Agreed Statement of Facts. The Statement set out that the Respondent carried out and supervised prescribed electrical work in relation to the construction of a new dwelling in that he installed a power cable in a trench of approximately 400mm depth. AS/NZS 3000:2007 sets out that the cable should have been laid at a minimum depth of 500mm. Further, when the cable was livened, part of it was exposed, with no marker tape installed. The Respondent provided a Certificate of Compliance and Electrical Safety Certificate for the prescribed electrical work which stated it has been done lawfully and safely.
- [13] The Investigator sought the opinion of an expert who provided a report stating that the prescribed electrical work had not been completed in accordance with of AS/NZS 3000.
- [14] The Agreed Statement of Facts did note that there was an intention to eventually concrete over the trench in which the cable had been laid. At the time of certification, however, it had not been concreted over.
- [15] The Respondent accepted the facts as outlined above.
- [16] The general rule is that all facts in issue, or relevant to the issue in a case, must be proved by evidence. As the Investigator and Respondent agreed to the facts as outlined above, it was not necessary to call any further evidence or to test the evidence as outlined in the Statement.

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<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

### **Board's Conclusion and Reasoning**

- [17] The Board has decided that the Respondent **has** carried out or caused to be carried out prescribed electrical work in a manner contrary to any enactment relating to prescribed electrical work that was in force at the time the work was done being an offence under section 143(a)(ii) of the Act, IN THAT, he, in breach of regulations 59(1) of the Electricity (Safety) Regulations 2010, failed to bury an underground cable at the correct depth, failed to install underground marker (warning) tape, and left sections of an underground wiring system exposed at the time of connection.
- [18] The Board has also found that the Respondent provided a false or misleading return being an offence under section 143(f) of the Act, IN THAT, he certified prescribed electrical work that had not been carried out lawfully.
- [19] The reasons for the Board's decisions follow.

### **First Offence**

- [20] The charges put before the Board were laid in the alternatives of negligence or incompetence under section 143(a)(i) and contrary to an enactment under section 143(a)(ii). The Board decided that the prescribed electrical work had been completed in a manner that was contrary to the Safety Regulations but that the legal tests for a finding of negligence or incompetence had not been met.
- [21] There is a hierarchy to the disciplinary charges in that the Board needs to first consider whether the prescribed electrical work was carried out or caused to be carried out in a manner that was contrary to an enactment. If the Board finds in the affirmative it then needs to consider whether the conduct reaches the threshold for a finding of negligence or incompetence.
- [22] Contrary to an enactment is a form of strict liability offence in that all that need be proven is that the relevant enactment has been breached – in this instance, the Electricity (Safety) Regulations 2010 or any of the cited standards within Schedule 2 of the Regulations. The Board does not need to find that there was intention, fault, or negligence<sup>5</sup>.
- [23] Turning to negligence and/or incompetence there are no statutory definitions of the terms. It is noted however, that they are not the same. In *Beattie v Far North Council*<sup>6</sup> Judge McElrea noted:
- [43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*
- [24] Negligence is considered to be the departure by an electrical worker, whilst carrying out or supervising prescribed electrical work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is

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<sup>5</sup> *Blewman v Wilkinson* [1979] 2 NZLR 208

<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

being inquired into. This is described as the *Bolam*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

- [25] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise prescribed electrical work to an acceptable standard. *Beattie* put it as “*a demonstrated lack of the reasonably expected ability or skill level*”. In *Ali v Kumar and Others*,<sup>9</sup> it was stated as “*an inability to do the job*”.
- [26] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>10</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.
- [27] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board’s own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>11</sup>. The test is an objective one and, in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>12</sup>.
- [28] The Board notes that the purposes of the Act are:

**1A Purposes**

*The purposes of this Act are—*

- (a) *to provide for the regulation, supply, and use of electricity in New Zealand; and*
- (b) *Repealed.*
- (c) *to protect the health and safety of members of the public in connection with the supply and use of electricity in New Zealand; and*
- (d) *to promote the prevention of damage to property in connection with the supply and use of electricity in New Zealand; and*
- (da) *to provide for the regulation of fittings and electrical appliances that are, or may be, exported pursuant to an international trade instrument; and*
- (e) *to provide for the regulation of electrical workers.]*

- [29] The Board also notes, as regards acceptable standards, that all prescribed electrical work must comply with the Electricity (Safety) Regulation 2010 and the cited

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<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>12</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

Standards and Codes of Practice in Schedule 2 of the Regulations. As such, when considering what is and is not an acceptable standard they must be taken into account.

- [30] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>13</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

*[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

#### Contrary to an Enactment

- [31] The prescribed electrical work was carried out on a low-voltage installation. Under the Safety Regulations, the work had to be carried out in accordance with AS/NZS 3000. This is because regulation 59 stipulates:

**59 Low and extra-low voltage installations to comply with AS/NZS 3000**

(1) *Every low or extra-low voltage domestic installation, or part of a domestic installation, must be installed, tested, inspected, and connected so as to comply with Part 2 of AS/NZS 3000 if it has a maximum demand at or below—*

(a) *80 amperes per phase if single-phase; or*

(b) *50 amperes per phase if multi-phase.*

- [32] The Board received evidence that the prescribed electrical work had not been completed in accordance with AS/NZS 3000, and the Respondent accepted that evidence and agreed that the work was not in accordance with it. As such, the prescribed electrical work set out in the First Offence was carried out in a manner that was contrary to an enactment.

- [33] It should be noted that whilst the Board received evidence that the cable might, at some time in the future, be concreted over (which would have allowed for a shallower buried depth) at the time it was installed, livened and certified, it had not been concreted over. The Respondent is reminded that prescribed electrical work has to be lawful at the time it is certified. Future intentions or intended actions are irrelevant.

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<sup>13</sup> [2001] NZAR 74

## Negligence

- [34] The contraventions were not, in the Board's view, serious enough to warrant a finding of negligence or incompetence. As such, a finding under section 143(a)(ii) of the Act (contrary to an enactment) is the appropriate finding.

## **Penalty, Costs, and Publication**

- [35] Having found that one or more of the grounds in section 143 applies, the Board must, under section 147M of the Act<sup>i</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [36] The Respondent made submissions at the hearing as regards penalty, costs, and publication.

## Penalty

- [37] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*<sup>14</sup> commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [38] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,<sup>15</sup> the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Electricity Act they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors. The same applies to disciplinary proceedings under the Electricity Act.
- [39] The Board adopted a starting point of a fine of \$700 an amount that was consistent with penalties imposed by the Board for similar offending. There were no aggravating factors. In mitigation, the Respondent has accepted responsibility for his actions, and the matter has been dealt with by way of an agreed statement of facts. The Board also noted that had the conductor been concreted over sooner, the matter may not have arisen.
- [40] Taking the mitigating factors into account, the Board decided to reduce the fine by 50% to one of \$350.

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<sup>14</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>15</sup> 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288



## Costs

- [41] Under section 147N of the Act, the Board may require the Respondent to pay the Board any sum that it considers just and reasonable towards the costs and expenses of, and incidental to the investigation, prosecution and the hearing.
- [42] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case<sup>16</sup>.
- [43] In *Collie v Nursing Council of New Zealand*,<sup>17</sup> where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [44] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,<sup>18</sup> the High Court noted:
- [46] *All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.*
- [47] *Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.*
- [45] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was simple. Adjustments based on the High Court decisions above are then made.
- [46] Based on the above the Board's costs order is that the Respondent is to pay the sum of \$250 toward the costs of and incidental to the matter. In setting the amount of costs the Board took into account that the Respondent had agreed to the matter proceeding by way of an Agreed Statement of Facts.

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<sup>16</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>17</sup> [2001] NZAR 74

<sup>18</sup> CIV-2011-485-000227 8 August 2011

## Publication

- [47] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register as required by the Act<sup>19</sup>. The Board can, pursuant to section 147Z of the Act, also order publication over and above the public register notation. Under section 147Z the Board may, if no appeal is brought within 20 working days of its decision, direct the Registrar to cause a notice stating the effect of the decision or order, the reasons for the decision or order, and (unless the Board directs otherwise) the name of the person in respect of whom the decision or order was made, to be published in the Gazette and any other publications as may be directed by the Board.
- [48] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [49] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990<sup>20</sup>. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction<sup>21</sup>. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive<sup>22</sup>. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*<sup>23</sup>.
- [50] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest<sup>24</sup>. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [51] Based on the above, the Board will publish a general article in the Electron summarising the matter but will not order further publication. The Respondent will not be identified in the Electron.
- [52] The Respondent should also note that the Board has not made any form of order under section 153(3) of the Act which allows for prohibition of publication.

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<sup>19</sup> Refer sections 128 of the Act

<sup>20</sup> Section 14 of the Act

<sup>21</sup> Refer sections 200 and 202 of the Criminal Procedure Act

<sup>22</sup> *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

<sup>23</sup> *ibid*

<sup>24</sup> *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

## Penalty, Costs and Publication Orders

[53] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to section 147M(1)(f) of the Electricity Act 1992, the Respondent is ordered to pay a fine of \$350.

**Costs:** Pursuant to section 147N of the Act, the Respondent is ordered to pay costs of \$250 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Electrical Workers in accordance with section 128(1)(c)(viii) of the Act.

**The Respondent will be named in this decision.**

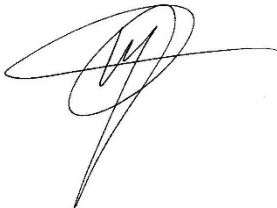
**A summary of the matter will be published by way of an article in the Electron which will focus on the lessons to be learnt from the case. The Respondent will not be named in the publication.**

[54] The Respondent should note that the Board may refuse to relicence an electrical worker who has not paid any fine or costs imposed on them.

## Right of Appeal

[55] The right to appeal Board decisions is provided for in sections 147ZA and 147ZB of the Act<sup>ii</sup>.

Signed and dated this eighth day of November 2022



**Mr M Orange**  
Presiding Member

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### <sup>i</sup> Section 147M of the Act

(1) *If the Board, after conducting a hearing, is satisfied that a person to whom this Part applies is guilty of a disciplinary offence, the Board may—*

(a) *do 1 or more of the following things:*

(i) *order that the person's registration or practising licence (or both) be cancelled:*

(ii) *order that the person's provisional licence be cancelled:*

(iii) *order that the person may not apply to be reregistered or re-licensed before the expiry of a specified period:*

(b) *order that the person's registration or practising licence (or both), or the person's provisional licence, be suspended—*

(i) *for any period that the Board thinks fit; or*

- (ii) until that person does 1 or more of the things specified in subsection (2):
- (c) order that the person's registration or practising licence (or both), or the person's provisional licence, be restricted for any period that the Board thinks fit, in either or both of the following ways:
  - (i) by limiting the person to the work that the Board may specify:
  - (ii) by limiting the person to doing, or assisting in doing, work in certain circumstances (for example, by limiting the person to work only on approved premises or only in the employ of an approved employer):
- (ci) order that the person be disqualified from doing or assisting in doing prescribed electrical work that the person would otherwise be authorised to do in that person's capacity as a person to whom this Part applies—
  - (i) permanently, or for any period that the Board thinks fit; or
  - (ii) until that person does 1 or more of the things specified in subsection (2):
- (cii) order the person to do 1 or more of the things specified in subsection (2) within the period specified in the order:
- (ciii) order the person to pay a fine not exceeding \$10,000:
- (civ) order that the person be censured:
- (cv) make no order under this subsection.
- (2) The things that the person can be required to do for the purposes of subsection (1)(b), (d), and (e) are to—
  - (a) pass any specified examination:
  - (b) complete any competence programme or specified period of training:
  - (c) attend any specified course of instruction.
- (3) The Board may take only 1 type of action in subsection (1) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b), (c), (e) or (g).
- (4) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an—
  - (a) offence for which the person has been convicted by a court; or
  - (b) infringement offence for which the person has been issued with an infringement notice and has paid an infringement fee.
- (5) The Board must not exercise any authority conferred by this section in respect of any offence committed by any person before the date of that person's registration or, as the case may be, the date on which that person's provisional licence was issued if at that date the Board was aware of that person's conviction for that offence.
- (6) If a person is registered under Part 10 in respect of more than 1 class of registration, the Board may exercise its powers under subsection (1)(a) to (e) in respect of each of those classes or 1 or more of those classes as the Board thinks fit.]

## ***ii Section 147ZA Appeals***

- (1) A person who is dissatisfied with the whole or any part of any of the following decisions, directions, or orders may appeal to the District Court against the decision, direction, or order:
  - (e) any decision, direction, or order under any of sections 108, 109, 120, 133, 137, and 153 or Part 11 (except section 147C).

## ***Section 147ZB Time for lodging appeal***

*An appeal under section 147ZA must be brought within—*

- (a) 20 working days after notice of the decision, direction, or order was given to, or served on, the appellant; or
- (b) any further time that the District Court may allow on application made before or after the expiration of that period.