

Before the Electrical Workers Registration Board

	CE No. CE22078
Electrical Worker:	Barry Renton (the Respondent)
Registration Number:	E 9429
Electrical Worker Number:	EW 047547
Registration Class:	Electrician

Decision of the Board in Respect of the Conduct of an Electrical Worker

Under section 147G and 147M of the Electricity Act 1992

Hearing Location:	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	15 December 2020

Board Members:

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

Appearances:

- Ms S Blick for the Investigator
- Mr B Gotlieb for the Respondent

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 not** committed a disciplinary offence.

Contents

Introduction	2
Function of Disciplinary Action	3
Evidence	4
Legal Principles	8
Serious Harm and Significant Property Damage.....	8
Negligence and/or Incompetence	9
Contrary to an Enactment.....	10
Certification.....	11
Board’s Findings	11
Right of Appeal	13

Introduction

- [1] The hearing resulted from a complaint 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.
- [2] The Respondent was served with a notice setting out the alleged disciplinary offences the Investigator reported should be considered by the Board. The charges are set out in Appendix A.

First Alleged Disciplinary Offence

- On or around 4 December 2016 at Building A57, Burnham Military Camp, Mead Road Substation, Burnham, Barry Renton has negligently created a risk of serious harm to any person, or a risk of significant property damage, through having carried out or caused to be carried out prescribed electrical work being an offence under section 143(b)(ii) of the Act, IN THAT, he connected cables between the main circuit breakers and changeover panel that was undersized for the duty they were to perform.*

Or in the Alternative

- On or around 4 December 2016 at Building A57, Burnham Military Camp, Mead Road Substation, Burnham, Barry Renton 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 connected cables between the main circuit breakers and changeover panel that was undersized for the duty they were to perform.*

Or in the Alternative

3. *On or around 4 December 2016 at Building A57, Burnham Military Camp, Mead Road Substation, Burnham, Barry Renton 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 connected cables between the main circuit breakers and changeover panel that was undersized for the duty they were to perform in breach of regulation 13(1) of the Electricity (Safety) Regulations 2010.*

Second Alleged Disciplinary Offence

4. *On or around 4 December 2016 at Building A57, Burnham Military Camp, Mead Road Substation, Burnham, Mr Barry Renton has provided a false and misleading return being an offence under section 143(f) of the Act, IN THAT, he certified work as being electrically safe when it was not.*

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

Function of Disciplinary Action

- [5] 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*¹ and in New Zealand in *Dentice v Valuers Registration Board*².
- [6] 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*³ 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 maintained in order to protect clients, the profession and the broader community.”

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

² [1992] 1 NZLR 720 at p 724

³ [2016] HZHC 2276 at para 164

- [7] 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.

Evidence

- [8] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. The Board notes that 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.

- [9] The Board heard evidence from:

Barry Renton	The Respondent
[Omitted]	Witness for the Investigator
Brendan Erasmuson	The Investigator
Stephen Doust	Expert witness for the Investigator
Mike Chopping	Expert witness for the Respondent

- [10] Pacific Generator Services Limited, who employed the Respondent, was engaged by Spotless Facilities Services (NZ) Limited⁵, on behalf of the New Zealand Defence Force (NZDF), to replace a generator at the Burnham Military Camp (the Meads Road Generator). The Respondent carried out and certified the prescribed electrical work for the replacement. His certification stated that the work carried out was:

Replace existing 500 amp transfer contactors with motor operated 800 amp CB's, run new cables between new transfer switch and new generator, install new 500kva generator and control system and control cabling.

- [11] The Meads Road Generator was a back-up-generator. It was designed and installed so as to supply electricity to a bore pump for the Cline water tower, Warrant Officer's and Senior Non-Commissioned Officer's Mess, main gate and four transit barracks during distribution network outages.
- [12] The Investigator alleged that the cables between the main circuit breakers and the changeover panel were undersized for the duty they were to perform. Specifically, it was alleged that the connection cables, which were 95mm² single-core cables, were underrated as the main circuit was set to 800amps with a 500kva supply transformer.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁵ Spotless held a maintenance contract for the NZDF facility.

- [13] The 95mm² cable, which ran from the distribution network transformer to the switchboard and, from there, on to installation, was rated for a 250amp supply. Both the distribution network supply and the Meads Road Generator installed by the Respondent were capable of providing up to 800amps of current. The generator that had been replaced was capable of providing up to 500 amps.
- [14] The Respondent did not install any of the cables from the distribution network to the switchboard, or from the switchboard to the installation. He did install an upgraded cable between the Meads Road Generator and the automatic transfer switch (ATS). The cable the Respondent installed was rated for the potential output of the Meads Road Generator. The Respondent noted that the cable he replaced was, prior to its replacement, underrated as the replaced generator had a 500amp supply.
- [15] The allegation was that, as he was aware that the cable from the ATS to the switchboard and onto the installation was underrated, he should have taken steps to ensure the installation was safe. The work that Pacific Generator Services Limited had contracted to complete did not include an upgrade of any cabling beyond the ATS.
- [16] The supply cables maximum measured demand was 160amps. The Respondent gave evidence that the peak load when the Meads Road Generator was tested, was 160amps. The period over which the supply cable from the network had been in place was not known, but it had a 2009 manufacture marking and was estimated as having been in operation for around ten years. There was no evidence that any issues had arisen with the supply cable over its installed life. The Respondent gave evidence that there were no signs of damage or deterioration on the supply cable. Evidence was received that damage can occur and accumulate over time, and that minute damage can be difficult to visually identify. The integrity of the cable was not tested. The Meads Road Generator was tested on a monthly basis without issue.
- [17] The NZDF was made aware of the issue as regards the underrated cable by both the Respondent, by verbal advice being given to its agent Spotless, and by [omitted]who sent an email dated 28 November 2016 to a representative of the NZDF. The email stated:

[Omitted]from Spotless informed me that the Meads Road generator had arrived last week.

I took the opportunity to have a look at the unit, its setup and testing. I have noted a few things that we could have improved on.

Most notably is that the generator is a lot larger than the old generator. It's a 500kVA unit that can deliver 721amps (prime rating).

Meads Substation (from the BMS) show a maximum of about 110kVa (160Amps) +/- 15%.

I got approval by Spotless to attend the commissioning (as an observer) on Sunday 11am to observe the mains fail test and setup.

The generator performed as expected (mains fail, synchronise, and working as intended). However the generator was being setup as fixed load configuration for 70% output (504Amps).

The changeover breakers are set at max 800Amps, so these will never trip. These need to be reviewed.

We agreed to scale this back to about 31% due to the existing cable size (95mm²) between the changeover breakers and the main switchboard. 95mm² can only accept 250amp, max. Any higher then there's potential for an accident or fire.

However running at 31% for long periods is not good for any diesel generator. So I suggest that we upgrade the small cables and associated equipment so that it can take at least 50% of the generator load.

Or that we relocate this generator to a location that is likely to take at least 50% of its load nominally.

Possibly a good discussion point when we meet next week.

I'll also need to look into the main switchboard when I'm next on site.

- [18] A report titled A57 Substation Cable Replacement, written by [omitted] and dated 31 July 2017, also identified the underrated cable issue. It stated:

MAIN SWITCHBOARD

It has been noted to NZDF in November 2016 that there is a "weak" link within the switchboard cabling which must be replaced as soon as practically possible. NZDF noted that this is best done during summer periods when the site loads are at its lowest and that preparatory and investigative work can take place now for the replacement.

This "weak" link within the main switchboard are cables that runs between the main switchboard and the generator/mains changeover switch cabinet. The cable set is a Tricab flexible rubber 95mm² copper cable. The maximum current carrying capacity of this cable set is estimated to be 242 amps per phase, based on similar cable types.

In this installation, this set of cables may be subjected far higher currents (as high as 721 amps or higher) as the existing main incomer circuit breaker is set to 800A, its lowest setting on the unit. If the cable set is subjected to currents higher than its rated capacity, the cable insulation will melt and likely cause a short circuit. The main circuit breaker is likely to trip to reduce the damage but with such large currents, the damage will be severe in any case.

Significant damage and fire can be expected to occur within the substation due to the high energy density.

This will ultimately lead to the substation being unavailable for a significant period while major repairs can be undertaken. It is likely that the generator

set will also be out of service as the generator /changeover cabinet will likely be damaged. It is expected that a complete replacement of the main switchboard and its mains/generator changeover systems will be required. Depending on the severity of the damage, the building and its surroundings may also need to be repaired or rebuilt.

This cable set was installed some time in 2009, based on the cable markings, and has been in service ever since. There has been no notable incident on this main switchboard. This is attributed to the downstream loads of the substation which have not increased beyond the cable's designed current carrying capacity.

A57 GENSET REPLACEMENT WORK

During the A57 genset replacement on the 6th July 2017, the main switchboard's internal condition, design, busbar location and connection points were examined as part of the preparatory works for the "weak" cables replacement. It was noted that the cables were largely still intact and in relatively good condition. There were no apparent signs of overheating or damage. The connection points are noted to be in fair condition.

- [19] As stated by [omitted] in the 28 November 2016 email, the Meads Road Generator was, after it was installed, limited to 31% of its output which limited its output to the rating of the supply cable, if the Generator was operating. It was not clear how long those restrictions remained in place. The 31 July 2017 report noted that the cables had not, as at the date of the report, been replaced or upgraded but that the cables were in good condition.
- [20] There were no reported supply issues with the Mead Road Generator, or the supply cable, following the completion of the Respondent's work. The Generator was, as noted above, moved to another location at the Camp.
- [21] Notwithstanding issues being raised on 28 November 2016, the day after the install had been complete and a power supply connected, a complaint about the Respondent's prescribed electrical work was not made until November 2018.
- [22] Mr Doust provided his opinion that if the current draw was greater than the cable's rating, then it would heat. The protective insulation was then at risk of melting and igniting. He accepted that his opinion was related to the potential current draw and that restricting the output might have mitigated the risk.
- [23] The Respondent gave evidence that the Meads Road Generator, if it was called upon to operate during a distribution network outage, would match the demand that was being supplied by the distribution network. He stated that the draw from the Generator would, therefore, not be greater than 160amps, the measured peak demand. He further stated that if there had been evidence of damage or deterioration to the supply cable, he would not have continued with the work.

- [24] Mr Chopping, who provided several written opinions, noted that the installation was in an unsafe condition prior to the Respondent carrying out his prescribed electrical work as a result of the pre-existing underrated cables and that the installation of the Mead Road Generator did not change the condition of the installation. His opinion was that the Respondent had not created an unsafe installation or contributed to the installation being unsafe. He also noted that as the maximum demand was only 160amps there were no safety issues. Mr Chopping's opinion was that the Respondent had done what was required of him in that he had noted the issue and had brought it to NZDF's attention.
- [25] The Board also received evidence that if the maximum or peak demand was to be increased through additional load being added, then a process would have to be followed to assess the capability of the infrastructure to deal with the increase. Specifically, the additional load could require an upgrade in the supply cables.

Legal Principles

Serious Harm and Significant Property Damage

- [26] The First Alleged Offence was laid in the alternatives of negligently creating a risk of serious harm or significant property damage, carrying out or causing to be carried out in a negligent or incompetent manner or in a manner contrary to an enactment.
- [27] To make a finding on the First Alternative, the Board must make a finding that there was a risk of serious harm or significant property damage. Serious harm is defined in section 2 of the Act. It means:
- (a) *death; or*
 - (b) *injury that consists of or includes loss of consciousness; or*
 - (c) *a notifiable injury or illness as defined in section 23 of the Health and Safety at Work Act 2015⁶.*
- [28] Significant property damage is not defined in the Act. Section 16(1)(b)(ii) of the Act, which relates to notification of accidents, also refers to serious harm and to property damage. In respect of damage it requires notification where there is:
- damage to any place or part of a place that renders that place or that part of that place unusable for any purpose for which it was used or designed to be used before that accident.*
- [29] As section 16 refers to both serious harm and to damage the Board considers significant property damage in section 143(b)(ii) should be interpreted in line with the definition in section 16(1)(b)(ii).
- [30] Actual serious harm or significant property damage need not occur. There need only be a risk that either might occur. The risk must be real in that there needs to be a

6

material or substantial possibility, chance or likelihood that serious harm or significant property damage will occur. A real risk has also been described as one that a reasonable person would not brush aside as being far-fetched or fanciful⁷.

Negligence and/or Incompetence

[31] The First Alternative also requires that the Respondent be found to have been negligent. The Second Alternative relates to negligence and/or incompetence. There is no statutory definition of the terms negligence or incompetence. Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ 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.

[32] Negligence is 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 being inquired into. This is described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

[33] 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*¹¹ it was stated as "*an inability to do the job*".

[34] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². 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.

[35] 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 Act¹³. 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

⁷ *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹³ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

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 practitioner¹⁴.

[36] 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.]*

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

[38] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ 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

[39] Contrary to an enactment is the least serious of the alternatives. Unlike the other alternatives, all that need be proven is that the relevant enactment has been breached – in the instance the Electricity (Safety) Regulations 2010. The charge is a form of strict liability offence in that it is liability without fault. Negligence need not be proved¹⁶.

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁵ [2001] NZAR 74

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208

Certification

- [40] The final charge relates to the provision of a false or misleading return. In determining whether a return is false or misleading is a question of fact to be decided objectively and the intention of the issuer is irrelevant¹⁷.
- [41] The returns referred to are issued under the Regulations. There is a requirement that an Electrical Safety Certificate be issued for all prescribed electrical work. It must contain a statement to the effect that the installation or part installation is connected to a power supply and is safe to use. There is also a requirement that a Certificate of Compliance is issued for high and general risk prescribed electrical work. A Certificate of Compliance must state that the prescribed electrical work has been done lawfully and safely and that the information in the certificate is correct.

Board's Findings

- [42] The Board has decided that the Respondent **has not** committed a disciplinary offence.
- [43] The Board took the following factors into account in coming to its decision:
- (a) the underrated cable was a pre-existing non-compliant condition;
 - (b) the cable was rated for 250amps;
 - (c) the maximum measured demand was 160amps which was within the cable's rating;
 - (d) the Meads Road Generator had been set at 31% of its output which brought the current output within the cable's rating;
 - (e) the risk was one of "potential demand". There was no evidence of actual demand exceeding the cable's rating;
 - (f) there was no evidence of cable damage or deterioration as a result currents in excess of the cable's rating notwithstanding that it had been in use for approximately ten years; and
 - (g) if maximum demand was increased by way of additional load being added then an assessment of the infrastructure capability would have been carried out.
- [44] The risk that the cable might overheat as a result of currents that exceeded its rating was ever-present as the cable supplied the installation from the distribution network. The risk of overheating when the Meads Road Generator was operating was limited to those periods when there was a distribution network outage.

¹⁷ *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1

- [45] The Respondent did not cause the issue. Nor did he exacerbate it. If anything, he made the connection between the Meads Road Generator and the ATS safer by upgrading the cable connections between the two.
- [46] The Respondent did become aware of the underrated cable issue when he carried out his work. He notified Spotless who was contracted to maintain the NZDF Camp. Another NZDF contractor was also aware of the issue, and he also raised it with NZDF.
- [47] The question for the Board was whether the Respondent should have done more than just raise the issue with Spotless. In this respect, there is a requirement under Regulation 19 of the Safety Regulations to notify both WorkSafe and the owner or occupier of a property if an electrical worker, when carrying out prescribed electrical work, if there are reasonable grounds to believe that there is an immediate danger to life or property. Given the factors outlined in paragraph [43] above, the Board did not consider that the cable rating issue came within the parameters of regulation 19.
- [48] The Board did consider that the Respondent should have raised the issue in writing rather than just verbally. Such a course of action would have afforded him a degree of protection by way of an audit trail. It may have resulted in greater weight being placed on the notice by the recipient. Notwithstanding, NZDF was advised of the issue in writing by [omitted], but no action was taken. In this respect, if the underrating was as serious as was alleged, then the Board would have expected steps to have been taken to address the issue.
- [49] The Board further notes that the installation did not come within definitions of electrically safe and unsafe in regulation 5 of the Safety Regulations:

5 Meanings of electrically safe and electrically unsafe

In these regulations, unless the context otherwise requires—

electrically safe means, in relation to works, installations, fittings, appliances, and associated equipment, that there is no significant risk that a person or property will be injured or damaged by dangers arising, directly or indirectly, from the use of, or passage of electricity through, the works, installations, fittings, appliances, or associated equipment

electrically unsafe means, in relation to works, installations, fittings, appliances, and associated equipment, that there is a significant risk that a person may suffer serious harm, or that property may suffer significant damage, as a result of dangers arising, directly or indirectly, from the use of, or passage of electricity through, the works, installations, fittings, appliances, or associated equipment.

- [50] As noted, the definitions refer to a significant risk, but within the context of a significant risk of injury to persons or of damage to property. Once again, taking the factors in paragraph [43] herein into account, the Board finds that there was not a

significant risk that a person might suffer serious harm, or that property may suffer significant damage.

- [51] Given the above, the Board has decided that whilst it would have been advisable for the Respondent to have issued written advice, he was not obligated to take any actions over and above those that he did take.
- [52] Finally, the Board did note that the Respondent had treated the work as “general risk” under regulation 6A of the Safety Regulations. The Board was of the opinion that the work was “high risk” and that it should, as a result, have been inspected and certified in accordance with the “high risk” requirements in the Safety Regulations. The reason the Board considered it was “high risk” was that it was not “maintenance or replacement” as the Meads Road Generator had a higher output capacity. The replacement cable also had different characteristics. As such, the prescribed electrical work was not “low risk”. Furthermore, the work was noted in the Certificate of Compliance as having been carried out under Part 1 of AS/NZS 3000. Under regulation 6A(2)(a)(i) prescribed electrical work that is not “low risk” is “high risk” if the installation does not, or will not, comply with Part 2 of AS/NZS 3000. Given the certification that it was completed under Part 1 it was “high risk”. It should have been inspected in accordance with regulation 70.
- [53] The failure to identify the work as “high risk” and to have it inspected was not a matter that was put before the Board. As such, it cannot take any action with regard to it. The Respondent is cautioned, however, to take care in the future and to correctly identify the risk category of the prescribed electrical work as it is important that “high risk” work is correctly identified and that inspections are carried out on it so as to provide the added protection that the inspection regime affords.

Right of Appeal

- [54] The right to appeal Board decisions is provided for in section 147ZA and 147ZB of the Actⁱ.

Signed and dated this 15th day of January 2021



Mr M Orange
Presiding Member

ⁱ **Section 147ZA Appeals**

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- (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.*