



Western Australia

Electricity Referee and Dispute Resolution Regulations 1997

Compare between:

[01 Apr 2006, 01-b0-05] and [01 Jul 2007, 01-c0-09]

Western Australia

Electricity Corporation Act 1994

Electricity Referee and Dispute Resolution Regulations 1997

Part 1 — Preliminary

1. Citation

These regulations may be cited as the *Electricity Referee and Dispute Resolution Regulations 1997*¹.

2. Commencement

These regulations come into operation on 1 July 1997.

3. Definitions

In these regulations unless the contrary intention appears —

“access agreement” means —

- (a) an access agreement as defined in the Transmission Regulations; or
- (b) a distribution access agreement as defined in the Distribution Regulations;

“access services” means —

- (a) access services as defined in the Transmission Regulations; or

(b) distribution access services as defined in the Distribution Regulations;

“**Act**” means the *Electricity Transmission and Distribution Systems (Access) Act 1994*;

“**acting referee**” means a person appointed under regulation to act in the office of electricity referee;

“**business day**” means any day other than a Saturday, Sunday and any day that is a public holiday or bank holiday in the Perth Metropolitan area;

“**connection services**” has the same meaning as in the Transmission Regulations or the Distribution Regulations;

“**corporation**” has the same meaning as in the Act;

“**Court**” means the Supreme Court of Western Australia;

“**determination**” means a determination of the referee, whether interim or final, and includes an award, order and direction;

“**dispute**” means any dispute or difference concerning —

- (a) the construction of;
- (b) anything contained in, connected with or arising out of or in relation to; or
- (c) the rights, obligations, duties or liabilities of a party under,

the Act, these regulations, the Transmission Regulations, the Distribution Regulations or an access agreement;

“**dispute notice**” means any written notice given by one party to a dispute to the other party or parties which describes the nature of the dispute between them and is stated to be a dispute notice for the purposes of regulation 5 or 35 as the case may be;

“**Distribution Regulations**” means the *Electricity Distribution Regulations 1997*;

“**exclusive jurisdiction**” means the jurisdiction granted to the referee by regulations 4 and 21(1);

“electricity distribution network” means the electricity distribution system defined in section 89 of the Act;

“electricity transmission network” means the electricity transmission system defined in section 89 of the Act;

“Judge” means a single judge of the Court;

“misconduct” includes corruption, fraud, partiality, bias or lack of independence from a party to a dispute;

“new connection” means an exempt connection as defined in the Transmission Regulations or the Distribution Regulations;

“non-prescribed dispute” means a dispute that is not a prescribed dispute;

“party” means a party to any dispute or proceedings, and includes any person claiming through or under a party, and also includes any permitted representative of that party;

“prescribed dispute” means any dispute dealing with any of the following —

- (a) the obligations referred to in regulation 4 and whether or not a corporation —
 - (i) has complied with the obligations imposed on it; and
 - (ii) has properly exercised any power granted to it,

by Schedule 5 or 6, the Transmission Regulations or the Distribution Regulations (but not any term of an access agreement, including the Transmission Regulations or the Distribution Regulations to the extent that they have effect as a term of an access agreement) or any other written law that relates to access to or the granting of capacity in the electricity transmission network or the electricity distribution network or the prices payable for such access or grant;

- (b) prices;

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- (c) enhancements to or expansion of the electricity transmission network or the electricity distribution network, including capital contribution;
- (d) electricity transmission capacity or electricity distribution capacity, including new capacity, spare capacity, and capacity committed under regulation 52 of the Distribution Regulations;
- (e) the provision of connection services using a new connection; and
- (f) a technical code;

“prices” means prices, charges and pricing methods determined or adopted by a corporation from time to time in respect of the provision of access services;

“proceedings” means any proceedings before the referee whether final or interlocutory, and includes any application to the referee in connection with or at any stage of proceedings, and also includes the making of a determination;

“prospective user” means an applicant for access to capacity or any person of whom a corporation is aware who is in good faith preparing or has foreshadowed an application for access to capacity;

“reasonable and prudent person” means a person acting in good faith with the intention of performing his or her obligations under the Act, these regulations, the Transmission Regulations, the Distribution Regulations and any access agreement and who in so doing and in the general conduct of his or her undertaking exercises that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be exercised by a skilled and experienced person complying with recognised standards and applicable law engaged in the same type of undertaking under the same or similar circumstances and conditions;

“referee” means the person appointed by the Minister under regulation 10 to the office of electricity referee and includes an acting referee;

“Schedule” means a Schedule to the Act;

“summons” means a summons issued under regulation 39;

“technical code” means a technical code prepared from time to time by a corporation under regulation 26 of the Transmission Regulations or a distribution technical code prepared from time to time by a corporation under regulation 28 of the Distribution Regulations;

“Transmission Regulations” means the *Electricity Transmission Regulations 1996*.

[Regulation 3 amended in Gazette 31 Mar 2006 p. 1323 and 1324.]

Part 2 — Enforcement of obligations

4. Obligations enforceable before referee only

For the purposes of section 94(1) of the Act, all of the obligations imposed on a corporation by Part 6 of the Act and Schedules 5 and 6 with respect to access to and pricing for, electricity transmission capacity or electricity distribution capacity are enforceable by proceedings before the referee and are not enforceable by civil proceedings in a court.

[Regulation 4 amended in Gazette 31 Mar 2006 p. 1325.]

Part 3 — Dispute resolution procedures

5. Parties to attempt to resolve disputes

- (1) Despite the terms of any access agreement if a dispute arises between parties, a party must if it wishes to resolve the dispute in accordance with these regulations give a dispute notice to the other parties to the dispute.
- (2) Following receipt of a dispute notice given under subregulation (1), the parties to the dispute must cause authorised officers of the parties to meet and to use all reasonable endeavours to resolve the dispute.
- (3) If the dispute is not resolved within 10 business days of the date of receipt of the dispute notice given under subregulation (1), the parties must within a further 2 business days by written notice appoint senior personnel (or representatives) to negotiate on behalf of the parties.
- (4) Each party must advise the other parties in writing of the identity of the appointed representatives.
- (5) The appointed representatives under subregulation (3), must be appointed as attorneys of the parties with full power to bind the parties in contract in respect of any resolution of the dispute and to execute such instruments as are reasonably necessary to record and give effect to any agreement so reached.
- (6) Unless otherwise agreed by the parties, the appointed representatives must meet for not less than 5 consecutive business days (or such shorter period if agreement is reached earlier).
- (7) The first day of these meetings must be within 20 business days of the day on which the dispute notice given under subregulation (1) is received.

6. Disposition of unresolved prescribed disputes

If a prescribed dispute remains unresolved at the conclusion of meetings held under regulation 5(6), it is to be dealt with under Parts 5 to 8.

7. Resolution of other disputes

- (1) Subject to subregulation (2), if a non-prescribed dispute remains unresolved at the conclusion of meetings held under regulation 5(6), it must be dealt with by arbitration under this regulation.
- (2) If a non-prescribed dispute between a corporation and a user remains unresolved at the conclusion of meetings held under regulation 5(6) and the relevant access agreement contains terms providing for how such a dispute is to be dealt with, the dispute must be dealt with in accordance with those terms.
- (3) A party that requires that a non-prescribed dispute be dealt with by arbitration under this regulation, must give notice, (“**the arbitration notice**”) to the other party specifying with reasonable particularity the matter in dispute and the dispute is by that notice referred to arbitration of a single arbitrator in accordance with this regulation.
- (4) If the parties cannot agree on a person to be arbitrator, either party may request the President for the time being of the Law Society of Western Australia to nominate a person to be arbitrator.
- (5) In any arbitration —
 - (a) the proceedings are to be conducted generally in accordance with the provisions of the *Commercial Arbitration Act 1985* as modified by this regulation;
 - (b) a party may be represented by a legal practitioner; and
 - (c) the proceedings are to be conducted in Perth.

- (6) In conducting proceedings, the arbitrator is not to be bound by the rules of evidence.
- (7) The arbitrator must not order any of the parties to take any steps to achieve a settlement of the dispute being arbitrated.
- (8) A party to the arbitration proceedings may —
 - (a) apply to a Judge for the determination of any question of law that may arise in the course of the arbitration; or
 - (b) appeal to a Judge on any question of law arising out of or by an arbitrator.
- (9) Subject to these regulations, the arbitrator has all the powers of an arbitrator under the *Commercial Arbitration Act 1985* and may —
 - (a) award such interest as he or she considers appropriate;
 - (b) if a party has overpaid another, whether under a mistake of law or fact order repayment of the sum overpaid together with the interest; and
 - (c) rectify any term of an access agreement so as to conform to the true intention of the parties, but any rectification must comply with the Act, these regulations and the principles of general law applicable to the rectification of contracts.

[Regulation 7 amended in Gazette 31 Mar 2006 p. 1325.]

8. Suspension of time periods

- (1) The periods of time referred to in regulations 8(5), 9(4)(b), 10(1), 11(1) and 11(7) of the Transmission Regulations cease to run, if —
 - (a) in the case of regulations 8(5), 9(4)(b), 10(1) and 11(1), the person to whom a corporation makes a request under regulation 9(1) of those regulations brings a dispute as to whether or not the information can be requested under regulation 9(3) of those regulations; and

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- (b) in the case of regulation 11(7), if the applicant brings a dispute concerning the terms of an access offer within the period referred to in regulation 11(7),

until the dispute is resolved.

- (2) The periods of time referred to in regulations 8(7), 9(4)(b), 10(1), 11(1) and 11(7) of the Distribution Regulations cease to run, if —

- (a) in the case of regulations 8(7), 9(4)(b), 10(1) and 11(1), the person to whom a corporation makes a request under regulation 9(1) of those regulations brings a dispute as to whether or not the information can be requested under regulation 9(3) of those regulations; and

- (b) in the case of regulation 11(7), if the applicant brings a dispute concerning the terms of an access offer within the period referred to in regulation 11(7),

until the dispute is resolved.

[Regulation 8 amended in Gazette 31 Mar 2006 p. 1325.]

Part 4 — Appointment of referee and administration

9. Office of electricity referee created

An office of electricity referee is created.

10. Appointment of referee

- (1) The Minister is to appoint a suitably experienced person to the office of electricity referee.
- (2) The Minister may delay the appointment of a person to the office of electricity referee until he or she receives notification of a dispute under regulation 36.
- (3) Subject to this Part the referee —
 - (a) holds office for a period, not exceeding 3 years, fixed by the instrument of appointment; and
 - (b) is eligible for one further appointment.
- (4) The referee is not required to devote the whole of his or her time to the duties of the office.
- (5) Subject to this Part, the Minister may determine other terms and conditions of service (if any) that apply to the office of electricity referee.

11. Remuneration

The referee is entitled to be paid such remuneration and allowances as are determined by the Minister.

12. Resignation

The referee may resign from office by a signed notice or resignation addressed to the Minister and the resignation takes effect on the day on which the notice is received by the Minister or on such later day as is specified in the notice.

13. Suspension and removal of referee

- (1) If the Minister is satisfied that the referee —
- (a) is physically or mentally incapable of performing the duties of the office of referee;
 - (b) has shown incompetence or neglect in performing those duties; or
 - (c) has been guilty of misbehaviour,
- the Minister may suspend the referee from office.
- (2) In subregulation (1)(c), misbehaviour includes conduct that renders the referee unfit to hold office as referee whether or not the conduct relates to any function of the office.
- (3) After being suspended from office under subregulation (1) the referee is entitled to be restored to office unless —
- (a) a statement of the grounds of suspension is laid before each House of Parliament during the first 7 sitting days of that House following the suspension; and
 - (b) each House of Parliament, during the session in which the statement is so laid, and within 30 days of it being so laid, passes an address praying for the removal of the referee from office.
- (4) If the referee is suspended from office under subregulation (1) and is not restored to office under subregulation (3), the office of referee becomes vacant.

14. Completion of matters commenced

Despite the fact that the term of office of the referee has expired, or that he or she has resigned, the referee may continue in office for the purpose of completing the determination of any dispute that has been commenced before that expiry or resignation, unless the Minister otherwise directs.

15. Acting referee

- (1) The Minister may appoint a person to act in the office of referee whenever the office is vacant or a referee is suspended or disqualified or otherwise is unable to act in the office.
- (2) These regulations, other than regulation 10(3), apply to an acting referee as though he or she were a referee.
- (3) An acting referee holds office —
 - (a) in the case of a vacancy in the office of referee, until the appointment of a new referee; or
 - (b) in the case of appointment on the suspension, disqualification or inability to act of the referee, for the duration of that suspension, disqualification or inability.
- (4) A person may be appointed as an acting referee despite the fact that the person has held that position in the past.

16. Administration

- (1) The referee may make arrangements for the provision of staff and facilities as he or she thinks fit.
- (2) The referee may by arrangement with the relevant Minister on such terms and conditions as may be agreed make use of —
 - (a) the services of any officer or employee employed in the public sector (as that term is defined in the *Public Sector Management Act 1994*); or
 - (b) the facilities of a Department or State instrumentality.

17. Liability of referee

- (1) Subject only to subregulation (2), the referee is not liable and is immune from all claims for, in respect of, or arising out of any thing he or she does or omits to do in the capacity of referee.
- (2) Nothing in this regulation affects the referee's liability for fraud.

Part 5 — Jurisdiction and powers of referee

18. Referee bound by the Act and the regulations

The referee is not to make a determination that is inconsistent with the Act, these regulations, the Transmission Regulations or the Distribution Regulations.

19. Referee is not an arbitrator

The referee is not an arbitrator within the meaning of the *Commercial Arbitration Act 1985*, and the dispute resolution process is not an arbitration within the meaning of that Act.

20. Referee not a regulator

Any question that arises for determination in the course of proceedings is to be determined according to law and the referee is not to —

- (a) review the merits or otherwise of any decision, act or omission by any party which is lawfully made, done or omitted; or
- (b) make a determination in respect of any matter not subject to a dispute unless authorised to do so under regulation 24, 25 or 33.

21. Jurisdiction over disputes

- (1) The referee has jurisdiction, exclusive of the jurisdiction of courts and other tribunals, to hear and determine any prescribed dispute that remains unresolved at the conclusion of meetings held under regulation 5(6).
- (2) The referee has jurisdiction to hear and determine any non-prescribed dispute between a corporation and a user if the dispute remains unresolved at the conclusion of meetings held under regulation 5(6) and the terms of the relevant access agreement provide for the dispute to be dealt with by the referee.

[Regulation 21 amended in Gazette 31 Mar 2006 p. 1324.]

22. Exceptions to referee's exclusive jurisdiction over prescribed disputes

A grant of exclusive jurisdiction to the referee under these regulations does not affect the rights of appeal, of judicial review, and to refer questions of law to a Judge under Part 8.

23. Referee may disqualify himself or herself

If at any time the referee believes that —

- (a) his or her hearing or determination of a dispute would or might result in misconduct by the referee;
- (b) there is a real danger of undue influence being exercised in relation to the referee; or
- (c) the referee is unsuitable to deal with the particular dispute,

the referee may, by his or her own motion or on the application of a party, disqualify himself or herself from hearing or determining that dispute.

24. Referee may extend ambit of proceedings regarding prescribed disputes

Where —

- (a) a prescribed dispute between any 2 or more parties is referred to the referee; and
- (b) there is some other prescribed dispute between some or all of those parties,

the referee may, upon application to the referee by any one or more of the parties any time before a final determination is made in relation to the first-mentioned dispute, make an order (on such terms and conditions, if any, as the referee thinks fit) directing that the proceedings be extended so as to include the other prescribed dispute.

25. Referee may extend ambit of consent proceedings

Without limiting the referee's jurisdiction under regulation 24 in respect of prescribed disputes, the referee may with the consent of the parties determine any additional dispute that may be raised by any party by way of further claim, set-off, defence or counterclaim, subject to any conditions as to costs or otherwise that the referee may impose, as long as the additional dispute is within the referee's jurisdiction, whether or not a dispute notice has been given in respect of that additional dispute.

26. Court referral of prescribed disputes

- (1) Where, on the application of any party to proceedings before a court, the court is satisfied that a prescribed dispute between any of the parties to those proceedings is before the court, the court is to order that the prescribed dispute be transferred to and determined by the referee.
- (2) Where the court makes an order under subregulation (1), proceedings before the referee are by force of this regulation to be taken to have been commenced at the date of that order.

27. Jurisdictional disputes to be heard by referee

Any dispute which arises in proceedings before a referee as to the jurisdiction of the referee is to be heard and determined by the referee, and the referee's determination on the matter is subject to appeal in accordance with Part 8.

28. Authority of referee

- (1) Subject to the Act and these regulations and to subregulation (2), the authority of the referee to hear and determine a dispute referred to him or her is irrevocable.
- (2) The parties to a dispute that is not a prescribed dispute may agree unanimously in writing to revoke the referee's authority.

29. Rules of natural justice

The rules of natural justice apply at and in connection with all proceedings.

30. Referee may give practice directions

- (1) The referee may conduct proceedings in such manner as he or she thinks fit and may from time to time give practice directions, whether general or in respect of particular proceedings, regarding all matters relating to the procedure and conduct of proceedings, including without limitation the following —
 - (a) for regulating and prescribing the procedure (including the method of pleading or otherwise defining the issues in a dispute) and the practice to be followed in proceedings before the referee and any matters incidental to or relating to any such procedure or practice;
 - (b) for regulating the sittings of the referee, including the commencement, adjournment and resumption of proceedings;
 - (c) for prescribing matters relating to evidence, including directions that depart from the law of evidence, and directions regulating the means by which particular facts may be proved, the mode in which evidence thereof may be given, the examination, cross-examination and re-examination of witnesses, and the disclosure of the nature and substance of evidence to be given;
 - (d) for the discovery, inspection and production of documents;
 - (e) for the serving and deemed serving of notices or other documents;
 - (f) regarding the manner, timing and costs of publication of determinations;

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- (g) for the setting and determination of time, time limits and extension of time; and
 - (h) for the assessment and taxation of costs, and for the setting of appropriate costs scales.
- (2) The power to give practice directions in subregulation (1) may be exercised at any time and from time to time, and includes the power to alter, annul, or add directions, and to prescribe, alter, annul, or add forms.

31. Miscellaneous powers of the referee

- (1) The referee may of his or her own motion, but only to the extent reasonably necessary to facilitate the determination of a dispute presently before him or her —
- (a) retain the services of any person suitably qualified in any field of expertise to advise the referee in relation to matters within that field of expertise;
 - (b) retain an accountant, and submit to the accountant's examination such accounts connected with the dispute as the referee thinks fit;
 - (c) retain one or more duly qualified legal practitioners as counsel assisting the referee;
 - (d) consult in the absence of the parties with any person whom the referee thinks proper to consult;
 - (e) undertake his or her own investigations and inquiries;
 - (f) cause any maps, plans, models, reports and measurements to be made, written or taken that he or she considers necessary or expedient; and
 - (g) call witnesses.
- (2) A person retained under subregulation (1)(a) may sit with the referee during the hearing of all evidence relating to the person's field of expertise and may take part in the proceedings.
- (3) The referee, in making a determination, may adopt the opinion of any person retained or consulted under subregulation (1)(a),

(b), (c) or (d), after first disclosing the opinion to the parties and receiving the parties' submissions thereon.

- (4) The costs and expenses of —
- (a) any person retained or consulted;
 - (b) any investigations or inquiries undertaken; and
 - (c) any maps, plans, models, reports and measurements made, written or taken,

by or on behalf of the referee under subregulation (1) are to be reasonable and are to be in the referee's discretion and, without limiting that discretion, may be dealt with as part of the costs of the proceedings.

- (5) The term of retainer of any person retained or consulted under this regulation must end no later than the day on which the referee publishes his or her final determination in the proceedings in question.
- (6) Any witness called by the referee under subregulation (1)(g) may be cross-examined by any party, to the same extent (if any) that the party would be entitled to cross-examine that witness if the witness had been called by an opposing party.
- (7) Nothing in this regulation affects the referee's obligation to comply with the rules of natural justice.

32. Referee may dismiss matters

The referee may dismiss any matter before him or her on the grounds that a party's position is wholly without merit, or is vexatious or amounts to an abuse of process of the referee, and that dismissal is a determination for the purposes of the Act, these regulations, the Transmission Regulations, the Distribution Regulations or an access agreement.

33. Referee may consolidate matters

- (1) Where in relation to 2 or more proceedings before the referee it appears to the referee upon the application of any one or more of the parties to those proceedings —
- (a) that some common question of law or fact arises in both or all of them;
 - (b) that the rights to relief claimed in both or all of them are in respect of or arise out of the same transaction or series of transactions; or
 - (c) that for some other reason it is desirable to make an order under this regulation,

the referee may order those proceedings to be consolidated on such terms as he or she thinks just, or may order them to be heard at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

- (2) Nothing in this regulation is to be construed as preventing the parties to 2 or more proceedings before the referee, from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

Part 6 — Commencement and conduct of proceedings

34. Time limitation

- (1) Subject to subregulations (2) and (4), proceedings in respect of any prescribed dispute may only be commenced within 12 months after the occurrence of the act, omission or decision of a corporation or the user or prospective user that is the subject of the dispute.
- (2) Subject to subregulation (4), a proceeding in respect of a prescribed dispute about prices may only be brought by a user within 12 months after an access offer has been made for the provision of access services to the user and before an access agreement is entered into.
- (3) Proceedings in respect of any dispute within the referee's jurisdiction that is not a prescribed dispute may be commenced during any time in which, according to the nature of the dispute in question, proceedings are not time barred under any other written law.
- (4) If there is no referee when a prescribed dispute arises, proceedings may commence outside the time limit in subregulation (1) or (2) as long as a party to the prescribed dispute has notified the Minister within 12 months after the occurrence of the act, or omission or decision of a corporation or the user or the prospective user or the access offer which is the subject of the dispute.

[Regulation 34 amended in Gazette 31 Mar 2006 p. 1325.]

35. Referral of prescribed disputes

A party to any prescribed dispute may at any time after conclusion of the meetings held under regulation 5(6), give to the other party or parties to the dispute a dispute notice, and must at the same time lodge with the referee a copy of such notice, and if after 5 business days of the lodging of the notice

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with the referee the dispute is not settled by agreement in writing between the parties then —

- (a) by operation of this regulation, the dispute is referred for hearing and determination by the referee; and
- (b) proceedings before the referee are to be taken to have commenced.

36. Referral of disputes before referee appointed

- (1) If at the time that a prescribed dispute arises the Minister has not appointed a referee under regulation 10, a party to the prescribed dispute may notify the Minister of the nature and details of the prescribed dispute and the Minister is to appoint a referee under regulation 10 as soon as it is practicable to do so.
- (2) If after 5 business days after the appointment of the referee the prescribed dispute is not settled by agreement in writing between the parties then —
 - (a) by operation of this regulation, the dispute is referred for hearing and determination by the referee; and
 - (b) proceedings before the referee are to be taken to have commenced.

37. Referral of non-prescribed disputes

- (1) Subject to the terms of any relevant access agreement, a party to any dispute that is not a prescribed dispute may, if the dispute is within the referee's jurisdiction, at any time after conclusion of the meetings held under regulation 5(6) refer the dispute for hearing and determination by the referee.
- (2) A referral under subregulation (1) must be made in writing and a copy of the relevant access agreement (if any) must be lodged with it.
- (3) When the referral is received by the referee, proceedings before the referee have commenced.

38. Informality and expedition

- (1) Subject to these regulations, proceedings must be conducted with as little formality and technicality, and with as much expedition, as the requirements of these regulations, and a proper hearing and determination of a dispute, permit.
- (2) The referee may from time to time make orders regulating the conduct of proceedings, and regulating parties' conduct in relation to proceedings.
- (3) Orders under subregulation (2) are to be directed toward achieving the objectives of subregulation (1).
- (4) An order under subregulation (2) is not a determination, and must be consistent with the Act, these regulations, the Transmission Regulations, the Distribution Regulations and any practice directions given by the referee under regulation 30.
- (5) The parties to a dispute must at all times conduct themselves in a manner which is directed toward achieving the objectives of subregulation (1).

39. Referee may issue summons

- (1) The referee may, of his or her own motion or on the application of any party, issue a written summons requiring a person —
 - (a) to appear before the referee to give evidence, or to produce specified documents, or to do both; and
 - (b) to attend proceedings from day to day unless excused, or released from further attendance, by the referee.
- (2) A summons may be issued to a person under subregulation (1) whether or not the person is a party to the dispute.
- (3) A summons issued under subregulation (1) has the same force and effect as a subpoena issued by the Court and may be enforced by the referee in the same manner.

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- (4) If a party to a dispute —
- (a) refuses or fails to attend before the referee for examination when required under a summons by the referee to do so; or
 - (b) fails within the time specified by the referee or, if no time is so specified, within a reasonable time to comply with the requirement of the referee,

the referee may continue with the proceeding in default of appearance or of any other act by the party.

40. Protection and liabilities of witnesses

A witness summoned to attend or appearing before the referee has the same protection and is subject to the same liabilities as a witness in any case tried in the Court in any civil or criminal proceedings.

41. Evidence before referee

- (1) Evidence before the referee —
- (a) may be given orally or in writing; and
 - (b) must, if the referee so requires, be given on oath or affirmation or by affidavit.
- (2) The referee may administer an oath or affirmation or take an affidavit for the purposes of proceedings.
- (3) The referee in conducting proceedings is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as he or she thinks fit.
- (4) The referee may make orders as he or she thinks fit for the remuneration of witnesses in accordance with the rules set out in Item 30 of Schedule 4 to the *Rules of the Supreme Court 1971* as if the proceedings conducted before him or her had been conducted before the Court.

42. Representation

- (1) A party to a dispute may, in any proceedings, be represented by a duly qualified legal practitioner or other representative.
- (2) The referee may require the parties to a dispute to attend a conference in the absence of their legal representatives or other representatives.
- (3) To the extent that a provision of an access agreement or other agreement purports to limit or exclude any party's right to legal representation in any proceedings, that provision is of no effect.

43. Effect of appointment of new referee on evidence previously given and awards and determinations previously made

- (1) Where a new referee is appointed in place of a previous referee who has begun but not completed the hearing and determination of a dispute —
 - (a) the new referee may order the proceedings to be re-heard —
 - (i) in full, in which case all evidence heard by the previous referee is to be disregarded by the new referee; or
 - (ii) in part, in which case any evidence heard by the previous referee during the parts of the proceedings which are re-heard is to be disregarded by the new referee;
 - (b) if no order is made under paragraph (a), then the proceedings are to continue as though the new referee had been present from the commencement of the proceedings;
 - (c) if an order is made under paragraph (a)(ii), then —
 - (i) the proceedings are to continue as though the new referee had been present during the earlier proceedings; and

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- (ii) the new referee is to treat any evidence given, document produced or thing done in the course of the earlier proceedings in the same manner in all respects as if it had been given, produced or done in the course of the proceedings conducted by the new referee;
 - (d) any interim determination made in the course of the earlier proceedings is to be taken to have been made by the new referee; and
 - (e) the new referee may adopt and act on any determination of a matter made in the course of the earlier proceedings without applying his or her own judgment to the matter.
- (2) This regulation has effect subject to regulation 14.
- (3) In subregulation (1) —
“**earlier proceedings**” means the proceedings or part of the proceedings that the new referee does not order to be re-heard under subregulation (1)(a)(ii).

44. Confidentiality

- (1) All proceedings are to be conducted in private.
- (2) Subject to subregulation (6) information that is identified by a party as confidential before being disclosed by that party in the course of any proceedings relating to a dispute that is not a prescribed dispute, is to be kept confidential by the other parties and their advisers and by the referee and any person retained or consulted by the referee, for such period as may be reasonably required by the party disclosing the confidential information.
- (3) Information that is identified by a party as confidential before being disclosed by any party in the course of proceedings relating to a prescribed dispute, is to be kept confidential —
 - (a) by the other parties and their advisers and by any person retained or consulted by the referee, except as otherwise

agreed between the parties or directed by the referee;
and

(b) subject to subregulations (4) and (6), by the referee,

for such period as may be reasonably required by the party disclosing the confidential information.

(4) The referee in publishing his or her reasons under regulation 52 is to —

(a) determine whether information identified as confidential under subregulation (3) has been reasonably so identified; and

(b) if it is practical to do so and so far as it is consistent with such publication, endeavour to protect any information reasonably identified as confidential and disclosed by any party in the course of proceedings,

but the referee or any person retained or consulted by the referee is not liable in respect of any loss or damage suffered by any person by reason of the referee's failure to protect such information.

(5) An action for damages lies against any person (other than the referee) in respect of any breach by that person of subregulation (2) or (3).

(6) Nothing in this regulation prevents the disclosure of information in any circumstances permitted by regulation 14(4) of the Transmission Regulations or regulation 14(4) of the Distribution Regulations.

45. Death of a party

Where a party to a dispute dies, any proceedings before the referee are not to be discharged (either as respects the deceased or any other party) and the proceedings are to continue by or against the personal representative of the deceased.

46. Duties of parties

The parties to proceedings before the referee must at all times do all things that the referee requires to enable a just determination to be made and a party must not —

- (a) do or refrain from doing any thing; or
- (b) cause any thing to be done or not to be done,

with the intention of delaying or preventing the making of a determination.

47. Service of notices

Where under these regulations a notice is required or permitted to be served on any person, the notice may be served —

- (a) in the case of a natural person by service on the person or by registered post to the last known address of that person; or
- (b) in the case of a company or other body corporate by service of (or posting by registered post), the notice at the registered office or principal place of business of the company or body corporate.

Part 7 — Determinations, interest and costs

48. Determinations to be made according to precedent

The referee, in making a determination that involves ascertaining the meaning of any provision of the Act, these regulations, the Transmission Regulations, the Distribution Regulations or a technical code —

- (a) must have due regard to any relevant prior determination of the referee; and
 - (b) is bound by any relevant prior judgment of the Court,
- as to the meaning of the provision in question.

49. Determinations that may be made

- (1) The referee may, subject to the Act and these regulations (particularly, but without limitation, regulation 18) make any determination which the referee considers expedient to justly dispose of any proceedings before him or her.
- (2) Without limiting the generality of subregulation (1), the referee may —
 - (a) award damages;
 - (b) order any party to a dispute to do any thing or to refrain from doing any thing, whether permanently or for a specified time;
 - (c) interpret the provisions of any written law or any contract;
 - (d) make a determination ordering specific performance of any contract if a Judge would have power to order specific performance of that contract;
 - (e) determine whether an access agreement or other agreement has been frustrated and the consequences of that frustration;
 - (f) order rectification of an access agreement;

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- (g) subject to section 94 of the Act, make any order which a Judge may make under sections 76, 77, 78 and 79 of the *Fair Trading Act 1987* in relation to any dispute or prescribed dispute; and
- (h) make a declaration that a party has breached a provision of the Transmission Regulations, the Distribution Regulations or a technical code.

50. Limitations on determinations that may be made in certain cases

- (1) The referee has no power to make any determination, requiring a corporation to provide connection services using a new connection or to construct a new connection.
- (2) In respect of a dispute about prices, the referee may only make a determination —
 - (a) determining whether or not a corporation has complied with clause 6(2) of Schedule 5 or clause 6(2) of Schedule 6 and, if it has not complied, ordering that the corporation re-determine prices and that such re-determined prices will apply to the provision of access services under an access agreement as from the date of the referee's determination in respect of that particular user; or
 - (b) ordering a corporation to correct any manifest error in the calculation of charges payable by a user under an access agreement.
- (3) In respect of a dispute about a technical code the referee may only make a determination as to the following —
 - (a) determining whether or not the technical code complies with the Act, the Transmission Regulations or the Distribution Regulations; or

- (b) determining whether or not a party has complied with its obligations under —
 - (i) regulation 26(4) or (5) of the Transmission Regulations or regulation 28(5) or (6) of the Distribution Regulations; or
 - (ii) a determination by a corporation under regulation 26(7) of the Transmission Regulations or regulation 28(8) of the Distribution Regulations,

and, if not, making any order that the referee thinks fit as to damages, or to enforce those regulations or that determination or to prevent continuing or further breaches of those regulations or that determination.

[Regulation 50 amended in Gazette 31 Mar 2006 p. 1323-5.]

51. Form of determinations

The referee must —

- (a) make any determination in writing;
- (b) sign the determination; and
- (c) provide a statement of the reasons for making the determination.

52. Publication of determinations

- (1) The referee must, as soon as possible after making a determination, give copies of that determination to all parties to the dispute.
- (2) The referee must give a copy of every final determination to the Minister.

53. Time limits for making determinations

- (1) The referee must make a determination within a reasonable time, and in any event must do so within 20 business days after the conclusion of the hearing of the proceedings.

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- (2) Despite subregulation (1), the referee may, with the agreement in writing of all parties to a dispute, make a determination later than 20 business days after the conclusion of the hearing of the proceedings.
- (3) Failure by the referee to make a determination within the time limit specified in subregulation (1), in the absence of an agreement referred to in subregulation (2) is a ground for suspension of the referee under regulation 13(1)(b).

54. Interim determinations

The referee may make an interim determination.

55. Consent determinations

- (1) The parties to any dispute may lodge with the referee written consent to the making of a determination in any proceedings before the referee.
- (2) Upon receipt of written consent, the referee may settle and sign the consent determination in accordance with the terms of the consent.
- (3) A party may by notice in writing to the referee withdraw his or her consent at any time before the referee signs the consent determination.
- (4) The consent determination must state that it is made by consent and is to be of the same force and validity as if it had been made after a hearing by the referee.
- (5) If the referee is not satisfied by the written consent that the consent determination should be made, the parties to the dispute are to be notified to appear before the referee to make submissions in support of the written consent.
- (6) The referee may not make any determination by consent that he or she could not have made after hearing the dispute.

56. Power to correct determinations

Where a determination contains —

- (a) a clerical mistake;
- (b) an error arising from an accidental slip or omission;
- (c) a miscalculation of figures or a mistake in the description of any person, thing or matter referred to in the determination; or
- (d) a defect of form,

the referee may correct the determination.

57. Determinations binding on all parties

Subject to regulations 54, 58 and 59, a determination is binding on all parties to the dispute in respect of which it is made.

58. Certain determinations to be of no effect

- (1) If a determination requires a corporation to do or refrain from doing any thing which the corporation, in its discretion as a reasonable and prudent person, certifies in writing to the referee and all other parties to the dispute would jeopardise —
 - (a) the continued safe operation and integrity of —
 - (i) the electricity transmission system; or
 - (ii) the electricity distribution system;
 - or
 - (b) the safety of any person,

the whole of the determination has no effect.

- (2) Any party may within 3 months of that certification apply to the referee for a further determination in respect of the matter and the referee has jurisdiction to make a further determination.

[Regulation 58 amended in Gazette 31 Mar 2006 p. 1324.]

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59. Determinations are subject to the Act

- (1) If a determination requires a corporation to do any thing that under the Act is subject to any approval but —
 - (a) the approval has not been given; or
 - (b) the Minister, under the Act, has directed the corporation not to do that thing,

the whole of the determination has no effect if the corporation certifies in writing to the referee and all other parties to the dispute that the approval has not been granted or that the Minister has made such a direction.

- (2) Any party may within 3 months of that certification apply to the referee for a further determination in respect of the matter and the referee has jurisdiction to make a further determination.

[Regulation 59 amended in Gazette 31 Mar 2006 p. 1324.]

60. Enforcement of determinations

- (1) A determination must be entered as a judgment of the Court, upon presentation to the Registrar of the Court of a copy of the determination signed by the referee, and, on entry, the judgment of the Court is deemed to have been given in terms of the determination.
- (2) A determination may, once entered as a judgment of the Court, be enforced by a Judge in the same manner as a judgment or order of the Court to the same effect.

61. Interest up to making of a determination

The referee has in respect of any proceedings the power to make an order in respect of interest that an arbitrator has under sections 31 and 32 of the *Commercial Arbitration Act 1985*.

62. Costs at discretion of referee

- (1) The costs of proceedings before the referee are to be borne by the unsuccessful party unless the referee considers that the

conduct of a party or the circumstances of the determination are such that it would be equitable for the referee to make any other order as to costs in which case the referee, may —

- (a) by determination, direct to and by whom and in what manner the whole or any part of those costs is to be paid; and
 - (b) tax or settle the amount of costs to be so paid, or any part of those costs, in accordance with regulation 63.
- (2) For the purposes of these regulations the costs of proceedings may include such share of the remuneration of the referee and of the costs of the staff and such facilities under regulation 16 as the referee determines.

63. Taxation

- (1) Any costs of the proceedings (other than the fees or expenses of persons retained or consulted by the referee under regulation 31 which are payable in accordance with an order of the referee and are not taxable) that are directed to be paid by a determination are to be taxed or settled by the referee.
- (2) Costs are to be taxed or settled under subregulation (1) by reference to —
- (a) the scale of costs to be established by the referee; or
 - (b) failing establishment of such scale, by reference to the costs scale applicable to matters brought in the Court and —
 - (i) if such scale does not specially provide for matters in respect of which costs are claimed, the referee may allow costs by way of analogy according to the item in the scale which is most nearly applicable thereto; or
 - (ii) if in the opinion of the referee there is no such item, the costs are to be fixed at such sum as in the opinion of the referee is adequate in the circumstances.

64. No prospective agreement that parties bear their own costs

A provision in an access agreement or other agreement to the effect that the parties or a particular party to future proceedings before the referee are in any event to pay their own or any party's costs of any future proceedings, or any part of those costs, is of no effect.

65. When no provision in a determination for costs

If no provision is made by a determination with respect to the costs of the proceedings, a party to the dispute may, within 10 business days of the determination being given to that party pursuant to regulation 52, apply to the referee for directions as to the payment of those costs, and the referee must, after hearing any party who wishes to be heard, amend the determination by adding to it such directions as the referee may think proper with respect to the costs of the proceedings.

66. Conduct of parties is relevant

The referee, in exercising the discretion as to costs conferred on the referee by regulation 62 —

- (a) must take into account any refusal or failure by a party to the dispute to comply with regulation 46; and
- (b) may take into account any other conduct by a party to the dispute.

Part 8 — Appeals, judicial review and the Court

67. No appeal generally

Other than in accordance with this Part, no appeal lies from a determination.

68. Appeal on questions of law

- (1) An appeal is to lie to a Judge on any question of law arising out of a final determination, and that appeal may be brought by any of the parties to a dispute within 15 business days after the final determination is made, or within such further time as the Judge may allow.
- (2) On the determination of an appeal under subregulation (1), the Judge may by order —
 - (a) confirm, vary or set aside the determination; or
 - (b) remit the determination, together with the Judge's opinion on the question of law which was the subject of the appeal, to the referee for determination.

69. Effect of variation

Where the determination of a referee is varied on an appeal under regulation 68, the determination as varied has effect (except for the purposes of this Part) as if it were the determination of the referee.

70. Stay of execution of determination pending appeal

- (1) Prior to the determination of an appeal, a Judge may make any order that he or she thinks fit relating to the stay or continuation in effect of any final determination or order made by the referee.
- (2) A Judge may by further order revoke, substitute or amend an order under subregulation (1).

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71. Referee may state case for a Judge

- (1) The referee may of his or her own motion at any time before making a final determination refer any question of law raised by the dispute in question to a Judge, and a Judge has jurisdiction to determine that question of law.
- (2) A Judge, on any question of law referred to him or her under this regulation, may make whatever order (if any) as to costs that he or she thinks fit.

72. No exclusion of appeals and references

The rights —

- (a) of appeal under regulation 68; and
- (b) to refer questions of law to a Judge under regulation 71,

cannot be excluded or limited by any agreement, and to the extent that a provision of an access agreement or other agreement purports to limit or exclude any or all of those rights, that provision is of no effect.

Notes

- ¹ This is a reprint as at 7 November 2003 of the *Electricity Referee and Dispute Resolution Regulations 1997*. The following table contains information about the regulations and any reprint.

Compilation table

Citation	Gazettal	Commencement
<i>Electricity Referee and Dispute Resolution Regulations 1997</i>	1 Jul 1997 p. 3297-334	1 Jul 1997 (see r. 2)
Reprint 1: The Electricity Referee and Dispute Resolution Regulations 1997 as at 7 Nov 2003		
<i>Electricity Corporations (Consequential Amendments) Regulations 2006 Pt. 4</i>	31 Mar 2006 p. 1299-57	1 Apr 2006 (see r. 2)
<u>This order was repealed by the Electricity Distribution Access Repeal Order 2007 r. 3 as at 1 Jul 2007 (see r. 2 and Gazette 29 Jun 2007 p. 3194)</u>		