IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-2514
[2018] NZHC 847

BETWEEN	BLUE REACH SERVICES LIMITED and BLUE REACH WIRELESS LIMITED Plaintiffs
AND	SPARK NEW ZEALAND TRADING LIMITED Defendant

Hearing: 23 April 2018

Appearances: M B Wigley for Plaintiffs
Z G Kennedy and J Hambleton for Defendant

Judgment: 30 April 2018

JUDGMENT OF LANG J
[on application to strike-out claim and dismiss proceeding]

This judgment was delivered by me on 30 April 2018 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] In this proceeding Blue Reach Services Limited and Blue Reach Wireless Limited (Blue Reach) allege that Spark New Zealand Trading Limited (Spark) has been guilty of misleading and/or deceptive conduct in terms of s 9 of the Fair Trading Act 1986 (FTA). That conduct is said to have occurred when Spark provided the Commerce Commission (the Commission) with information in support of an application for clearance of a transaction under s 66 of the Commerce Act 1986 (the Commerce Act). The application sought clearance for Spark's proposed acquisition of the management rights to spectrum within the 2300 MHz band.

[2] The Commission gave clearance for the transaction to proceed on 23 March 2016.[1] Spark has now deployed the spectrum to expand its fixed wireless access services across New Zealand.

[3] Blue Reach contends the Commission would not have granted clearance if Spark had provided material that was not false or misleading. Furthermore, it alleges that it would have been the likely acquirer of the rights if the Commission had declined clearance of the sale to Spark. Blue Reach seeks remedies against Spark under s 43 of the FTA. These include an order that Spark transfer the management rights to Blue Reach and/or pay Spark monetary compensation.

[4] Spark has applied for an order that Blue Reach's claim be struck out on the basis that it discloses no tenable cause of action and amounts to an abuse of the Court's process. It advances three arguments in support of the application. They are:

1. Section 106(9) of the Commerce Act provides Spark with immunity to any civil suit that is based on the material it provided to the Commission in support of its application for clearance.

2. The Commerce Act is a code and prescribes exclusive sanctions and remedies for any misleading or deceptive statements that parties may make to the Commission.

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1 *Re Spark New Zealand Trading Ltd* [2016] NZCC 7.

3. Blue Reach is endeavouring to mount an impermissible collateral attack on the Commission's decision to grant clearance.

Strike out: relevant principles

[5] There is no dispute regarding the principles to be applied in the present context. They are to be found in decisions of the Court of Appeal and Supreme Court in *Attorney-General v Prince*[2] and *Couch v Attorney-General*.[3]

[6] In short, the Court is required to proceed on the basis that the plaintiff can prove the pleaded facts. The Court will only strike out a proceeding when the cause of action is so clearly untenable that it cannot succeed or is "so certainly or clearly bad" that it should not be permitted to proceed.[4]

[7] Although the jurisdiction to strike out a proceeding is to be exercised sparingly, the Court may exercise the power under both r 15.1(1)(d) of the High Court Rules 2016 and its inherent jurisdiction.[5]

[8] The Court should be slow to strike out claims in areas of the law that are developing.[6] It should also obviously exercise caution where the facts upon which the plaintiff's claim is based need to be determined at trial.

1. Does s 106(9) of the Commerce Act 1986 provide Spark with immunity from civil suit based on the material it provided to the Commission?

[9] Section 106(9) provides as follows:

> **106 Proceedings privileged**
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> …
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> (9) Anything said, or any information furnished, or any document produced or tendered, or any evidence given by any person to the Commission, shall be privileged in the same manner as if that statement, information, document, or evidence were made, furnished, produced, or given in proceedings in a court.

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2 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).
3 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
4 *Couch v Attorney-General,* above n 3, at [33].
5 *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, [2015] NZAR 1 at [100]-[105].
6 *Couch v Attorney-General,* above n 3, at [33].

…

[10] Spark argues that the word "privileged" in s 106(9) should be interpreted as meaning "immune from civil suit". It contends s 106(9) places a party applying to the Commission for clearance of a proposed transaction in the same position as a witness giving evidence in court. Witnesses who give evidence in court enjoy the privilege of being immune from any form of civil action based on the evidence that they give. As a result, a party who provides the Commission with material in support of an application for clearance enjoys the same privilege.

[11] Blue Reach disagrees. It contends the word "privileged" in s 106(9) does not render parties in Spark's position immune from all civil claims based on material they provide to the Commission. It argues the privilege extends only to immunity from liability in defamation for comments made in such material.

[12] I accept that the courts have been cautious to uphold claims to immunity, particularly in a strike-out context. Mr Wigley reminded me that the majority judgment of the Supreme Court in *Lai v Chamberlains* begins with the following paragraph:[7]

> [1] Access to the Courts for vindication of legal right is part of the rule of law. Immunity from legal suit where there is otherwise a cause of action is exceptional. Immunity may be given by statute, as in New Zealand in respect of personal injuries where other, exclusive, redress is provided. An immunity may attach to status, such as of diplomats or heads of state. All cases of immunity require justification in some public policy sufficient to outweigh the public policy in vindication of legal right.
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> (footnote omitted)

[13] Mr Wigley also referred to the fact that the House of Lords described immunity as being "granted grudgingly" in the following passage in *Darker v Chief Constable of the West Midlands Police*:[8]

> Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in *Rees v Sinclair* [1974] 1 NZLR 180, 187, "The protection

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7 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

8 *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435 (HL) at 453.

> should not be given any wider application than is absolutely necessary in the interests of the administration of justice." Many other authorities contain language to similar effect.

[14] During the hearing both counsel referred me to other statutes in which Parliament has sought to provide a degree of protection for persons dealing with or appearing before judicial and quasi-judicial bodies. In some cases the statute provides for such persons to enjoy the "privileges and immunities" afforded to those who appear in court and in others affords only the "privileges" enjoyed by those persons. It is impossible to see any pattern in the words used. This probably explains why a Full Court of this Court accepted in *De Bres v McCully* that, while there are undoubted similarities between the wording used in such provisions, there is "nothing to indicate any coherent legislative intent in the use of one formula as opposed to another in different statutes".[9] I share the same view. For that reason I do not derive any assistance from the wording used in other statutes.

[15] In *Lai v Chamberlains* the Supreme Court was required to decide whether, as a matter of policy, the immunity from civil liability barristers had previously enjoyed should remain in its current form. Before making that decision the Court was required to interpret s 61 of the Law Practitioners Act 1982, which provided:

> **61 Status of barristers** – subject to this Act, barristers of the Court shall have all the powers, privileges, duties, and responsibilities that barristers have in England.

[16] The majority[10] did not consider it necessary to consider it necessary to consider the extent to which there may be differences between "privileges" and "immunities" in other contexts. They held that the term "privileges" as used in successive Law Practitioner Acts "is apt to cover any immunities which attached to barristers in England".[11] Tipping J reached the same conclusion having regard to dictionary definitions of the word "privilege".[12]

[17] I take a similar view in the present case notwithstanding the fact that s 106(9) of the Commerce Act 1986 does not have a legislative history comparable in any way

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9 *De Bres v McCully* [2004] 1 NZLR 828 (HC) at [19].
10 Elias CJ, Gault and Keith JJ.
11 At [81].
12 At [111]-[113].

with s 61 of the Law Practitioners Act 1982. Furthermore, it is not necessary in the present case to determine whether parties who deal with the Commission enjoy any immunity from civil liability because both parties acknowledge s 106(9) provides a degree of immunity. The area of disagreement relates to the scope of the immunity.

[18] The wording used in s 106(9) persuades me that a party who provides information to the Commission in support of an application for clearance is in an analogous position to that of a witness who gives evidence and produces documents in court. It follows that s 106(9) is designed to provide such parties with the same degree of immunity as that provided to witnesses who give evidence and produce documents in court.

[19] The law as to witness immunity in New Zealand is settled. In *New Zealand Defence Force v Berryman* the Court of Appeal described the principle and the policy reasons on which it is based in the following terms:[13]

> [67] Those who give evidence or make submissions to a court enjoy immunity from suit. The purpose of this immunity is not to encourage dishonest or defamatory submissions or perjury; rather it is to protect parties to litigation, along with their counsel and witnesses, from vexatious litigation. There is also an associated purpose of limiting the scope for re-litigation. All of this, along with the metes and bounds of the immunity, is discussed at length in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL) and *Meadow v General Medical Council* [2007] 1 All ER 1 (CA).

[20] The Court of Appeal went on to confirm that witness immunity is not open ended. It applies only to evidence given in court and necessary preliminaries to that. Furthermore, it provides protection only in relation to civil liability:

> [68] We recognise that the immunity is limited. It is confined to what is said in court and necessary preliminaries to that (see *Darker)*. It is also merely an immunity from civil suit. Thus an expert witness may face professional sanctions in respect of evidence, see for instance *Meadow*. And obviously criminal prosecution for perjury may result from the deliberate giving of false evidence. Claims of malicious prosecution are maintainable even though such a claim might necessarily involve impugning the evidence given during the preceding criminal proceedings. Likewise these principles do not now prevent counsel being sued for negligence, see for instance, *Chamberlains v Lai* [2007] 2 NZLR 7 (SC). In marginal cases, where there is uncertainty as to which side of the line a particular claim falls, the courts should be slow to resort to the strike out or summary judgment jurisdiction.

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13 *New Zealand Defence Force v Berryman* [2008] NZCA 392.

[21] There is currently some debate regarding the extent to which the immunity may now apply to expert witnesses. The Court of Appeal has recently described the law in that area as being unsettled.[14] I do not consider the present case to be analogous to a case involving expert witnesses. Rather, it relates to the material provided to the Commission by an applicant for clearance. I consider that to be analogous to a claimant or applicant giving evidence and producing documents in support of the claim or application.

[22] Mr Wigley for Blue Reach draws my attention to ss 106(1) and (2), which provide as follows:

> **106 Proceedings privileged**
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> (1) No proceedings, civil or criminal, shall lie against the Commission for anything it may do or fail to do in the course of the exercise or intended exercise of its functions, unless it is shown that the Commission acted without reasonable care or in bad faith.
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> (2) No proceedings, civil or criminal, lie against any member of the Commission, or any officer or employee of the Commission, or any member of a committee of the Commission, for anything that person may do or say or fail to do or say in the course of the operations of the Commission, unless it is shown that the person acted in bad faith.
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> …

[23] Mr Wigley submits that Parliament was obviously concerned to ensure the Commission and its staff have complete immunity against claims by persons with whom they deal in carrying out their duties. He contends this supports the argument that the immunity afforded to persons who provide material to the Commission is much more limited.

[24] I agree with this submission to the extent that the subsections provide immunity for the Commission and its staff in relation to both civil and criminal liability. The only exceptions are where it is shown a Commission member has acted without reasonable care or in bad faith, or a staff member has acted in bad faith. Section 106(9) provides a more limited form of immunity because it does not protect persons who provide material to the Commission from criminal sanction. They may be prosecuted

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[14] *EBR Holdings Ltd (in liq) v McLaren Guise Associates* [2016] NZCA 622, [2017] 3 NZLR 589 at [38].

for providing the Commission with false or misleading information under either the Crimes Act 1961 or s 103 of the Commerce Act.

[25] I do not accept, however, that the inclusion of ss 106(1) and (2) means that persons who provide material to the Commission are only immune from claims in defamation. There is nothing in s 106(9) to suggest the scope of the immunity should be restricted in that way. I consider Parliament intended such persons to enjoy immunity from civil liability to the same extent as witnesses who give evidence in court.

[26] Mr Wigley also referred me to several English cases in which the courts have held that immunity did not extend to defamatory statements made to tribunals or bodies other than courts.[15] He also referred me in the same context to the decision of the New Zealand Court of Appeal in *Tertiary Institutes Allied Staff Association Inc v Tahana.*[16] I do not derive any assistance from these cases because none of them involved a statutory provision equivalent or similar to s 106(9).

[27] Mr Wigley placed considerable reliance on observations made by Heath J in *Norbrook Laboratories Ltd v Bomac Laboratories Ltd.*[17] In that case the plaintiff issued a claim under the FTA in relation to allegedly false or misleading statements made by the defendant to the Agricultural Compounds and Veterinary Medicines Group when seeking approval under the Agricultural Compounds and Veterinary Medicines Act 1997 to sell prescription animal remedies. Heath J upheld the claim and in doing so observed:[18]

> … It is important that the Courts support the desirability of accurate information being conveyed to regulatory authorities required to make determinations. In this case the ACVM's determination impinged upon both animal welfare and public health (in the sense that milk or meat from treated cows are likely to enter the food chain) considerations.

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15 *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475 (CA); *O'Connor v Waldron* [1935] AC 76 (PC); *Trapp v Mackie* [1979] 1 All ER 489 (HL).

16 *Tertiary Institutes Allied Staff Association Inc v Tahana* [1998] 1 NZLR 41 (CA).

17 *Norbrook Laboratories Ltd v Bomac Laboratories Ltd* HC Auckland CP241/SW02, 2 December 2002.

18 At [217].

[28] Again, however, the legislation with which *Norbrook* was concerned did not contain a provision comparable to s 106(9). It therefore provides little assistance for present purposes.

[29] I consider there are obvious policy reasons underpinning Parliament's desire to grant immunity to parties who provide material to the Commission. The Commission is a specialist body with acknowledged expertise in discharging its functions under the Commerce Act.[19] It has wide powers to investigate matters within its jurisdiction and to compel persons to provide information or documents.[20] It is responsible for approving or declining trade practices and acquisitions that may affect competition within the market place. It is also responsible for enforcing compliance with the requirements of the Act.

[30] To enable the Commission to carry out these functions Parliament has provided it with the ability to require applicants for clearance to furnish such documents and information as the Commission may specify.[21] It is obviously important that an applicant for clearance is candid and fulsome in the information it provides to the Commission.

[31] Furthermore, the Commission may consult with any person who, in the opinion of the Commission, may be able to assist it in making a determination as to clearance.[22] This means the Commission is not required to rely solely on material supplied to it by an applicant for clearance. Many applicants are in any event likely to have a limited or imperfect knowledge of the ramifications of the proposed transaction within the wider market in which they operate. The Commission may therefore seek further information regarding the effects of the proposed transaction from those who are likely to hold it. These may include the applicant's competitors as well as customers or consumers within the relevant market. It is imperative that such persons know they can respond to the Commission's requests for information free from the fear of subsequent civil action by the applicant or any other party who may be adversely affected by such disclosure. Immunity from civil action provides that reassurance.

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19 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [55].
20 Commerce Act 1986, s 98.
21 Commerce Act, s 68(1).
22 Commerce Act, s 68(5).

This necessarily comes at a cost. That cost is the removal of any ability to obtain redress for any loss that might be caused as a result of the material being provided to the Commission.

[32] For these reasons I consider the position in the present case to be clear. Section 106(9) prevents Blue Reach from bringing any claim against Spark based on the material Spark provided to the Commission in support of its application for clearance. It is not necessary for the facts to be adduced at trial because Blue Reach depends on that material as the basis for its claim. The claim must therefore be struck out as disclosing no tenable cause of action.

[33] This conclusion is sufficient to dispose of the application and the proceeding. In case I am wrong, however, I propose to deal very briefly with Spark's other two arguments.

2. Is the Commerce Act a code that provides exclusive sanctions and remedies relating to misleading or deceptive statements made to the Commission?

[34] In this context Mr Kennedy for Spark referred me to the following observations made by a Full Court of this Court in *Dickson Livestock Associates Ltd v Wrightson Ltd*:[23]

> In our view the Commerce Act and the Fair Trading Act fall into the third class of statutes referred to by Willes J. The Acts are a code each of which provides what conduct is prohibited in the interests of promoting competition in markets or generally in trade, what remedies are available by way of substantial monetary penalties for breach at the suit of the regulatory authority, and for monetary recompense to any individual injured by the breach, and for limitation of time. The statutory intention to provide exclusive remedies is in our view clear. The difficulty of demonstrating why another remedy by way of general tort law with a different time limitation should be available tends to support this interpretation of the statute.

[35] I do not consider these observations to be of great assistance once they are understood within their context. The plaintiff in *Dickson* advanced a tortious claim alleging the defendant had interfered with the plaintiff's economic interests by unlawful conduct. The unlawful conduct relied upon were breaches of the Commerce

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[23] *Dickson Livestock Associates Ltd v Wrightson Ltd* (1999) 6 NZBLC 102,806 (HC) at 102,816.

Act and the FTA. The Court's observations were directed to its view that the Commerce Act and the FTA were exclusive codes and that the plaintiff could only obtain redress for any breaches of them through the remedies contained within them. Blue Reach is not advancing a claim in tort for breach of the FTA It alleges instead that Spark has engaged in conduct that breaches s 9 of the FTA. It also seeks remedies under the FTA.

[36] Next, Mr Kennedy points out that the FTA and the Commerce Act differ in the mental element required to establish breach. A party can engage in misleading or deceptive conduct even where the conduct is unintentional.[24] An applicant for clearance can only be guilty of an offence under s 103 of the Commerce Act, however, where it knowingly provides the Commission with false or misleading information.

[37] I do not consider this argument supports the proposition that an action will not lie under the FTA where the misleading or deceptive conduct relied upon relates to actions taken under the Commerce Act. It merely reflects the fact that a claimant in a civil proceeding bears a lesser onus than does the party who brings criminal proceedings for breach of an enactment.

[38] I accept, however, that practical issues may arise where a claim is advanced under the FTA alleging liability in respect of conduct relating to the Commerce Act 1986. By way of example, it may in some cases be difficult for the Court to determine whether the Commission would have decided the application for clearance differently if Spark had provided it with different information. In other cases, however, the position may be straightforward. I do not consider this issue should result in a claim being struck out prior to trial.

[39] Similarly, I acknowledge it is difficult to see how the Court could make an order under s 43 of the FTA requiring Spark to transfer the management rights to Blue Reach when that might itself be a transaction requiring clearance from the Commission. I am prepared to accept for present purposes, however, that the issue of remedy would generally be determined at trial and not in a strike out application.

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[24] *Norbrook Laboratories Ltd v Bomac Laboratories Ltd,* above n 17, at [214].

[40] I therefore consider it remains theoretically possible for a plaintiff to bring a claim under the FTA for misleading or deceptive conduct towards the Commission but, for the reasons already given, not where the claim is based on material the defendant has provided to the Commission. In practical terms, however, the scope for such claims may be extremely limited.

3. Does the claim amount to a collateral attack on the Commission's decision to grant clearance to the proposed acquisition?

[41] Mr Kennedy submits that Blue Reach's claim amounts to a collateral attack on the Commission's clearance process and the clearance itself. He bases this argument on the proposition that the claim will require the Court to examine the process undertaken by the Commission in considering Spark's application. In particular, the Court will need to examine the material the Commission took into account in order to determine whether it may have come to a different conclusion if Spark had not provided it with information that was false or misleading.

[42] The principles relating to abusive collateral challenge have their origin in the rules of public policy based on fairness to litigants and the need to bring litigation to an end.[25] Among other things they give rise to rules relating to estoppel and res judicata that prevent a party to a final judgment challenging the decision in other proceedings between the parties or their privies.[26]

[43] I accept that Blue Reach's claim would require the Court to undertake the process that Mr Kennedy describes. Assuming Blue Reach can show that Spark provided the Commission with misleading or false information, it will also be necessary for Blue Reach to establish on the balance of probabilities that the Commission would have reached a different view if it had been given the correct information.

[44] Although this creates other issues I do not consider it amounts to a collateral attack on the Commission's decision. Blue Reach does not contend the Commissioner reached the wrong decision based on the material Spark provided. Rather, the claim

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25 *Lai v Chamberlains*, above n 7, at [58].
26 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 909 and 946.

focuses on what the Commission is likely to have done if Spark had not engaged in misleading or deceptive conduct. For that reason I do not consider Blue Reach's claim amounts to a collateral challenge to the Commission's decision to grant clearance to the transaction.

[45] Mr Kennedy acknowledges that not all collateral challenges have been held to be abuse of process. They have been successfully advanced in both criminal and civil proceedings where, for example, the validity of an administrative act or subordinate legislation have been called into question.[27] Mr Kennedy submits, however, that the courts have been reluctant to permit a collateral challenge where there are other more appropriate means of challenging an administrative decision. In the present case Blue Reach had no right of appeal against the Commission's decision to give clearance but Mr Kennedy submits it ought to have sought judicial review if it wished to challenge the decision.

[46] I do not consider this to be an appropriate ground on which to strike the proceeding out. It would normally be considered following trial, when the Court would have the benefit of any explanation Blue Reach might advance for failing to take action earlier.

[47] Mr Kennedy also submitted that the claim would undermine the commercial certainty ss 66 and 69 of the Commerce Act were designed to achieve. Where the Commission has given clearance to an acquisition under s 66, s 69 provides that nothing in s 47 of the Act applies to it. Section 47(1) prohibits any person from acquiring assets or a business that would have, or would be likely to have, the effect of substantially lessening competition in a market.

[48] I agree that this could be a side effect of permitting the claim to proceed. The objective of promoting commercial certainty once clearance has been given may well be one of the reasons why Parliament enacted s 106(9). It may also underlie the fact that the Commission has no power to subsequently revoke a clearance given under

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[27] See the examples cited by Blanchard J in *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 220 (CA) at [47]-[48].

s 66.[28] Without more, however, I do not consider this argument to be sufficient to strike the claim out.

Result

[49] The claim is struck out because it is based solely on material provided to the Commission that is subject to immunity from civil suit by s 106(9) of the Commerce Act.

Costs

[50] Spark is the successful party and is entitled to costs. My initial impression is that costs should be calculated on a Category 2B basis. If either party takes a different view and counsel cannot reach agreement, I will deal with costs on the basis of concise memoranda to be filed as soon as possible.

Lang J

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[28] Compare Commerce Act, s 65D (revocation of clearance given under s 65A relating to cartels).