

EXEMPTION OF LINER SHIPPING FROM COMPETITION LAW

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1 Introduction

We are all schooled by the thinking of Adam Smith: as consumers, we treasure the freedom to choose.¹ The more choices we have the better. More choices mean more sellers are competing for our attention. Our attention can be captured in many ways, but usually in three particular ways: low prices, quality services and innovative products. In the market jungle, sellers must ruthlessly compete against each other in order to survive. They must compete for our attention. This process of competition, unwittingly but importantly, procures the things that consumers want and need. Without competition, the foundations of market economy will collapse and consumers will find themselves beneath that pile of rubble. It is therefore no exaggeration to say that competition is the ‘Magna Carta’ of the free market.²

Competition law is the guardian of that Magna Carta. It seeks to prevent practices that would limit choices and undermine the competition process. Intuitively, competitive law should apply to all industries in the economy. It is therefore very odd that s 44(2) of the *Commerce Act 1986* (NZ) (*‘Commerce Act’*) exempts the liner shipping industry from competition law.³ The oddity is compounded given the industry is responsible for a significant value of New Zealand’s international trade.⁴ Competition in liner shipping has been subject to much debate since the beginning of the twentieth century. The exemption has traditionally been accepted as indispensable to the functioning of the industry. Recent studies have, however, displaced that presumption.⁵ In particular, the recent radical move by the European Union (‘EU’) to remove the exemption raises serious doubts as to that claimed indispensability. This paper thus questions the utility of the exemption in New Zealand.

In this paper, I will first consider the validity of the assumptions underlying the exemption. I will then discuss the possible effects of exposing the industry to competition law, and in particular, the *Commerce Act*. Following that I will examine whether a removal of the exemption would be the optimal solution for deterring anticompetitive behaviour. And finally, I will suggest some reform options that will deal, in a more nuanced way, with the vexing competition problem in the shipping industry.

2 The Rationale for Exemption

The debate surrounding the validity of the exemption focuses on economic arguments. As such it is necessary to examine the competing economic theories favouring and opposing the exemption. Historically, economists have sided with the liner carriers as the economic findings tended to favour the exemption. As a result, the exemption has been enjoyed by carriers for many decades. There are four recurring arguments in support of the exemption: stability, indispensability to trade, potential consumer welfare, and efficiency. I will examine each of the arguments below.

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¹ The benefits of competition and free-choice can be found in many introductory texts on economics. For an interesting and lucid exposition, I suggest Milton Friedman, and Rose Friedman, *Free to choose: a personal statement* (1st Ed, 1980). For an enlightening classical text, I recommend Adam Smith, *An inquiry into the nature and causes of the wealth of nations* (5th Ed, 1904).

² *United States v Topco Associates, Inc* (1972) 405 US 596, 610.

³ *Commerce Act 1986* (NZ), s44(2) provides:

(2) Nothing in this Part of this Act applies—

(a) To the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand or from a place outside New Zealand to a place in New Zealand; or

(b) To any act done to give effect to a provision of a contract, arrangement, or understanding referred to in paragraph (a) of this subsection.

⁴ Ministry of Transport, *Report of the Shipping Industry Review ‘A Future for New Zealand Shipping’* (2001) 19. Approximately 85% of New Zealand’s exports and 75% of its imports by value are carried by sea.

⁵ See generally: OECD Directorate for Science, Technology and Industry, *Division of Transport, Competition Policy in Liner Shipping - Final Report DSTI/DOT* (2002) 2; Australian Productivity Commission *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, No.32 (2005) and European Commission, *White Paper on the Review of Regulation 4056/86 - Applying the EC Competition Rules to Maritime Transport 2003/COMP/18* (COM (2004) 675 final).

2.1 Price Stability

Price stability, according to the carriers, is crucial to the existence of the shipping industry. Price stability has always been central to the carriers' arguments, but a pre-existing problem of instability has never been shown. Rather, it has always been accepted as an article of faith. But if carriers claim that their anticompetitive behaviour would somehow contribute to price stability, they must first show an existing problem of price instability.⁶ Otherwise, the carriers may have just invented a problem and provided a false solution to it.⁷ All industries experience price fluctuations but price fixing is not the answer. Price fluctuations simply reflect the economic reality. Interference with that reality would distort the true price signals in the market. And the wrong signals will 'confuse' the market participants. As a result, the needs on the demand side (shippers and consumers) will not be properly catered, and resources on the supply side (carriers) will be misallocated.

2.2 Indispensability

The indispensability of liner conferences (and price fixing) to trade stability has also been traditionally accepted as an indisputable fact.⁸ Given the indispensability, as the carriers contend, liner conferences must be immune from competition law. Otherwise the stability, growth and existence of maritime trade will be in jeopardy.⁹ Implicit in the argument is that the shipping industry is a unique industry. Amongst other capital-intensive transport industries, it is somehow so unique that trade will come to a halt if it is subject to regulation. With that leverage and uniqueness, the carriers insist that they must override competition law. The *OECD Study on Competition Policy in Liner Shipping* ('OECD report'),¹⁰ however, has expressed doubts upon the self-claimed uniqueness of the industry. The OECD observed that:¹¹

[I]t is more difficult to perceive in which manner liner shipping is more "unique" than any other industries, or why it should be treated more favourably or even differently from other transport providers with respect to price-fixing and rate discussions. The cost structure of the industry is not significantly different from that of other transport industries and returns in liner shipping are similar to those of other scheduled transport providers.

As a result, the OECD recommended its members to 'seriously consider' removing the exemption for price fixing conduct in the liner shipping industry.¹² Subsequent to the OECD report, the European Commission published a white paper to consider repealing its exemption for liner conference.¹³ Echoing the OECD's economic analysis, the European Commission report found that the liner shipping sector exhibits no unique features to justify an anomalous treatment. The cost structure of the industry is not substantially different from other capital intensive sectors.¹⁴ The report also refuted the assumed link between price fixing and stability. It considered the increasing trend of individual service agreements as the true driving force behind price and trade stability. Therefore, it declined to accept that the conference system is crucial to stabilising prices and trade.

Furthermore, carriers have adopted increasing number of alternatives to deal with price and trade instability.¹⁵ This suggests price fixing is not indispensable in achieving stability.¹⁶ The market is capable of producing more effective means of addressing the problem.¹⁷

2.3 Efficiency

Due to the, allegedly, peculiar nature of the maritime transport industry (notably high fixed costs and seasonal demands), carriers argue that efficiency can only be achieved by controlling the capacity for cargo carriage.¹⁸ In

⁶ Luis Ortiz Blanco, *Shipping Conferences under EC Antitrust Law – Criticism of a Legal Paradox* (Hart Publishing, 2007) 528.

⁷ *Ibid.*, 529.

⁸ Francesco Munari, 'Liner Shipping and Antitrust after the repeal of Regulation 4056/86' [2009] *Lloyd's Maritime and Commercial Law Quarterly* 42, 44.

⁹ *Ibid.*

¹⁰ OECD Directorate for Science, Technology and Industry, *Division of Transport, Competition Policy in Liner Shipping - Final Report DSTI/DOT* (2002) 2.

¹¹ *Ibid.*, [187].

¹² *Ibid.*, [201].

¹³ European Commission, *White Paper on the Review of Regulation 4056/86 - Applying the EC Competition Rules to Maritime Transport* 2003/COMP/18 (COM(2004) 675 final).

¹⁴ For example, air freight and rail freight.

¹⁵ For example, increased participation by independent operators, greater ease of 'independent' action by conference carriers, increase in slot chartering agreements, and the massive rise in confidential service contract negotiations.

¹⁶ OECD Directorate for Science, Technology and Industry, above n 10, 69.

¹⁷ *Ibid.*, 69.

¹⁸ Blanco, above n 6, 530.

competition law parlance, this is referred to as capacity fixing. Capacity fixing is in effect price fixing. The free determination of price suffers interference through the manipulation of supply (of services). By reducing supply, the prices charged will rise. The fundamental problem in capacity fixing is that it is insensitive to the actual market conditions. It will always result in excess or under supply, resources are therefore either wasted or not efficiently utilised.

The capacity fixing-efficiency argument is inherently flawed. This is apparent if we compare a liner conference with a natural monopoly.¹⁹ A monopoly is the sole actor in a particular market, and due to its size it may be able to achieve economies of scale. But liner conference is a different creature. It *pretends* to be a monopoly. In reality it is simply a combination of independent firms who choose not to compete against each other. Conferences, therefore, would not produce the economies of scale that is often associated with a true monopoly.²⁰ A true monopolistic market is often considered as inefficient (when compared to a competitive one), but the conference is even more inefficient than a monopolised market. Therefore, carriers are likely to incur costs that are not tailored to market conditions. This will result in excessive costs and so freight rates will be raised to cover those costs.²¹ As such, the rates charged would be considerably higher than that in a competitive market.

Furthermore, consider the structure of a liner conference. It consists of both efficient and inefficient carriers. The freight rates charged *must* cover the cost of the most inefficient of the carriers. Otherwise, there is no incentive for those carriers to participate in the conference. As such, the freight rates are fixed with reference to the most inefficient carrier rather than the most efficient one. The weakest carriers, supposedly weeded out by competition forces, are thereby given shelter and kept alive in a liner conference. The conference system, by its very nature, misallocates resources and causes inefficiency.

2.4 A Transfer of Benefits

Carriers have maintained that the benefits they derive from the exemption can be passed on to shippers and consumers.²² It follows from their argument that the exemption may actually benefit consumers, and so there is no reason to oppose the exemption. This argument is devoid of realism. The extent to which shippers can benefit from the exemption depends on the benevolence of the carriers.²³ If carriers are willing to pass on the benefits in the form of lower freight rates and quality services, then shippers and consumers will benefit from the exemption. Carriers, however, are not charities. I think our faith will be better placed elsewhere, perhaps in the Commerce Commission and market forces.

2.5 A Critique of Recent Findings

2.5.1 Waning Power of the Conference System

Criticisms, however, have been levelled at the OECD report. Although the report recognised that conference power is waning, it declined to accept that the decline was in spite of the existing exemption.²⁴ The OECD instead attributed the decline to the increasing phenomenon of individual service contracts.²⁵ A curious question thus follows: if the power of liner conferences is waning, why do carriers wish to maintain the exemption? On the other hand, if it is indeed waning (which means the detrimental effect may be inconsequential), why is there a need to remove the exemption? A reply to the first question is that the retention of the exemption allows conference carriers to set a common baseline from which to price.²⁶ The benefit of pricing off the baseline is that it will prolong the survival of inefficient carriers. Pricing off the true market equilibrium will drive

¹⁹ Ibid, 531.

²⁰ Ibid.

²¹ Ibid, 530.

²² Australian Productivity Commission, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, No.32 (2005) 143. The Productivity Commission has noted that the exemption allows carriers to benefit from 'making cost savings by achieving efficiencies through coordinating their investment, scheduling and the use of shipping assets in the joint provision of liner shipping services on particular trade routes. Also, by coordinating their assets and joint provision over a number of trade routes, as opposed to concentrating them on one, or a few, trades, carriers can reduce their market risks and benefit from increased scale and scope of their operations. Carriers can also benefit from exercising their collective market power to control freights rates in, and/or the supply of shipping services to, a market'.

²³ Ibid.

²⁴ Jason Chuah, 'Liner Conferences in the EU and the Proposed Review of EC Regulation 4056/86' 2005 *Lloyd's Maritime and Commercial Law Quarterly* 207, 211.

²⁵ OECD Report, above n 10, [121].

²⁶ Ibid, [155].

inefficient carriers out of the market.²⁷ The answer to the second question is that the exemption remains a market distortion nonetheless. It will result in a sub-optimal market condition that we need to improve upon. Therefore, there are no reasons to retain the exemption.

2.5.2 A Lack of Transparency

Further, the report has been criticised for failing to provide transparency.²⁸ For example, the report is unclear as to whether the gradual increases in freight rates relate to conference charges only, or charges agreed upon between independent carriers. The research methodology employed in producing the statistics was also unexplained; the questionnaire and the size of sample data used were not provided.²⁹

It is true that all statistical research suffers certain limitations. The real question, however, is whether they truly mar the broad picture being painted. The broad picture here is that the assumptions of the exemption can no longer be accepted as absolute truth. They have, at least on one type of research methodology, been empirically refuted. And it seems improbable that separate research conducted by the OECD, the European Union and Australia would suffer the same mistake. As experience suggests, recourse to attacks on fine statistics is often a sign of desperation.

2.6 Concluding Remarks

The pendulum that has once swung in favour of the carriers is now swinging towards the shippers. Recent research has cast considerable doubt on the rationale underlying the exemption. Although there are reasons to be sceptical about the statistics given, it seems too compelling that the recent studies of the OECD, the European Union and Australia provided the same result. They have all concluded that the exemption is not indispensable to the functioning of maritime trade. They were unanimous in recommending a removal of the exemption. Actions, as always, speak louder than words. The fact that carriers are opting for different arrangements in operating their trade suggests, quite compellingly, that price fixing is not essential to the functioning of the industry. The pendulum has swung and the question remains: what should be done? Although it might be too early to judge the effects of the EU changes, the doubts raised by various studies are too large to be ignored. At the very least, New Zealand should carry out a review of the current exemption. But given the historical baggage of the exemption,³⁰ there has always been reluctance to review it.³¹ Although there have been rumours that the exemption will be reviewed, they have not yet materialised. In light of the reluctance and inaction, this paper hopes to fill the void.

3 The Likely Effect of Exposing the Liner Shipping Industry to Competition Law

From the above analysis, it is tempting to argue that the exemption under s 44(2) of the *Commerce Act* should be removed. But the issues involved are subtle. The *Commerce Act* was drafted with a view to exempt its application from the liner shipping industry. It is therefore understandable that the Act, in its existing form, may not be adequate to deal with the issues peculiar to the industry. As such, the following will discuss the effects of exposing the industry to competition law. In particular, it will address whether the *Commerce Act* can deal with the problem of tacit collusion. This is important as the problem of tacit collusion will characterise the industry following the removal.

Removing the exemption is simple. The abolishment of s 44(2) of the *Commerce Act* will bring all shipping activity within the jurisdiction of the Commerce Commission. This means all the relevant provisions: s 27 (substantially lessening competition), s 30 (hardcore cartel activity) and s 36 (taking advantage of substantial market power) will apply to all agreements, conduct and understanding between carriers that may have an anticompetitive effect. Clearly, all *express* price fixing between conferences will be caught under the *Commerce Act*. But there is other anticompetitive conduct that will fall through the lacuna of the *Commerce Act*.

²⁷ Ibid, [159].

²⁸ Chuah, above n 24, 212.

²⁹ Ibid.

³⁰ There are strong sentimental ties to liner shipping in New Zealand. See generally Ian Farquhar, *The Tyser legacy: A History of the Port Line and its Associated Companies* (New Zealand Ship & Marine Society, 2006).

³¹ Ministry of Transport, above n 4, 43. The Shipping Review in 2001 simply brushed this issue aside as 'the issue is not specifically within the Terms of Reference for the Review'.

In reviewing the European exemption, one commentator has warned that the European member countries should exercise great caution not to let the shipping industry evolve into an oligopolistic market.³² An oligopolistic market refers to a market that has few sellers, who exercise unconstrained dominance in the market. An oligopolistic market can usurp the role played by the conference system. It will, if not properly regulated, maintain an artificial price level. Price fixing can easily be achieved in an oligopolistic market. Oligopolies can do so simply by limiting supply or fixing rates through tacit collusion.³³ As such, liner shipping may result in collusion whether the exemption is in place or not.³⁴ The removal simply gives rise to the possibility of competition, but it may not produce actual competition. The obliteration of the conference system will achieve little unless the oligopoly issue is resolved.

3.1 The Oligopolistic Problem - Tacit Collusion

The oligopolistic problem is that tacit collusions between major market suppliers are prone to occur. It is therefore important to examine whether the *Commerce Act*, in its existing form, is adequate to deal with tacit collusions. Tacit collusion refers to a situation where firms tacitly understand, through repeated experiences of interaction, that they will act in a uniform manner.³⁵ In a competitive market, without explicit communication, the forces of competition will prevent collusion as competitors face an ever present risk of price cutting.³⁶ Competitors are always tempted to undercut a rival's price in attempt to increase market share. Firms cannot, therefore, afford to be idle and maintain prices at an artificial level. Even if the price is only slightly above the competition level, a rival will seize that opportunity and undercut that price. Without an explicit communication (to collude), firms cannot collude in a competitive market. But this does not apply in an oligopolistic market. An oligopoly can 'learn' through repeated practices in a closely held market of its competitors' habits and intentions. They can signal each other a decision to collude and impose a supra-competitive price without the threat of undercutting. This can occur even in the absence of communication.³⁷

3.2 Section 27 – What is an 'Understanding'?

3.2.1 A Requirement of Communication

The primary provision that deals with collusion is s 27 of the *Commerce Act*. The provision seeks to capture an array of horizontal collusion, it provides that:

27 Contracts, arrangements, or understandings substantially lessening competition prohibited

- (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

To establish a breach of s 27, the following elements must be proved: (1) The competing parties have entered into a contract, arrangement or understanding and (2) the impugned contract, arrangement or understanding had the purpose of, or has or is likely to have the effect of, lessening competition in a market. In the context of tacit collusions, the second element is not difficult to establish as most tacit collusions have the purpose of lessening competition. The difficulty lies in establishing the requisite 'understanding'. To establish that there is an understanding, one must show that there is some form of communication between the parties directed to a common goal.³⁸ Unless *independent actions* taken by firms amount to communications, it is highly unlikely that the court will hold tacit collusion as a breach of s 27.

The weakness of s 27 is that it is drafted and interpreted on the assumptions of a competitive market. One of the assumptions is that collusion is unlikely without explicit communication. As such, liability under the section requires communication or a conscious mutual agreement between the relevant parties. But the absence of

³² Blanco, above n 6, 589.

³³ *Ibid*, 588-589.

³⁴ *Ibid*, 589.

³⁵ CL Pass, and JR Sparkes, 'Control of Tacit Collusion in Britain' (1981) 15 *Journal of World Trade Law* 521, 522.

³⁶ Matthew Berkahn, 'Shared Monopolies and Tacit Collusion: Applying Competition Law to the Petrol Industry' (1998) 4 *New Zealand Business Law Quarterly* 87, 103.

³⁷ *Ibid*.

³⁸ Campbell Doerr, 'The Problem of Collusion: How Best to Resolve it?' (2000) *Auckland University Law Review* 104, 110.

communication is one of the defining features of tacit collusion. Section 27 therefore cannot adequately address the problem of tacit collusion. There are subtle hints, however, in New Zealand case law that suggest courts can adopt a more liberal approach. In *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd*,³⁹ Barker J held that:⁴⁰

An arrangement or understanding comes into existence as a result of some communication between the parties; the communication can however occur by written or spoken word the one to the other or by one observing and interpreting the other's behaviour.

Although the comments were made in the context of s 30, they can also be applied to interpreting 'an arrangement or understanding' under s 27. The significance of the comment is the recognition that communication can be in the form of 'observing and interpreting'. This will be particularly helpful in dealing with the problem of tacit collusion. Sadly, though, New Zealand courts have yet to apply this principle to prohibit anticompetitive price behaviour engaged by oligopolies.⁴¹ As such, the requirement of explicit communication renders s 27 ineffective in dealing with oligopolistic conduct. This is especially so as communications are characteristically absent from an oligopolistic market, and evidence of collusion can only be inferred from parallel pricing behaviour.⁴²

3.2.2 A Circumstantial Inference Approach

The European model, as represented by art 81 of the EC treaty, performs a similar function as s 27 *Commerce Act*.⁴³ The European model is, in my opinion, more effective than s 27. This is supported by the more liberal approach that the European Courts have adopted in solving the tacit collusion problem. In *Ahlstrom OY v Commission ('Woodpulp')*,⁴⁴ the Court interpreted art 81 in such a way so as to allow a concerted practice to be inferred from parallel conduct when 'concentration constitutes the only plausible explanation for such conduct'.⁴⁵ This interpretation derives its force from the phrase 'concerted practice'. The phrase was drafted with the view that many European oligopolistic industries can engage in concerted anticompetitive conduct without leaving 'any external evidence at all'.⁴⁶ This inference mechanism in effect creates a presumption of collusion. It is incumbent on the oligopolies to disprove that presumption. The presumption therefore makes art 81 a more effective control of tacit collusion than s 27. Although firms may conjure difference explanations for their conduct, the explanations must still cross the hurdle of plausibility. Therefore, firms may be deterred from engaging in tacit collusion by the *Woodpulp* ruling.⁴⁷ In contrast, liability under s 27 cannot be pressed unless there is evidence of explicit communication between the colluding firms.⁴⁸

The European jurisprudence is based on the assumption that the oligopolistic market structure inevitably leads to tacit collusion.⁴⁹ The New Zealand courts have, however, consistently expressed doubts as to this kind of reasoning.⁵⁰ It has been said that a highly concentrated market, in itself, does not necessarily lead to collusion.⁵¹

³⁹ *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647.

⁴⁰ *Ibid*, 662.

⁴¹ Berkahn, above n 36, 104.

⁴² *Ibid*.

⁴³ The article provides:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

⁴⁴ *Ahlstrom OY v Commission* [1993] 4 CMLR 407 ('Woodpulp').

⁴⁵ *Ibid*, 574. In particular, the judgment did not refer to any alleged 'communication' between the parties. But it noted that their individual pricing system contained sufficient similarity that gave rise to a presumption of concerted practice.

⁴⁶ DG Goyder, *EC Competition Law* (2nd ed, 1993), 97; Quoted in Berkahn, above n 36, 108.

⁴⁷ Doerr, above n 38, 119.

⁴⁸ *Ibid*.

⁴⁹ This industry-structural approach to competition law is known as the Harvard School approach. Contrast this with the Chicago School approach where institutional structure is of no relevance to the competition analysis. The Chicago school simply asks whether the conduct or agreement in question will substantially lessen competition.

⁵⁰ Berkahn, above n 36, 105.

⁵¹ *Ibid*.

This was expressed in *Re Magnum Corp Ltd v Dominion Breweries Ltd*,⁵² in which it was held (albeit in the context of a merger decision):⁵³

It is sometimes presumed that such concentration as exists in an oligopoly leads to cooperative behaviour or to interdependence in pricing and other strategic decisions that is equivalent to tacit collusion. While it is arguable that concentration or increased concentration itself might facilitate collusive behaviour, the commission does not accept that collusion – explicit or implicit – let alone successful collusion, will necessarily follow.

In *Trade Practices Commission v Email Ltd*,⁵⁴ Lockhart J took a step further and held that ‘the result does not justify an inference as to the process’.⁵⁵ This means even when a high market concentration is observed together with parallel conduct, it does not necessarily lead to an inference of collusion.⁵⁶ Contrary to the European jurisprudence, conduct that can only be explained by collusion or market concentration will not be inferred by the courts as falling afoul of s 27.⁵⁷ Since the possibility of an inference mechanism is not available in New Zealand, the power of s 27 to deal with tacit collusions is further crippled.

3.3 Section 36 – Singular vs Collective Dominance

Section 36 prohibits firms from taking advantage of a substantial degree of market power, the section provides:

- (1) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of –
 - Restricting the entry of any person into that or any other market; or
 - Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
 - Eliminating any person from that or any other market.

Although tacit collusion between oligopolies may amount to taking advantage of substantial market power, the weakness of s 36 is that the Court has held there can only be one party who can exercise market dominance at any one time.⁵⁸ But an oligopolistic market, by its nature, has more than one firm that exercises market dominance. Since s 36 is constrained by the concept of singular dominance, it is therefore ineffective as a regulator of tacit collusions.⁵⁹

In contrast, art 82 provides:

Any abuse by one or more undertakings of a dominant position within the common market insofar as it may affect trade between Member States.

The critical difference between the European and New Zealand regime is the phrase ‘one or *more* undertakings’. The phrase effectively provides for the concept of ‘collective dominance’. ‘Collective dominance’ suggests that there can be more than one firm exercising dominance in a market at any given time. Therefore, the European provision can scrutinise a wider range of firms whose conduct may be characterised as anticompetitive. Unless the *Commerce Act* adopts the concept of collective dominance in the near future, there remains a lacuna for tacit collusions to fall through.

3.4 Mergers and Acquisitions

Some commentators have suggested that the best way to deal with the problem of tacit collusion is through mergers and acquisitions controls. This is achieved by imposing a higher threshold on the clearance process, such that firms cannot merge unless the Commerce Commission is satisfied that the proposed merger will not substantially lessen competition in the market. This will create greater difficulties for firms to merge as it will prevent the creation or strengthening of an oligopolistic position and accordingly reduce the risk of tacit collusions. The merger and authorisation process, however, is only effective insofar as controlling the *emergence* of oligopolistic collusions. The merger and authorisation mechanism is deficient in dealing with

⁵²*Re Magnum Corp Ltd v Dominion Breweries Ltd* (1986) 2 TCLR 177 (Commerce Commission Decision No 182). This decision was affirmed by the High Court in *Lion Corp Ltd v Commerce Commission* [1987] 2 NZLR 682.

⁵³*Ibid*, 196.

⁵⁴*Trade Practices Commission v Email Ltd* (1980) 3 ATPR 42,367.

⁵⁵*Ibid*, 42,373.

⁵⁶Berkahn, above n 36, 105.

⁵⁷*Ibid*, 106.

⁵⁸*Telecom Corp of New Zealand v Commerce Commission* [1992] 3 NZLR 429, 442.

⁵⁹Doerr, above n 38, 110.

current exploitations by oligopolies. Put simply, it fails to deal with existing or pre-existing tacit collusions. Without incorporating the concept of collective dominance, the *Commerce Act* is inadequate to deal with tacit collusions between carriers.

3.5 Extraterritorial Application of Competition Law

Since most carriers operating on a New Zealand route are foreign based companies, there are concerns as to the extraterritorial application of New Zealand competition law. The *Commerce Act*, however, does provide for extraterritorial application. Section 4(1) of the *Commerce Act* allows extraterritorial application so long as the impugned conduct of a person carrying on business in New Zealand affects a market in New Zealand.⁶⁰ Given the oligopolistic structure of the market, the carriers must consistently conduct business in New Zealand. Otherwise their market share is jeopardised. Therefore the carriers can be said to be carrying on business in New Zealand. Furthermore, their anticompetitive conduct has a direct effect on the rates charged to shippers (the shipping service market in New Zealand). This will in turn impact on the price of goods charged to the end consumers. Therefore the anticompetitive conduct will have an indirect impact on the consumer market. As such, the carriers' conduct will affect a market in New Zealand. It follows, then, New Zealand competition law can be applied extraterritorially to the carriers.⁶¹

3.6 Concluding Remarks on the Inadequacy of the *Commerce Act*

The above analysis has shown that the major arsenals of the *Commerce Act* (ss 27 and 36) are inadequate. It fails to address the unique features of an oligopolistic market. The insistence in requiring actual communication and the failure to provide for the concept of collective dominance have rendered the *Commerce Act* impotent in dealing with tacit collusions. This is disturbing as tacit collusion is a likely phenomenon in the highly concentrated shipping industry. The objectives of competition policy – the promotion of competition, market efficiency and consumer welfare – will be better served in this industry, if stricter measures are adopted to combat anticompetitive oligopolistic conduct.

All actors adapt to changes in order to ensure survival, and carriers are no different. In the face of the exemption removal, carriers can always opt for other measures to procure the same results. Tacit collusion is one of such measures. It will bring about the same effect (of price and capacity fixing) without falling afoul of the *Commerce Act*. As such, removing the exemption may not eradicate the root of the problem. The underlying problem of oligopolistic market structure remains untouched. My view is that the *Commerce Act*, in its existing form, is inadequate to prevent the industry from resurrecting the artificial price system.

4 The 'Toothlessness' of the Current Regime

The fundamental weakness of the current New Zealand competition regulation in the liner shipping industry is the want of meaningful enforcement. This is clearly portrayed in the fact that the whole industry is beyond the jurisdiction of the Commerce Commission. Any anti-competitive behaviour worthy of condemnation cannot be punished in the usual way under the *Commerce Act*. In fact, it is not punishable at all. Although New Zealand is similar to other jurisdictions in that liner carriers are afforded some protection from competition law,⁶² New Zealand seems to exhibit the most lenient policy of all.

Competition issues pertaining to New Zealand outwards shipping is governed entirely by the *Shipping Act 1987* (NZ) ('*Shipping Act*'), which allows the Minister of Transport to regulate the industry (as opposed to the Commerce Commission and the *Commerce Act*). The legislation, however, has been described as 'toothless'.⁶³ This is not an exaggeration as the *Shipping Act* confers no power on the Minister in charge to nullify any anticompetitive agreements. All that the Minister is able to do is to issue directions requiring the challenged party to proffer certain information and, in some circumstances, require the challenged party to show evidence that it had entered into negotiations with the shippers.⁶⁴ It is not inconceivable to imagine a scenario where the carriers have entered into negotiations but failed to produce any fruitful results. The initial anticompetitive state will therefore remain unchanged.

⁶⁰ Noonan, Chris, 'The Extraterritorial Application of New Zealand Competition Law' (2007) *New Zealand Universities Law Review* 369, 401.

⁶¹ See, for example, *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 *New Zealand Law Report* 805.

⁶² Except for the European Union.

⁶³ Myburgh, Paul, 'Shipping Law' [2001] *New Zealand Law Review* 105, 106.

⁶⁴ *Shipping Act 1987* (NZ), s 7(1)(c).

This leniency is odd when compared to other jurisdictions. In Europe, for example, the regulator has large investigative powers to request information.⁶⁵ It has the authority to enter onto premises (business and private) to obtain evidence relating to anticompetitive conduct.⁶⁶ Further, it can impose fines up to 10 percent of the worldwide group annual turnover of any party involved in the infringement.⁶⁷ In Australia, agreements that fail the legislative competition threshold will be deregistered and will be subjected to their domestic competition laws.⁶⁸ To further illustrate the impotence of the current regime, no Minister has invoked his or her power, or conducted any investigation under the *Shipping Act* to date.⁶⁹ This is curious as the *Shipping Act* has been in force for 22 years. Although this may be explained on the basis that there has been nothing worthwhile to investigate, this is a weak speculation as the Shipping Report (conducted in 2001) has noted the great potential for anticompetitive conduct in the market. A more plausible explanation is the lack of effective enforcement in controlling carriers who engage in anticompetitive conduct. The *Shipping Act* has therefore failed to serve as a meaningful deterrent for liners not to engage in anticompetitive behaviour. A further anomaly is that the *Shipping Act* has never been reviewed. This is to be contrasted with the positions in Australia, EU and the OECD.

5 Options for Reform

In light of the shortcomings of the current regime, it is clear that reform is needed. In the following, I will suggest four options that will inject a more competitive spirit into the shipping industry: (1) abolishing the exemption; (2) instituting a reverse-authorisation procedure; (3) creating conditional exemptions and (4) imposing a 'special responsibility' on carriers. The first three options are premised on the belief that the *Commerce Act*, in its existing form, can deal with the potential anticompetitive problems from the industry. Despite its shortcomings, I do not suggest that the *Commerce Act* is hopelessly incompetent in dealing with *all* competition issues. The *Commerce Act* remains a weapon in regulating certain behaviours of firms. The application of the *Commerce Act* would, in my opinion, incentivise firms to move away from established practices like *express* price or capacity fixing, as such practices would constitute clear contraventions of the *Commerce Act*. The first three options will therefore mitigate the anticompetitive problem to a certain extent. But it must be reminded that the first three options will be inadequate to deal with the problem of tacit collusion.

My purpose in exploring the lacunae of the *Commerce Act* is to show that it does not deal with the root of the problem, which is the oligopolistic structure of the market. As argued, the oligopolistic structure facilitates tacit collusion. But the *Commerce Act* is not equipped to tackle tacit collusion as it is constrained by the restrictive interpretation of 'understanding', the requirement of 'communication' and the failure to provide for 'collective dominance'. The fourth option therefore provides an alternative approach that imposes, independently of the *Commerce Act*, a more rigorous competition regime on the shipping industry. The option will depart from the competition ideals traditionally accepted by the New Zealand judiciary. The changes made will be fundamental, but fundamental changes are needed. This is necessary in order to capture the true spirit of competition.

5.1 Abolishment of the Exemption

Abolishing the exemption is the most intuitive approach to changing the current landscape (or seascape) of the shipping industry. The legislature can simply repeal s 44(2) *Commerce Act*, and entrust the industry into the Commerce Commission's jurisdiction. To ensure the parties affected or potentially affected can adjust to the proposed removal, I recommend installing a transitional period so as to provide a smooth transition. Simplicity, however, comes at a price. This approach may allow carriers to simply play the old game under new rules. If the underlying problem (the oligopolistic market structure) is not confronted, then there is a real danger that the industry will simply collapse into a tacitly collusive environment. This will result in artificial prices, inefficient allocation of resources and sub-optimal level of innovation.

⁶⁵ Articles 18 and 19 of Regulation 1/2003.

⁶⁶ Articles 20 and 21 of Regulation 1/2003.

⁶⁷ See generally, Case T-33/02 *Britannia Alloys and Chemicals Ltd v Commission* [2006] 4 CMLR 1046.

⁶⁸ *Trade Practices Act 1974* (Cth) ss 45, 47.

⁶⁹ Russell McVeagh 'Liner Conference – Trade Practices' (2001) Findlaw Thompson Reuters <<http://www.findlaw.com/12international/countries/nz/articles/350.html>>, 15 October 2009.

5.2 Reverse-Authorisation

The reverse-authorisation approach is premised on the idea that all carriers may enjoy the exemption. But it allows the Commission to withdraw the exemption from a party if the agreement or conduct in question fails the benefit-detriment balancing test. If the Commission is satisfied that the anticompetitive agreement or conduct does not produce benefits that would outweigh the detrimental effects it will inflict on the market, then it may withdraw the benefits conferred under the exemption.

This approach is not the same as the authorisation process under s 47 *Commerce Act*. The authorisation process under the *Commerce Act* assumes that all anticompetitive behaviour is detrimental to the market and thus the onus is on the party engaged in such conduct to show there is a net benefit. If it is shown, the Commission will grant authorisation to the applicant despite that the behaviour in question contravenes the *Commerce Act*. The authorisation immunises the party from being challenged in respect of that conduct. The reverse-authorisation approach, however, is premised on the idea that the block exemption for the liner industry produces a net benefit to society. As such, the onus is on the Commission to prove that there is in fact no net benefit to justify the conferring of exemption. But once the Commission is satisfied that the detriment outweighs the benefit, the underlying justification for the exemption no longer holds, and therefore the exemption should be removed from the challenged party.

5.3 Conditional Exemption

The European Union had operated, until recently, a system of conditional exemption. This system prescribed certain requisite conditions for the exemption. It also enables the regulator to withdraw the benefits of the exemption if a particular firm has failed to comply or fulfil one of the conditions. The conditional exemption approach is less arbitrary than the reverse authorisation approach. Instead of allowing the Commission to conduct a ‘hot-pot’ test, where any factors of interest may be thrown into the balancing exercise, the conditional approach will provide a clearer guidance as to how the firms involved are expected to behave. I will first traverse the European model, and then I will offer a similar model for New Zealand.

5.3.1 The European Model⁷⁰

The European conditional exemption is enshrined in art 81(3). The article stipulates four conditions. Any contravention of the conditions will result in a withdrawal of the exemption. The article provides that:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The first condition is that the impugned agreement or practice must contribute to the improvement of technical or economic progress. The interesting point about this condition is that the European Courts have construed ‘technical or economic progress’ in a very wide sense. The ‘improvements’ are broad enough to embrace improvements that are not strictly economic.⁷¹ For example, they also include environmental protection and the

⁷⁰ The Australian approach is also an option New Zealand may consider but this will not be canvassed in this paper. The Australian model balances the interests of carriers and exporters/importers by requiring negotiation of negotiable shipping arrangements and preventing carriers from acting unilaterally: see *Trade Practices Act 1974* (Cth) Part X, ss 10.41, 10.52. For more information about the Australian model, see Australian Productivity Commission *International Liner Cargo Shipping: Review of Part X of the Trade Practices Act 1974*, No.9 (1999) 45-47. See also the new three-tier licensing regime announced on the 1 September 2011, Department of Infrastructure and Transport, *Stronger Shipping for a Stronger Economy* (2011) <http://www.infrastructure.gov.au/maritime/shipping_reform/>.

⁷¹ Nicholas Forwood, ‘The Content and Meaning of Article 81(3) EC’ (2004) *ERA Forum* 27, 32.

provision of employment in difficult economic circumstances.⁷² One difficulty with this condition is that it requires an inherently subjective balancing between the potential detriments and any countervailing social or economic benefits.⁷³

The second condition requires the agreement or practice in question to allow ‘consumers a fair share of the resulting benefit’. Traditionally, this would mean an improvement in the quality of goods or services, or an increase in innovation of products. But ‘consumers’ have now been interpreted so broadly that they include indirect beneficiaries of improved environmental protection or increased employment.⁷⁴ This condition ensures firms are not the sole beneficiary of anticompetitive conduct, a ‘fair share’ of any resulting benefits must be passed onto the customers. In determining whether a ‘fair share’ has been given, the Commission will assess the existing competitiveness of the relevant market. The rationale for this approach is that the more competitive a market is, the more likely benefits will be passed on to customers, and the converse is also true.⁷⁵ This condition will be difficult to satisfy in an oligopolistic market, as it is inherently non-competitive.

The third condition requires that there must be ‘a real causal link between the restrictive provisions of the agreement and the benefits claimed’. Further, the link must be a ‘reasonable’ one.⁷⁶ In other words, the restriction must be indispensable in securing the benefit and that the same cannot be achieved through a less anticompetitive strategy.

The fourth condition is similar to s 27 of the *Commerce Act*. It stipulates that the agreement shall not give the firm(s) in question ‘the possibility of eliminating competition in respect of a substantial part of the products in question’. Put simply, there must not be a substantial lessening of competition in the relevant market. This condition will usually be satisfied if there remains sufficient competition after allowing for the restrictive agreement.

5.3.2 A New Zealand Approach

There are two ways to implement the conditional exemption approach. One is to abolish the *Shipping Act* and bring the liner shipping industry into the Commerce Commission’s jurisdiction. The *Commerce Act* can then be amended to allow the Commission to withdraw the benefits of the exemption if the prescribed conditions are not fulfilled. Another, and in my opinion a better, way to implement this proposal is to stipulate the conditions and introduce the power of withdrawal in the *Shipping Act*. This is preferred to amending the *Commerce Act* because the latter option may entail implications for other industries as well, and thus appropriate changes may be harder to procure. The *Shipping Act*, on the other hand, is designed to deal with competition issues in the liner shipping sector. As such, the *Shipping Act* is a more appropriate channel to stipulate the conditions.

I do not wish to propose specific conditions here. It is more important to explore the issues that the drafters must be mindful of when forming the conditions. The conditions may be articulated in different forms. But to be effective, they must effectively ensure the following results:

- i) The anticompetitive practice in question must produce a public benefit.
- ii) There are no less anticompetitive means to procure the benefit.
- iii) The benefit claimed must outweigh the detriments caused to the competitive process in the market.

Public benefit

In respect of the first result, there are two issues that need to be considered: What constitutes a benefit and who constitutes the public? The word ‘benefit’ has been construed widely as such there is no limitation as to the nature of the benefit claimed.⁷⁷ This may include lower wage costs, enhanced job security, reduction in overcapacity in an industry, increased utilisation of New Zealand resources, productive efficiencies, economics or scale, cost savings and the like.⁷⁸ The second issue is more difficult to resolve. The issue is whether the

⁷² Ibid, 32.

⁷³ Ibid, 34.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ See Commerce Commission, *Guidelines to the Analysis of Public Benefit and Detriments* (1994) <<http://www.comcom.govt.nz/benefits-and-detriments-guidelines-consultation/>>.

⁷⁸ Ibid.

'public' refers simply to the consumers at large (the consumer welfare approach) or whether it includes the producers as well (the total welfare approach). If we take the policy of the *Commerce Act* seriously, which is to promote the welfare of consumers, then consumers must benefit if exemption is to be granted for a particular anticompetitive practice. It has been argued, however, that it is difficult to separate the producers from the consumers. Benefits accruing to the producers may actually translate into benefits for the consumers. But this argument seems implausible in the New Zealand shipping industry. The fact that most, if not all, carriers are foreign based companies makes it unlikely that benefits from charging a supra-competitive price will flow onto the consumers or the community at large. It has also been argued that since the provision is solely about efficiency, it does not matter who loses or gains. So long as efficiency is achieved, the goals of competition law are duly served. I disagree. It matters who gains and who loses. This is apparent if we consider why contraventions against s 36 (the taking advantage of substantial market power) cannot be authorised. The rationale is that even if the dominant firm produces substantial efficiency and economies of scale, these benefits are only accrued to the producer. If the identity of the winner or loser does not matter, then it seems inconsistent that breaches of s 36 cannot be authorised.

My view, however, is not without critics. The corollary of my view is that the interests of consumers must be given more weight in relation to those of producers and shareholders. It has been argued that this premise is contrary to the true intention of the authorisation process, which is the promotion of efficient allocation of resources.⁷⁹ The critics argue that there is no foundation for the belief that reallocating resources (in benefit terms) from firms to consumers will increase the net welfare of society.⁸⁰ It follows that the 'public' must include the producers.

The difference between the two approaches arises most starkly when considering whether cost savings for the producers would constitute a public benefit.⁸¹ Where the cost savings are unlikely to pass onto the consumers, the consumer welfare approach will exclude such benefit as a public benefit. Whereas the total welfare approach, being blind to the identity of the beneficiary, would consider such cost savings as a public benefit.⁸²

In my view, the interest of consumers is the real focus. The *Commerce Act* is intended to protect their interests. The consumer welfare approach must be adopted. If efficiencies gained from anticompetitive practices are not transferred to the consumers, the consumers are effectively being exploited. Given 'benefit' has a wide meaning, firms have various ways to pass on the fruits of their anticompetitive behaviour to the consumers. In light of that variety, a refusal to do so is ample justification for denying firms of the exemption.

Achievable by Other Means

Intuitively, if the benefit can be procured by less anticompetitive means then we need not authorise the more anticompetitive conduct. This is in effect an 'indispensability' question. Condoning anticompetitive conduct is justifiable only if such conduct is indispensable to attaining the claimed benefit. If a less anticompetitive means is available, then it follows that the conduct in question is not indispensable to procuring the benefit. And if it is not indispensable, then we need not authorise the conduct.

In New Zealand, 'indispensability' is only relevant to the question of weight. The more readily the claimed benefit can be achieved by less anticompetitive means, the less weight is to be given to the claimed benefit during the balancing exercise. The benefit is therefore less likely to outweigh the detriment, and so an authorisation is less likely to be granted. In contrast, in the context of United States merger law, § 4 United States Horizontal Guidelines ('Guideline') provides that the claimed efficiencies (or benefits) from mergers will not be considered if they are not merger specific.⁸³ Merger-specific efficiencies are 'those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects'.⁸⁴ To avoid over-inclusiveness, the Guideline explains that '[o]nly alternatives that are practical in the business situation faced by the merging

⁷⁹ Robert Officer and Phillip Williams, 'Public Benefit Test in Authorisation Decisions' in Richardson, Megan, and Williams, Phillip (eds), *The Law and The Market* (Federation Press, 1995) 157, 161.

⁸⁰ *Ibid.*

⁸¹ Paul Hughes, 'Comments on Professor Joshua Gans's presentation "Reconsidering the Public Benefit Test"' (2006) 34 *Australian Business Law Review* 49, 51.

⁸² *Ibid.*, 52.

⁸³ *Horizontal Merger Guidelines 1992* (US) § 4.

⁸⁴ United States Department of Justice and the Federal Trade Commission, *Commentary on the Horizontal Merger Guidelines* (2006) 49-50.

firms will be considered in making this determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical.⁸⁵

The United States approach, in my opinion, is the better approach. The rationale of competition law is that anticompetitive practices are presumed to be harmful. The more anticompetitive a practice, the more harmful it is presumed to be. If a less anticompetitive means is available to secure the same benefit, then there is no justification to condone the more anticompetitive one. Otherwise, it runs the risk of allowing excessive anticompetitive practices in society. The apparent strictness of the ‘indispensability’ requirement is tempered by the practicality limb of the analysis. The requisite indispensability exists only when there are no other *practical*, not merely theoretical, alternatives to secure the claimed benefits.

5.4 A Special ‘Responsibility’

5.4.1 A New Shipping Act

As discussed under part III, the *Commerce Act* suffers several defects. Those defects render the *Commerce Act* ineffective when dealing with oligopolistic industries, and the shipping industry is one of such industries. Unless the defects are rectified, the problem of collusion will persist. One approach is to perform surgery on the *Commerce Act*, but I suggest a more nuanced approach is preferred. Instead of focusing on the *Commerce Act*, changes should be made to the *Shipping Act*. The new *Shipping Act* will incorporate the major provisions of the *Commerce Act* (i.e. ss 27 and 36), but not in their existing form. The adopted provisions will be in the amended form I have proposed under part III of this paper.

By treating the shipping industry separately, the subtleties or future changes of the shipping industry can be accommodated more effectively. This will also allow more resources and expertise to be devoted into monitoring the industry. Further, this is consistent with the practice of industry regulation in New Zealand. With the support of Parliament, the Commerce Commission is accustomed to administering and enforcing industry-specific regulatory regimes. These are usually targeted at highly concentrated industries like dairy,⁸⁶ telecommunications,⁸⁷ electricity,⁸⁸ gas⁸⁹ and airports.⁹⁰ As these measures have largely been effective, there is reason to be optimistic about a separate, much improved and more rigorous regulatory regime for the shipping industry.

Following from part III, I suggest that the new regime should (1) dispense with the requirement of communication when establishing an ‘understanding’; (2) adopt a circumstantial inference approach in establishing an ‘understanding or arrangement’; (3) introduce the concept of collective dominance; and (4) endow a ‘special responsibility’ on the oligopolistic carriers and assess their conduct to a higher threshold. As I have already explained the need for the first three suggestions,⁹¹ the following will deal with the final suggestion. Before I do so, it should be noted that the last suggestion is not a change to the letter of the law. Rather, it is a change in the general approach towards competition law.

5.4.2 Endowing a Special ‘Responsibility’

In *Carter Holt Harvey Building Products Group Ltd v Commerce Commission*,⁹² the Privy Council discussed the differences between s 36 (New Zealand regime) and art 82 (European regime). It observed that, under the European model, the conduct of quasi monopolists or oligopolies are assessed according to a higher standard.⁹³ This is premised on the idea that firms with substantial market power need to be subjected to a ‘special responsibility’, as their conduct are more likely to prejudice competition.⁹⁴ But what that responsibility means in reality would depend on the circumstances of the case.⁹⁵ The higher standard therefore provides a more

⁸⁵ Ibid.

⁸⁶ *Dairy Industry Restructuring Act 2001* (NZ).

⁸⁷ *Telecommunications Act 2001* (NZ).

⁸⁸ *Electricity Industry Reform Act 1998* (NZ); *Commerce Act 1986* (NZ), pt 4(a).

⁸⁹ *Commerce Act 1986* (NZ), pt 4.

⁹⁰ Ibid.

⁹¹ Please refer to part III of this paper.

⁹² *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145.

⁹³ Ibid, [64].

⁹⁴ Peter Roth (ed), *Bellamy & Child on European Community Law of Competition* (Sweet & Maxwell, 5th ed, 2001) [9-068].

⁹⁵ *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145, [64].

rigorous tool in scrutinising the practices of carriers. Potential anticompetitive practices can therefore be prevented with greater ease.

This ‘special responsibility’ notion, however, is radically different from what the Australasian authorities have consistently held. One of the governing principles of New Zealand competition law is that monopolists are entitled to compete. To prevent them from competing would effectively ‘hold an umbrella’ over other inefficient competitors and thus stifle competition.⁹⁶ This would be inconsistent with the underlying philosophy of competition law, which is to promote competition.

I agree that the objective of competition law is to protect competition, not individual competitors. But I argue that the ‘special responsibility’ approach is consistent with that objective. The ‘special responsibility’ imposed is justified ‘on account of the prejudice that their (firms with substantial market power) activities may cause to *competition in general*’.⁹⁷ Given their power and the unique market structure, their activities are likely to have a greater impact on the market. This in turn means their activities are more likely to affect the competition level in general. A seemingly benign act, if orchestrated by dominant firms, may nonetheless have adverse anticompetitive effects.⁹⁸ Therefore a dominant firm should, in some circumstances, be deprived of the right to engage in conducts that are otherwise unobjectionable if taken by a non-dominant firm.⁹⁹

Another objection to the ‘special responsibility’ theory is that competition law ought to focus on efficiency. The ‘special responsibility’ approach distracts that focus and visits issues of equity and fairness. Unlike other branches of the law, competition law has always been reluctant to deal with issues of equity or fairness. It has always been preoccupied with efficiency. Efficiency, however, is an unjustified obsession. If we look at the purpose of the *Commerce Act*, it has been amended in 2001 to specifically to take into account of the ‘long term benefit of consumers’.¹⁰⁰ It is the concern for consumers that drives the *Commerce Act*. The Parliament sees that it is inequitable for consumers to suffer from anticompetitive behaviour of firms. To hide behind the veil of efficiency is no answer to the pressing problem of equity. Efficiency is *not* the only legitimate goal of competition law, the centrality of fairness cannot be ignored.¹⁰¹

Finally, I suggest that the approach taken under the *Shipping Act* need not replicate the timid approach taken under the *Commerce Act*. The new *Shipping Act*, if it adopts my recommendations, is designed to deal with the oligopolistic structure of the shipping industry in a more rigorous manner. The imposition of a ‘special responsibility’ on dominant carriers will achieve that aim.

6 Conclusion

In the wake of a plethora of reviews, serious doubts have been cast on the underlying assumptions of the liner shipping exemption. New Zealand, however, seems unmoved by those findings. It is highly unsatisfactory that New Zealand has yet to review its competition policy in this regard. The *Shipping Act* – a special regime drafted to deal with the competition issues in the shipping industry – has been dormant for 22 years. The lack of enforcement power in the *Shipping Act* has rendered the *Shipping Act* ineffective in fulfilling its purpose. Intuitively, removing the exemption would be the optimal solution to the competition problem. But I have argued otherwise as the *Commerce Act* is not designed to deal with oligopolistic markets and with the problem of tacit collusion. Since the shipping industry is inherently oligopolistic, removing the exemption under the *Commerce Act* will not eradicate the root of the problem. As a result, I have advocated a more nuanced approach. The proper channel to regulate the shipping industry is through the *Shipping Act*. By implementing my suggested provisions in the *Shipping Act*, anticompetitive behaviour in the shipping industry will be more effectively deterred.

But more importantly, there needs to be a fundamental change in the approach to competition law. We must not endorse efficiency and forget equity. At the heart of competition law lays the interests of consumers, and we must take measures to ensure their welfare. We must be ready to impose a ‘special responsibility’ on the

⁹⁶ *Olympia Equipment Leasing Co v Western Union Telegraph Co* (1986) 797 F 2d 370, 375 (7th Cir).

⁹⁷ Roth, above n 94, [9-068].

⁹⁸ For example, firms in a competitive market are free to choose whom they wish to conduct business with. They may refuse to deal with anyone for any reason. In the case of established oligopolies, however, a coordinated refusal to deal with any new entrants will effectively eliminate the competitive process. Therefore a dominant firm may not refuse to deal with a new entrant, whilst a non-dominant firm may do so.

⁹⁹ Roth, above n 94, [9-068].

¹⁰⁰ *Commerce Act 1986* (NZ), s 1(a).

¹⁰¹ Claus-Dieter Ehlermann, and Lorraine Laudati, ‘The Objectives of Competition Policy’ *European Competition Law Annual 1997: Objectives of Competition Policy* (1998) 53.

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oligopolistic carriers. We must assess their conduct to a higher threshold. Given their great power to prejudice competition, they must take greater responsibility for their conduct.

With the wave of recent studies, the climate is ripe for change. The flaws of the exemption are now exposed and the pendulum has swung the other way. It is time to act.