

- (a) That the specific act or acts charged against him were not unfair to the person or persons immediately affected, having regard to the circumstances of the case :
- (b) That the specific act or acts charged against him were not prejudicial either to any industry carried on in New Zealand or to the public welfare :
- (c) That acts of the nature of the specific act or acts charged against him, if commonly practised or repeated, would not, in similar circumstances, be unfair to the persons immediately affected and would not be prejudicial either to any industry carried on in New Zealand or to the public welfare.

My submission is this, that the words “unfair” and “prejudicial to the public welfare” are vague and uncertain conceptions, and if used will lead to confusion and prolonged litigation. Repeated and emphatic protests have been made for years by eminent judges against Courts having to decide between what is fair or unfair, reasonable or unreasonable, or detrimental to public welfare or public policy or public interest. Those are matters that will be submitted to the Courts if this section in its present form goes through.

In a case—*The Mogul Steamship Company* (1892) 23 Q.B.D. 598, 625, Lord Justice Fry stated : “To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts.”

In 1909 the United States Senate Judiciary Committee made a report in reference to a Bill, very similar in effect to the present Bill, which proposed to amend the Sherman Anti-Trust Act, 1890, by allowing “reasonable” trade combinations. The report contains a full, careful, and able analysis of judicial decisions on trade combinations and monopolies, and upon the proposed Bill reads as follows :—

The Anti-Trust Act makes it a criminal offence to violate the law, and provides a punishment both by fine and imprisonment. *To inject into the Act the question of whether an agreement or combination is reasonable or unreasonable would render the Act indefinite and uncertain and hence to that extent utterly nugatory and void, and would practically amount to a repeal of the Act.* And . . . the injection of the rule of reasonableness or unreasonableness would lead to the greatest variability and uncertainty in the enforcement of the law. The defence of reasonable restraint would be made in every case and there would be as many different rules as cases, Courts, and juries. What one Court or jury might deem unreasonable another Court or jury might deem reasonable. In the case of *People v. Sheldon*, Chief Justice Andrews remarks : “If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury it would be very difficult in any case to establish the invalidity although the moral evidence might be very convincing. To amend the Anti-Trust Act, as suggested by this Bill, would be to entirely emasculate it, and for all practical purposes render it nugatory as a remedial statute. Prosecutions would labour under the greatest doubt and uncertainty. The Act as it exists is clear, comprehensive, certain, and highly remedial. It is in every respect a model law. To destroy or undermine it when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity.” The result was an indefinite postponement by the Senate of *any further* consideration of the proposed amendment.

In a famous case in the House of Lords in 1853 Lord Parke made the following important comments on public welfare, or public policy : “It is the province of the statesman, and not the lawyer, to discuss, and the province of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only : the written law from the statutes : the unwritten or common law from the decisions of our predecessors and of our existing Courts . . . not to speculate upon what is the best, in his opinion, for the advantage of the community” (*Egerton v. Brownlow*, (1853) 4 H.L.C.1, at 122). He states that the task is for the statesman and not the lawyer to say what is best for the public good, what would be unfair, what would be reasonable, and so on ; and in passing I would draw your attention to the Australian Act of 1906 where “unfair competition” is defined. It has not been wholly effective, but there has been an endeavour there ; but as this Act stands it will be left to the Courts to endeavour to ascertain what is fair, what is unfair, and what is contrary to the public welfare and so on—a task which Judges have protested against being submitted to them. [Informed Mr. Ansell : Australian Industries Preservation Act of 1906.]

(*Mr. O’Leary* produced a book entitled “The Law relating to Trade Combinations” by Haslam.) You will find that this Act is referred to at pages 170 and the following. The following extract from page 176 was read by Mr. O’Leary :—

The section which gave treble damages to an injured party afforded little protection to public interest, since the cost of litigation deterred an individual plaintiff from attacking a powerful combine, which had the means at its disposal to carry appeals as far as the Privy Council. Furthermore, the absence of a clear definition of unfair competition rendered the administration of the Act extremely difficult. The learned author considered the ordinary Courts incompetent to deal with the problem, since the average Judge lacked business experience. He advocated the introduction of more flexible regulations to be administered by a special tribunal. In this manner novel devices on the part of industrialists to exploit the public interest might be brought to light and, if possible, prevented.

It is striking that one of the grounds on which competition shall be deemed to be unfair is if the defendant is a commercial trust—no other ground is necessary whatever.

*Mr. Harris* : What is the definition of “commercial trust” ?

*Mr. O’Leary* : “Commercial trust” is defined in section 2 of the Act of 1910 :—

“Commercial trust” means any association or combination (whether incorporated or not) of any number of persons established either before or after the commencement of this Act, and either in New Zealand or elsewhere, and

- (a) Having as its object or as one of its objects that of (i) controlling, determining, or influencing the supply or demand or price of any goods in New Zealand or any part thereof or elsewhere, or that of (ii) creating or maintaining in New Zealand or any part thereof or elsewhere a monopoly, whether complete or partial, in the supply or demand of any goods ; or
- (b) Acting in New Zealand or elsewhere with any such object as aforesaid ;

and includes any firm or incorporated company having any such object, or acting as aforesaid.