

He can do all these things legally, but, generally, if he does any of these things for the reasons set out in sections 3 and 4 of the Act he is acting illegally. Why is the trader not content with what, I submit, he can do legally at the present time? He is not content generally because he wants concerted action against the obstructive retailer, and he wants to use the power of combination and boycott—cut off supply. That is why this alteration is required to sections 3 and 4, because, whilst a trader can do legally what I submit he can do, if his wishes are not complied with, he wants to go beyond his own personal rights and he wants to use boycott and combination to have the recalcitrant trader dealt with.

I submit that experience from 1910 to 1935 demonstrates beyond question that, far from requiring modification, the Act is very weak and requires considerable extension. The following facts support this conclusion:—

- (a) In 1912 (two years after the Act was passed) the *Cost of Living Commission* made a drastic report [see extract attached to this memorandum; handed to members of Committee] on how monopolies, combines, trusts, and associations of manufacturers or sellers of the necessities of life had contributed to higher prices. The Commission heard 270 witnesses, but was met by a point-blank refusal from the Merchants' Association to give any evidence whatsoever. The Commission found that trusts, monopolies, and combines operate *extensively* in New Zealand, and were endeavouring to corner supplies and increase prices to the detriment of the people, and were *boycotting* independent traders, and that they fixed higher prices for at least twenty-six commodities. The Commission recommended drastic *additions* to the Act to embrace *all commerce*, and *additional and wider provisions* in the Act, including prohibition of any combination arranging selling-prices to the retail trader or to the public, with a direct or indirect *penalty* to any trader refusing to do so.
- (b) In November, 1912, two months after the Cost of Living Commission report, the Merchants' Association of New Zealand was prosecuted and found guilty of conspiring to create a monopoly in sugar (under section 5), boycotting (under section 4), accepting illegal concessions (section 3), aiding and abetting (section 9). This is the *only successful* large prosecution under the Act. [(1912) 32 N.Z.L.R. 702, 1233.]

(Mr. O'Leary: I make this remark; that this is the only major prosecution under the Act that has been successful in New Zealand; there have been some minor ones.)

There is a third point—

- (c) In 1914 Fairbairn, Wright, and Co. endeavoured to obtain £8,000 damages from Levin and Co., Ltd., for alleged breaches of sections 3, 4, and 5, but the Court of Appeal held that *no private person may sue under the Act* for damages; only the Crown can sue for the penalty of £500. The complaints against Levin and Co. were that they were a member of the Merchants' Association of New Zealand; that this association arranged for supplies of sugar from the Colonial Sugar-refining Co. on much better terms than outsiders; and that Fairbairn, Wright, and Co., by reason of the combine, were being victimized by illegal concessions (section 3); were being boycotted (section 4); and were victims of a monopoly (section 5). [(1914) 34 N.Z.L.R. 1.]
- (d) In 1915 the Act was extended from specific foods—meat, fish, flour, oatmeal, and sugar—to cover *all foods*. [Cost of Living Act, 1915, section 12.]
- (e) In 1919 the Board of Trade Act was passed, including special provision against profiteering, already provided for in the Commercial Trusts Act (section 6).
- (f) In 1927 the prosecution of the Crown Milling Co., Ltd., and Distributors Ltd., by which a practical monopoly in flour was established, failed. [(1925) N.Z.L.R. 258, 753; (1927) A.C. 394.]

Mr. O'Leary: And it failed, I submit—this is of very great importance in considering the present proposal to amend the Bill—because it is not a monopoly if the monopoly is not contrary to the public interest, and it was held that there was a failure to prove that this monopoly was contrary to the public interest. I submit this that the effect of this decision is that section 5 is annihilated. It is impossible—if the decision in the Flour Milling case is considered—to show that a monopoly is contrary to public interest.

- (g) In 1927 a Committee of inquiry under the Board of Trade Act investigated the Proprietary Articles Trade Association, already known in Canada, Great Britain, and New South Wales. The Committee found that the association would be a *danger to the public*, and stated that “the element of force by *the boycott* is a weapon which no body of citizens could use without coming sooner or later into serious conflict with public opinion.” (Page xvii of report.)

The final fact I submit why the Act should be retained in its entirety is this—

- (h) In 1933 tobacco and cigarettes were taken out of the Act. As a result certain independent traders can only buy supplies *on much worse* terms than competitors. A Tobacco Association is at present suggested, with cutting off supplies to those not falling into line with the association.

Mr. O'Leary: I have copies of the draft rules and the agreements to show you that what I am saying is perfectly correct.

To proceed with the amendment itself: The amendment makes it a sufficient defence if the defendant proves all of the following matters to the satisfaction of the Court, that is to say:—