

questions being interjected during the course of their presentation of the brief, or would you prefer just to start asking questions?

**Senator Molson:** Mr. Chairman, would it be feasible to go through the brief dealing with each heading as we come to it, discuss the general thought in that heading and then move on to the next section? I certainly do not think we should have the brief read, Mr. Chairman.

**Hon. Senators:** Agreed.

**The Chairman:** I think that is an excellent idea.

Mr. Hemens, your position, as we go over these headings, will be that either you will have some comment to make yourself or you will call on one of the members of the delegation to amplify the headings. Is that right?

**Mr. Hemens:** Yes. Thank you, Mr. Chairman.

**The Chairman:** All right.

The first heading in your brief is "Refusal to Deal—Exclusive Dealing—Market Restriction—Tied Selling". I would like to fire a question, to get things going. As a general question, with respect to these headings which give the authority to the commission to bring a person really to a hearing for the purpose of investigating a complaint in connection with refusal to deal, et cetera, how do you suggest that the provisions in the bill might be retained but the necessary amplification might be made to meet the points you raise in your opening statement?

**Mr. Hemens:** Mr. Chairman, in our conclusion, starting on page 28 of the brief, we have suggested several possibilities. First of all, one of the proposals is that we retain the basic concept of competition legislation, that only conduct constituting an undue restraint on competition should be prohibited. We suggest to you that that would be one way of restricting the unfettered jurisdiction of the commission.

A second proposal is made in the same series of conclusions, that a restrictive trade practice, so-called, should be prohibited, or prohibitable, only if it were attached to an otherwise unlawful activity. That follows the system adopted under the Robinson-Patman Act in the United States. We also suggest the possibility of certain specific defences.

**Senator Connolly:** Before you continue, you are talking really to item (ii) on page 29 of your brief, that the commission "should be empowered to prohibit any trade practice only if it was the result of an otherwise unlawful activity . . ."

**Mr. Hemens:** That is right, senator.

**Senator Connolly:** Would you care to give an example of that?

**Mr. Hemens:** Well, let us consider refusal to deal. If the refusal to deal were part of a conspiracy among, let us say, the sole manufacturers intended to keep someone out of the market or to force them out of the market, you would have a conspiracy in

restraint of trade, and we think the refusal to supply under that circumstance is reasonably prohibitable.

**Senator Connolly:** For the sake of argument, let us use the example of the manufacturer under licence of Chanel No. 5 perfume, and let us say that that manufacturer under the licence has an arrangement with a certain selective group of outlets to be the exclusive outlets for that product. Let us assume that not only the owners of the outlets but the manufacturing organization agree as among themselves that no other outlets will be available. Is that the type of "otherwise unlawful activity" you are talking about?

**Mr. Hemens:** No, sir, we do not suggest that.

**Senator Connolly:** Do you, for example, consider exclusive dealing or exclusive arrangement to market to be an unlawful combination as between the manufacturer and the retailer?

**Mr. Hemens:** No, sir. There, I think, we get into the problem of the definition of "product". I know little about perfumes, except as they are worn by others, but I suggest to you that there is not only Chanel No. 5 perfume but, for all I know, there may be Chanel No. 1 to Chanel No. 10, plus a whole series of other perfumes. Consequently, we suggest that the manufacturer of Chanel No. 5 should be entitled to set up his normal distribution system. He should not be compelled by the act to take on as distributors or marketers people whom he does not want to take on. Those people can obtain any variety of perfumes they want.

**The Chairman:** Mr. Hemens, I suppose it is also a fair conclusion that the manufacturer of Chanel No. 5 would not want everybody smelling of Chanel No. 5; it would soon cease to be popular. So you can recognize the need for some control and some restriction. Certainly, the manufacturer should have the right to improve the marketability of his product.

But did I interrupt you, Senator Connolly? What you said brought to mind the fact that we have these matters which are reviewable by the commission, starting with section 31.2, and these are not offences. We have otherwise in the bill what are called "trade practice offences". Now, in the trade practices those are made absolute offences. In other words, that *per se*, if you have done this and it is established that you have done it, you are guilty. But what Mr. Hemens has been talking about is the function of the commission with respect to the trade practices which are not made offences.

As I understood him, it would appear that if some additions are made to these provisions that the commission deals with, they may deal with the list of trade practices that are set out in the bill in the manner provided in the bill, only if what is being done is otherwise unlawful.

**Mr. Hemens:** That is one of our proposals, yes, sir.

**Senator Connolly:** Plus this fact, that Mr. Hemens' first point is that if there is this exclusive dealing it does not unduly restrain competition. That is your first point. Your second point is that it should be associated with an otherwise unlawful activity. You have a third point, and you may have others too.