examples of how we think the Restrictive Trade Practices Commission could exercise its discretion.

Let me now give you one of them. Suppose the complainant is not now carrying on business but wishes to do so. He has ample financial resources, adequate knowledge of the trade, premises in which to carry on business and is prepared to order in the quantities usual in the trade. If unable to obtain domestic supplies, he could purchase on the international market. If unable to purchase from the manufacturers, he could obtain supplies at higher prices from wholesalers.

The commission, in our view, could make the following findings:

(a) the relevant market is the domestic and not the international market;

(b) the relevant market is that supplied by the manufacturers and not the wholesalers of the product;

(c) the article is the one in question and not any substitute;

(d) the complainant is precluded from carrying on business even though he is not now in the business and even though he can obtain substitute articles because he has been prevented from entering the business of distributing the particular article in question;

(e) the complainant can meet usual trade terms since his credit is good and he is willing to order in usual quantities even though there is no evidence as to his ability to market or service the article to the satisfaction of the suppliers;

(f) the fact that the industry is highly concentrated is sufficient evidence of an inadequate degree of competition in the market.

Gentlemen, what we are trying to show you is that there are a host of legitimate business factors which enter into a supplier's selection of his customers. We think that the commission should be required, by legislation, by this bill, to consider these matters. This means that sections 31.2 and 31.4 should be modified and we have several suggestions to make in this regard.

The original concept underlying anti-combines legislation was that only conduct which constituted an undue restraint on competition should be prohibited. The minister appears to continue to recognize the validity of this concept because he has continued the concept in the bill in connection with combinations in restraint of trade. We believe the same approach should be built into Sections 31.2 and 31.4 dealing with trade practices. This can be done in any one or more of the following ways:

(a) Only trade practices which *unduly affect competition* should be prohibitable. This is the concept underlying the existing act.

(b) Only trade practices resulting from an otherwise unlawful activity (such as combinations in restraint of trade) should be prohibitable. This is the approach adopted in the United States.

(c) Specific exemptions should be provided.

e.g. No order against refusal to deal or exclusive dealing should be possible if:

(i) A supplier has adequate distribution in the market and an order would only increase distribution costs or reduce distribution efficiency;

(ii) The complainant is not willing and able to meet all reasonable commercial and statutory standards;

(iii) The complainant uses the supplier as a supplier of last resort;

(iv) The supplier deals only with full line customers and the complainant will not handle a full line;

(v) The complainant can obtain functionally competitive products.

If any of these approaches were adopted, we believe that the issues would be very much narrower than is now contemplated by the Bill and that it would therefore be appropriate for the courts to hear appeals from decisions of the Commission on fact as well as on law.

Mr. Chairman, before I conclude, can I touch on one other matter dealt with in some detail in our submission? On pages 9, 10 and 11, we suggest some amendments to the bill's misleading advertising provisions. Perhaps the most important suggested amendment is that a defence of honest mistake should be available to a charge of misleading advertising. In saying this, we recognize that industry should be very careful and should not be able to hide behind gross negligence of its employees. We believe however, that a fair position has been taken in the United Kingdom Fair Trading Act of 1973. Section 25 of that act provides a defence if the person charged can prove that the offence was due to a mistake or accident or some cause beyond his control and that he took all reasonable precautions to avoid the commission of the offence. We believe this defence should be available in Canada where the mistake was made by a servant, employee or agent of the person charged.

Mr. Chairman, that concludes our presentation. There are many other matters dealt with in our submission and we will be happy to make a serious effort to answer questions from the committee.

The Chairman: Now, Mr. Hemens, in connection with the presentation of your brief, who is going to open the discussion? There is a lot of meat in your brief and the subject is not an easy one to follow. Even the minister has conceded, many times, that there is confusion and complexity. We will appreciate any help that you can provide at this time for the proper understanding of the bill. How are you going to proceed? We have the opening statement.

Mr. Hemens: Mr. Chairman, we had rather thought that you might prefer, after the opening statement, to operate on a question-and-answer basis. As you can see, the brief is fairly complex. Fortunately, a great part of it is contained in the appendix and deals with what, to an extent, is dealt with in the opening statement. As to the other aspects, we will be glad to try to answer questions—unless you would prefer some other method of approaching it.

The Chairman: What is the wish of the committee? Would you care to have the brief read by members of the delegation, with