# COMPETITION LAW PROPOSALS MEET MIXED RESPONSE

Consumer and Corporate Affairs Minister André Ouellet circulated a Discussion Paper in April, 1981 outlining and explaining his proposals for revisions to the Combines Investigation Act (the text of the substantive parts of his proposals are reproduced in the June issue of the Record). Responses to the proposals by six national organizations are reported on below.

The submissions by the Canadian Chamber of Commerce, the Consumers Association of Canada, the Canadian Manufacturers' Association, the National Automotive Trades Association, the Canadian Construction Association and the Canadian Bar Association all agree on the need for competition. At the same time, they disclose continuing disagreements over what, if anything, must be done to preserve it. Some stress the insufficiency of competition in Canada and the need for a stronger competition law to stimulate productive efficiency. Others stress the vigour of existing competition and the danger that an overly stringent competition law would discourage production and investment by placing undue limitations on the freedom of entrepreneurs to act in their own best interests. As the submissions show, many of the issues are highly technical and they do not sustain the interest of the general public.

The reactions to the proposals by the Canadian Chamber of Commerce (CCC), the Canadian Manufacturers' Association (CMA), and the Canadian Construction Association (CCA) were largely adverse, while those of the Consumers Association of Canada (CAC) and the National Automotive Trades Association (NATA) were supportive. The Canadian Bar Association (CBA), while cautious about engaging in debate over economic policy, made a large number of constructive criticisms and suggestions.

The CCC termed the Discussion Paper "unsatisfactory as a basis for true discussion" and found that it "reflected too much the doctrinaire preconceptions of the Bureau of Competition Policy... and lacked a feel for the realities of competition in the marketplace. They proposed a whole new start beginning with a study and reworking of the proposals "by a group of persons having both a broad knowledge and experience of business, and also the perspectives of other government agencies including that of regulatory reform". The CCA saw no need for reform of competition policy in the prevailing circumstances in the economy today. The CMA stated:

> "Throughout the debate on competition policy, industry has felt that there has been a tendency to overreaching by the Department in its legislative proposals. Instead of identifying specific mischiefs and

> defining them with particularity, the legal net has been spread so wide that all kinds of normal and unobjectionable business practices would be liable to attack. The Discussion paper shows the same approach."

The following summarizes the positions taken on the principal issues.

## Constitutional Issues

The CBA has "very real doubts" that certain of the provisions of the 1976 legislation, and therefore of the Discussion Paper, will be upheld by the Supreme Court of Canada. It urges a reference to that Court before proclamation of new legislation. The CMA expressed similar concerns.

## Adjudication

The issue raised in the Discussion Paper is whether a board like the Restrictive Trade Practices Commission should adjudicate reviewable practices or whether the courts should do so.

Views on this subject were frequently linked to views on what kinds of criteria for evaluation should be adopted, especially for merger and monopoly cases. The CAC and the CCC, both of which favour a "balancing test" rather than a market share threshold, prefer a board. NATA and the CBA, which favour less complex criteria, prefer the courts and suggest the Federal Court. The CMA also favours the courts.

The CAC explains that in its view a board would be in a better position to deal with complex competition policy issues. Moreover, they point out that appeals to the courts would still be available on grounds such as errors in law or breaches of rules of fairness or natural justice. NATA, on the other hand, "would feel uneasy if the Government were to create a new and very powerful Board of officials or one powerful individual official, to be given the power to act without adequate controls to safeguard the freedom of business". For its part the CBA stated:

> "In the case of previous proposals for amendment which involved the use of an administrative board, we expressed many concerns with respect to the implementation of these proposals, particularly as to procedures to safeguard the rights of all parties and with respect to appeals. Most of those concerns would not arise if the regular courts are used. We did not absolutely oppose the use of an administrative board, however, in the case of earlier amendment proposals because of the nature of the legislation proposed and the public policy reasons advanced in support of it. If a market

threshold approach to the merger and monopoly provisions, or as we suggest an "effect upon competition" test, is adopted, it appears to us that the need for an administrative board to deal with merger and monopoly matters is removed."

The CBA added that the language of existing reviewable practices should be reviewed carefully to ensure that they are amenable to adjudication by a court as distinct from an expert tribunal.

The CMA, while favouring more complex criteria for evaluation of mergers and monopolies than those suggested in the Discussion Paper, strongly supports the use of the ordinary courts "because of their impartiality and the importance of the right of appeal". Their position is, however, conditional upon the following:

- "...the court will require a high level of expertise to deal with these issues, but we feel this problem may be overcome by specifying particular judges to hear competition law cases, by providing expert assistance to the court, and by legislation providing guidelines by which the adjudication should be made."

- "The burden of proof must remain clearly with the Crown and the Director must be the only one to initiate action."

- Civil standards of proof and criminal discovery methods including search and seizure should not be combined. Perhaps both should be criminal or both civil.

- The powers of the court should be restricted to making remedial orders and not extended to awarding penalties or damages.

The CMA expressed the preliminary view that purely provincial or local matters should go to a provincial superior court and national or inter-provincial matters to the Federal Court. They did not, however, rule out support for exclusive use of the Federal Court.

## Mergers

The Discussion Paper proposed the choosing of a specific market share threshold above which virtually all mergers would be prohibited or subjected to remedial orders. Mergers below the threshold would be judged according to whether or not they are likely to lessen actual or potential competition "significantly". Most of the briefs opposed the proposal and none gave it unqualified support.

The CAC considers that a threshold test would be too arbitrary and would not in any case provide certainty because the debate would shift to the

definition of the relevant market. They favour a balancing test without any specific market share threshold along the following lines:

> "...proof of market dominance by means of market share would create a presumption that the increased level of concentration is not in the public interest and that remedial action is required. As well, such proof would give rise to a right to an interim order prohibiting the merger prior to the adjudication of the matter.
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> "This presumption could be rebutted at the main adjudication by proof that the increased concentration or 'monopolistic' behaviour is not likely to lessen actual or potential competition and is in the public interest (in other words, the onus shifts to the firm or firms in question)."

The CCC also opposes a threshold and favours a balancing test, but "doubts the necessity for a highly-restrictive merger law on any grounds". They propose instead:

> "1. ...The significant lessening of competition should always be subject to judgment, whether by a court or a tribunal.
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> "2. Instead of referring mergers to the courts, the Chamber suggests that the Director, if he believes a significant lessening of competition would occur, would apply to the Restrictive Trade Practices Commission for a hearing of the case. The Chamber believes that this tribunal would be better qualified than the courts to evaluate the effects on the economy of a merger. In addition, the limited resources of the Commission would ensure that the Director brings only those cases which are of most significance, so that federal government intervention in merger activity through competition policy would be appropriately limited. This would not preclude action by other federal government departments to influence the Canadian industrial structure.
>
> "3. In evaluating mergers, the Restrictive Trade Practices Commission should be required to balance the effects of a merger on competition with other economic considerations including possible benefits from the merger.
>
> "4. Mergers having purely local or regional effects, and not properly under federal jurisdction, should be excluded from the operation of the merger law.
>
> "5. Provisions should be made for parties to a merger obtaining legally binding advance clearance from the Director if he is

> satisfied that the merger would not significantly lessen competition."

The CMA strongly opposes a market share test both for mergers and monopolies on grounds that it would be difficult to apply, would unfairly penalize some companies simply bvecause they are above a threshold and without identifying a market evil, and would provide inappropriate answers by ignoring other important factors.

The CMA objects to other features of the merger proposals as well, including its apparent application to purely local mergers on the one hand, and to bigness as such on the other hand. They consider that the legislation should be restricted to horizontal mergers and ones having significant horizontal implications in order to avoid an impediment to Canadian industry moving toward more world scale operations. They also dislike the proposed test of significant lessening of competition as being unclear.

At the same time, the CMA recognizes that merger control "may be an area for some measure of reform", possibly some measure for control of large mergers by legislation other than the Combines Investigation Act. Whatever the means, they consider that public detriment, to be determined by whether or not effective competition remains, should be one of the tests. However, in their view, there must be "a balanceing of all factors in a determination of the benefits to the economy".

The CBA supports a threshold of fifty per cent or more in the interest of certainty, but with the following significant qualifications:

> "We consider, however, that the basic test should be as set out in paragraph 18 of the Paper, i.e. whether or not the merger is likely to lessen actual or potential competition significantly. Accordingly, the effect of the threshold test would be that if the threshold were exceeded, the onus would be shifted from the parties to the merger or proposed merger. If it were established that the merged firms would account for a share of the relevant market in excess of the threshold percentage, a merger would nevertheless not be prohibited if the parties could satisfy the court that, notwithstanding this, significant competition would remain in the marketplace."

In addition, the CBA recommends that the Cabinet be empowered to approve a merger.

The CBA also expressed serious misgivings about the interface with the Foreign Investment Review Act, which is proposed in the Discussion Paper. For example, the CBA states:

> "If the procedure proposed in the Paper is followed, whereby if the Director of Investigation and Research has certified that he will be proceeding against the merger under the Combines Investigation

> Act, no consideration is to be given under the Foreign Investment Review Act to the competition issues raised by the merger, the situation might well arise where a merger would be found by the Governor in Council to be of significant benefit to Canada but could, nevertheless, be subject to dissolution or prohibition under the provisions of the Combines Investigation Act. This would be a contradictory situation."

The CBA noted other inconsistences as well, and suggested it might be desirable to amend the FIRA to substitute some other criterion for "significant benefit to Canada" where a decision is being made by FIRA without consideration of the competition issues.

With regard to pre-notification of mergers, the CAC expressed strong support while the CCC, the CMA and the CBA opposed it. The CMA added, however, that they "could see the utility to the Government of pre-notification in the case of some very large mergers", and they intend to consider this matter further.

A number of business briefs including that of the CMA expressed concern about the absence in the discussion paper of any proposal to exempt joint ventures.

## Monopoly and Joint Monopoly

The Discussion Paper would provide for the issuance of orders to remedy specified kinds of anti-competitive conduct where monopoly or joint monopoly, defined as exceeding specified percentages of market control, is found to exist.

The CAC opposes the establishment of specific thresholds for market dominance and prefers the establishment of market dominance before a tribunal in the same way as it proposes for mergers. However, the CAC would make all firms, whether dominant or not, subject to remedial orders if engaging in the specified practices. Their submission states:

> "(b) Proof of anti-competitive conduct alone (without proof of market dominance) would give rise only to a presumption that a cease and desist order should be issued unless the firm or firms in question can establish that the conduct is not likely to lessen actual or potential competition (i.e. the onus is shifted)."

The CCC is strongly critical of virtually all aspects of the proposals respecting monopoly and joint monopoly. They would simply delete the part on joint monopoly. With respect to the part on monopoly, they oppose the suggestion for a specific threshold, particularly as it applies to local markets. Moreover, they consider that a number of the specified kinds of anti-

competitive conduct are in many circumstances either pro-competitive or normal business practices with no overall detrimental effect. They also oppose the use of the qualifying words "to eliminate or restrict the growth of a competitor or to prevent entry" on the grounds that these are commonly regarded as legitimate competitive objectives. The CCC concludes:

> "Accordingly, the Chamber suggests that, as a minimum, clear instructions be given to the courts in a Competition Bill to weigh the true competitive or anti-competitive nature of the actions and practices of firms in a dominant position before issuing a remedial order. It would be preferable, however, to change the entire method of control proposed for monopolies to eliminate the arbitrary statistical tests of dominant position to adopt instead a functional method of defining dominance, and to provide for a careful weighing of the true effects on competition, on the economy and on the public of actions and practices of firms in such a position."

The CMA opposes the proposals respecting monopoly and joint monopoly as being too structurally oriented and attacking practices many of which it considers to be pro-competitive. The grounds upon which they oppose the proposals include the following:

- The existence of monopoly or dominance should be just one consideration in dealing with questionable trade practices.

- Market share of one or a few firms does not necessarily reflect market power, which is the real issue.

- Parallel marketing policies adopted by firms in concentrated industries are evidence of effective functioning of the market and not of abuse of market power.

- "We suggest, as a starting point for any discussion, that it must be recognized that the Crown has to assume the onus of proving predatory intent beyond a reasonable doubt and that it is a defence to any allegation of predation if the conduct complained of has a valid collateral purpose such as meeting competition, increasing or retaining market share, or increasing efficiency. This is what competition in the marketplace is all about."

However, the CMA agrees there may be types of predatory conduct that should be subject to review, and they express willingness to consider a behavioral approach. It would be based upon the Skeoch-McDonald definition of "dominant", in terms of power to choose a rate of profits or share of the market undeterred by competition from rivals.

NATA reacted favourably to the proposals on monopoly and joint monopoly and suggested thresholds of 40 percent. They also suggested the

addition of the anti-competitive practices "such as the consignment agreement for temporary voluntary allowances or equivalent predatory tools, and price discrimination".

The CBA made the following suggestions about the list of anti-competitive practices to which the monopoly provisions would apply:

- Practices (a) and (b) - selective price cutting and price squeezing - appear to be practices of the kind described in ss. 34(1)(b) and (c). The latter criminal provisions should be repealed if the proposed civil provisions are enacted.

- The practice which was described in ss. 31.72(1)(a)(iv) of Bill C-13 - coercing a competitor into avoiding, abandoning or restricting competitive behaviour or punishing him for past behaviour - might be added to the list.

- The practices as described in the Discussion Paper are assumed by the CBA to be "only concepts" and it may be difficult to express them in legislative language "so as to avoid bringing within their scope a wider range of activity than intended".

With regard to joint monopoly, the CBA is critical of the proposal whereby small groups of firms with a combined market share over the threshold would be subject to remedial order for pursuing the same or very similar conduct falling within the definition of one of the specified kinds of anti-competitive practices. They also note an overlapping of that proposal with the proposal in paragraph 53 of the Discussion Paper to amend the criminal conspiracy provision, i.e.:

> "...the definition of arrangement would be expanded to include a tacit arrangement or agreement where it can be shown that each of the parties adopts a course of conduct which would significantly lessen competition and intentionally arouse in each of the parties an expectation that he will continue in that course of conduct if each of them adopts a similar course of conduct."

The CBA considers that the proposal respecting joint monopoly is too harsh and that the foregoing proposal in the Discussion Paper to expand the criminal conspiracy law to include a tacit arrangement as defined should be civil rather than criminal law. Consequently, they suggest that the tacit arrangement test proposed for the criminal conspiracy provision be dropped and become the test for the civil joint monopoly provision. They point out that this would amount to incorporating in the joint monopoly provision the definition of "arrangement" enunciated by Lord Justice Diplock in Re British Slag, Ltd. (1963) 2 All E.R., i.e.:

> "...it is sufficient to constitute an 'arrangement' between A and B, if (i) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way; (ii) such representation is communicated to B, who has knowledge that A so expected and intended, and (iii) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way."

The CBA explains its position in part as follows:

> "It is our opinion that conscious parallelism alone should not give rise to either criminal or civil remedies under the Act. There should be some further element present, a situation sometimes referred as 'conscious parallelism plus'...
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> "We are not suggesting, as a basis for civil remedies, that there should be a degree of collusion which would be required to support a finding of conspiracy or agreement but rather we are seeking to avoid a situation where, merely because the circumstances of an industry, firms may have engaged in certain practices without any element of mutual reliance on each other's similar performance. We think that there should be at least some history of conduct which would bring it within the definition of Diplock..."

Of the briefs examined, only NATA favoured provision for award of damages in monopoly and joint monopoly cases.

## Statutory Monopoly

The Discussion Paper proposes a civil procedure to allow for remedial orders "where use has been made of a patent, trade mark, copyright or industrial design in a manner not expressly authorized by the governing legislation where such use has adversely affected competition." A list of practices is provided as examples of what the proposal would reach.

The CCC, the CMA and the CBA opposed the proposal, and the other briefs did not comment on it specifically. The CCC stated:

> "Although certain other nations have proposed or enacted limited prohibitions of the practices listed in the Discussion Paper, they have generally tried to word their guidelines or legislative enactments extremely carefully so as to provide proper exemptions and exclusions and to preserve the inherent value of the intellectual property rights. In the Chamber's opinion, the unqualified ban on practices listed in the current proposals would so reduce the value of these intellectual property rights in Canada that they will be less

> likely to stimulate a dynamic economy. The Chamber suggests that the scope of the proposed limitations on traditional patent and other intellectual property rights should be carefully re-examined to preserve the legitimate use of these rights."

The CMA stated:

> "Canada needs new technology and we need laws which will not only provide incentive to encourage innovation in Canada, but we also need encouragement to licence Canadian patents and to encourage the transfer of foreign generated technology to Canada."

They proposed further study to determine what, if anything, needs to be done, and they pointed out as possible alternatives the following actions which have been taken elsewhere:

> "The U.S. Justice Department Anti-trust Guide for International Operations, the EEC, the Fair Trade Commission Guidelines in Japan, the proposed UNCTAD Code of Conduct for Transfer of Technology and many other bodies, governments and institutions are sensitive to the kinds of abuses identified in section 37 of the Discussion Paper, and provide guidelines or regulations indicating the types of provisions in license agreements which are acceptable. They do not, however, for the most part, make them per se violations of competition law."

The CBA pointed out that the intellectual property laws do not "expressly authorize" the terms usually found in licensing agreements and there was the danger that all licensing arrangements would fall within the scope of the proposed provision.

## Export and Import Restrictions by Multinationals

The Discussion Paper proposed a civil provision whereby a Canadian subsidiary with a specified share of Canadian production or supply could be ordered not to implement an agreement with a foreign parent or affiliate to restrict exports or imports where such restrictions are designed to protect price levels in Canada or abroad.

The CMA brief was the only one to deal specifically with the proposal. While supporting the objective of removing a non-tariff barrier to trade, they expressed serious reservations about the proposal as drafted. In the first place they oppose a market share test as being an inappropriate proxy for monopoly power. In the second place, they foresee difficult enforcement problems in an attempt to control the conduct of foreign-based parent firms or of Canadian subsidiaries located abroad. They point out that an import or export restriction which may in some circumstances be in Canada's interest to

remove may be in the interest of a foreign firm or government to retain. Moreover, a Canadian Province may want to retain a restriction on the import of a product which is made locally. Nevertheless, they state:

> "If the problems of domestic and international acceptance can be overcome, we recommend using a test similar to that suggested for monopoly. In other words, Canadian affiliates should be ordered to withdraw from agreements to restrict imports where the MNE satisfies the Skeoch-McDonald definition of 'dominant firm' in Canada and where the likely effect of the agreement is to protect price levels to the detriment of the public in Canada."

Conspiracy Law

The Discussion Paper proposed that s. 32 of the Act be strengthened substantially. The "undueness" test would be deleted. It would be made clear that the offense lies in the agreement and the natural effects it would have, whether or not it is subsequently implemented. Tacit arrangements would be clearly covered.

The CAC supported these proposals. However, as an option, it suggested that with regard to agreements other than price fixing and market sharing, the accused might be given the opportunity of demonstrating that the agreement was not likely to lessen actual or potential competition. NATA also supported the proposals.

The CCC was strongly opposed to the proposals and called for their entire rejection.

The CMA opposed the proposals strenuously and disagreed that there was a need for major changes to the conspiracy section. They stated:

> "The proposals set forth an inaccurate interpretation of the current state of conspiracy law, particularly the effect of the Aetna Insurance and Atlantic Sugar cases. Moreover, they fail to mention the 1976 statutory amendments which overcame at least one of the stated defects in these cases; section 32(1.1) makes it clear that the Crown need not prove the virtual elimination of competition. Our legal advice is that the state of the law has not been significantly changed by the two cases cited, and in any event, it seems wrong to base such a major reform on such tenuous evidence."

Nevertheless, the CMA does not object in principle to the proposal to make it clear that the offence lies in the agreement, whether or not implemented. However, they consider the phrase "the agreement and the natural effects it would have" to be too wide. In their view, the offence must contain "the two essential elements of a conspiracy, namely, the existence of an agreement and the intent to commit an unlawful act."

The CMA brought forward two amendments of their own. First, section 32 should be amended "to provide that horizontal agreements should not be unlawful if they involve cooperation for economic purposes broader than merely the elimination of rivalry and if the primary purpose is not to restrict output". Second, they stated:

> "...it is essential to amend the definition of 'product' and 'article' to make it clear that they include all substitutes that are effectively in competition with one another and to make it clear that actual or potential competition from outside the market area in question (such as import competition) is taken into account."

The CBA criticized the proposals on the following grounds:

- As indicated above in connection with the joint monopoly proposals, the CBA considers that conduct falling short of an agreement, tacit or otherwise, should not be made a criminal offense and should be dealt with in the civil provision respecting joint monopoly. Moreover, they disagree that the Supreme Court of Canada in Atlantic Sugar ruled out a tacit agreement in which express communication among the parties could not be demonstrated. Rather, the CBA states:

  > "The court did not accept the proposition that mere consciously parallel conduct, without anything more, would constitute a 'tacit agreement'."

  Consequently, they see no need to amend s. 32 to provide for tacit agreements.

- The CBA disagrees with the statement in the Discussion Paper that a showing of virtual monopoly is required in proceedings under s. 32. The cases upon which that statement was based involved situations which pre-dated s. 32(1.1) which was enacted in 1976. That provision makes it clear that proof is not required that an agreement would or be likely to eliminate competition completely or virtually.

- The CBA agrees with the Discussion Paper that the Aetna and Sugar judgements created the difficulty that the prosecution now appears called upon to prove that an agreement was intended to lessen competition unduly. However, the CBA considers that this problem could be met by the insertion of a provision in s. 32 in a manner similar to the 1976 insertion of s. 32(1.1).

- The CBA opposes the deletion of "unduly".

The CBA summarized its position as follows:

> "Our view is, therefore, that a drastic revision of the criminal conspiracy provisions along the lines suggested in paragraphs 45 to 56 of the Paper is neither required not desirable. Such a change, apart from problems of substance in the new provisions, would result in a new framework of legislation which would have to be refined and developed by a new line of jurisprudence. We consider that it is far prefereable to retain the present provisions of section 32, and the case law which has developed under it, to give the courts an opportunity to apply subsection (1.1) and to rectify the problems created by the Aetna and Eastern Sugar cases in the manner suggested above."

The CBA also noted an absence in the Discussion Paper of a proposal to broaden the export exemption in ss. 32(4) and (5). There was such a proposal in Bill C-13, and the CBA expressed support for it with a few amendments.

## Specialization Agreements

The Discussion Paper proposes an exemption from the conspiracy offence for specialization agreements of up to five years duration relating to products already in production.

The CCC proposes that the exemption be extended to long-term specialization agreements and to "many other types of agreements in restraint of trade in all circumstances where there is a net benefit to the consumer and the economy". The CMA also favours a broadening of the exemption, while pointing out that no such exemption would be required if its proposals for the conspiracy section (see above) were adopted. The CBA favours extending the exemption to specialization agreements respecting products not currently in production and for periods longer than five years. Also, instead of entrusting the adjudication to the Restrictive Trade Practices Commission, it favours approvals by Order in Council, possibly on the recommendation of the Minister of Industry, Trade and Commerce.

## International Cartels

The Discussion Paper proposes a prohibition of agreements by Canadian firms with foreign firms to limit imports or exports when the Canadian firms account for more than a specific share of Canadian production or supply, except where specifically authorized by an Act of Parliament. The CCC opposed the proposal and NATA supported it. The CMA proposed that the offence be limited to international cartels "that unduly limit exports from or competition in Canada". They point out that some international joint ventures

and group projects which, on balance, assist foreign trade, should not be subject to criminal penalties. The CBA suggested that an exemption from the proposed provision be made available on the authority of an Order in Council.

## Systematic Delivered Pricing

The Discussion Paper proposes that firms be prohibited from refusing to supply their customers at any location where the firms are supplying the product to other customers. The CMA and the CCC opposed it and NATA supported it. The CMA considers basing point systems to be pro-competitive in that they discourage the development of local monopolies. Moreover, they consider "that competition policy should not concern itself with regulating the marketing policies of individual firms except in cases of fraud and predation".

The CBA suggested that the provision only apply where facilities for delivery in the quantity required are available.

## Other Matters

The proposal to transfer responsibility for competition policy more fully from the Bank Act to the Combines Investigation Act was only opposed by the CCC. The CMA has reservations about it but considers it outside their field of expertise.

Both the CCC and the CBA raised the issue that in their respective views, Crown corporations should be fully subject to the competition law.

The CMA proposed that the prohibition relating to price discrimination in s. 34 and promotional allowances in s. 35 be repealed. They regard s. 34 as an unwarranted interference with the freedom of businessmen to set the price they wish for their products, and point to the lack of prosecutions under it. With regard to s. 35, they consider that a supplier should be free to direct his advertising dollars where he believes they will get the best product support.