June 21st, 2002

The Secretary
Trade Practices Act Review
Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir,

Review of the Competition Provisions
Of the Trade Practices Act 1974

This submission is put forward on behalf of the Independent Paper Group (IPG).

The IPG consists of eighteen senior executives of independent paper merchants, mill agents and importers, supplying some two thirds of Australia's fine paper (printing, writing and graphic papers) requirements. It is thus an integral part of the Australian paper industry, together with the sole local producer, Australian Paper – part of the expansive PaperlinX Group, which also encompasses substantial wholly owned paper distributors. A list of current IPG members is attached and further information on the Group and its membership is available on our website at www.independentpapergroup.com.

Terms of Reference and Scope of Submission

Essentially, the Terms of Reference asks the Committee to review the operation of the competition and authorisation provisions of the Act and identify justified improvements to the Act and its administration, to achieve a more efficient, fair, timely and accessible framework for competition law.

While this submission will attempt to cover the main issues, it is not intended to be an in-depth examination of the legal arguments that will arise during this review; rather, it puts forward the views of the Group from a practical point of view, set against the backdrop of the current fine papers market which has emerged over the years.

The Backdrop

The IPG has made a number of substantial submissions and representations on industry issues over the past couple of years – the most significant being those relating to the administration of Australia's Anti-Dumping System and Australian Competition and Consumer Commission (ACCC) inquiries into the acquisition of Commonwealth Paper by Spicers Paper Limited and PaperlinX's full acquisition of Spicers Paper Limited – Australia's largest paper merchant.

The IPG submissions to the Minister/s for Justice and Customs raised members' concerns with the local paper industry's use of Australia's Anti-Dumping System as an anti-competitive tool, and the perceived manipulation and politicisation of the system through

on-going and persistent lobbying of the Minister and staff by the Industry Task Force on Anti-Dumping (mainly comprised of local manufacturers of chemicals, plastics and paper) and their political supporters, to delay and/or overturn the independent recommendations put forward by Customs after extensive public inquiry and report.

Our submissions and representation to the ACCC expressed our deep concerns with more recent acquisitions (Commonwealth Paper by Spicers and Spicers by PaperlinX) – these acquisitions coming on top of a series of creeping acquisitions over the last decade or so which gradually and progressively lessened competition in the once very competitive fine papers market. In the PaperlinX/Spicers merger the ACCC went some way to alleviating our concerns by obtaining court enforceable undertakings for two of the merged entity merchants (Edwards Dunlop and Commonwealth Paper) to be divested, and future anti-dumping actions over the next three years, lodged by PaperlinX or any of its attendant parts, to be assessed by an independent expert before going to Customs. This outcome was reasonable given that the IPG was not against the merger altogether in view of PaperlinX's stated intention of expanding its merchanting operations internationally. However, IPG members are still quite concerned with the obvious lessening of competition in this valuable market – with the resultant PaperlinX/PaperlinX merchants now controlling over 60% of the Australian fine papers market and over 90% of the fastest growth market, the A4 cut ream copy/office paper market.

Existing anti-dumping measures on A4 copy paper and two side coated sheets (another major segment of the fine papers market) on a number of European, South African, Scandinavian and Japanese suppliers add further to this lessening of competition – with PaperlinX and its merchants being able to control the volume and pricing of imports to a large extent by importing these papers from a number of low-priced Asian/South East Asian suppliers not subject to anti-dumping measures.

At the time of the PaperlinX/Spicers merger, it was stated that the primary purpose was to consolidate the Australian operations in order to expand its merchanting operations globally. Most IPG group members were not against the merger in principle on this basis and were reasonably satisfied with the outcome in regard to the undertakings given, and accepted by the ACCC. However, we were concerned with the lack of transparency in the consideration of this matter, whereby we were presented with a fait accompli. Additionally, we had very little involvement in the finalisation of the undertakings apparently given by PaperlinX and to this day we have not been given a copy of those undertakings. Aside from this aspect, we have become increasingly concerned with the significant lessening of competition in the fine papers market, and the very real potential for the misuse of the substantial market power now possessed by PaperlinX. Furthermore, there are fears that PaperlinX's global plans and acquisitions may add to a further deterioration of the competitive situation on the Australian domestic market.

Relevance of Review to IPG

Put in the context of the situation outlined in the preceding paragraphs, we believe the current review is of direct relevance to IPG members – particularly in regards to the Committee's examination and recommendations relating to:-

- the Trade Practices Act and globalisation;

- The possible need for amendment/s to the merger (Section 50) and misuse of market power provisions of the Act; and

- The administration of the Act by the ACCC and whether the positions of individuals and corporations are provided sufficient protection.

The Trade Practices Act and Globalisation

Resulting from our observations of the more recent major mergers outside our industry (for instance the BHP/Billiton merger) and the recent PaperlinX/Spicers merger, we must assume that the current merger provisions do not inhibit firms wishing to operate and expand globally. If anything, we are led to believe that the Act does not provide sufficient "teeth" to allow the ACCC and similar overseas bodies to cope with the apparent rise in cartels operating globally in some industries. Closer to home, we are concerned that the stated intention or purpose of approved mergers (which result in a dominant position in the domestic market) to expand globally does not eventuate whether intentionally or unintentionally. In such a situation, we believe the Committee should give consideration to amending the Act to give the Commission the power of divestiture. It is expected that this power would only be used in a limited number of cases where the dominance of market power is substantial.

Possible Need for Amendments to the Merger (Section 50) and Misuse of Market Power (Section 46) Provisions

Mergers

Based on our own experience, and from an examination of the wide range of available literature and commentary, this provision appears central to any review of the competition provisions of the Act. It would appear a number of large business operations are pushing for a watering down of the merger provisions and a reversion to the former test of "market dominance". We entirely reject this approach and believe that the current provisions provide a proper balance of power between small and large businesses except in situations outlined in the previous sub-section (The Trade Practises Act and Globalisation) where the Committee should give some consideration to amending the Act to give the ACCC the power of divestiture in limited situations.

Misuse of Market Power

Much has been written about this provision – with the major arguments centring on whether misuse of market power should be based on a "purpose" or "effects" test. There is little doubt that the current purpose test needs changing – bearing in mind the near impossibility of pursuing a Section 46 action because the possibility of prohibited conduct takes place in the minds and covert actions of those possessing market power. There have been a number of possible solutions proposed, including:-

- listing actions or behaviour which constitute misuse of market power (as apparently contained in Canadian legislation);

- use of the above with an "effects" test; and

- reversal of onus of proof in cases brought by the ACCC only.

In our view, Section 46 should be amended to encompass a combination of all three of the above – where an examination of the effects shows, prima facie, that a corporation possessing a substantial degree of market power has misused that power to damage competition. It is our view that this effects test should be prima facie evidence of "purpose", with the onus of proof being reversed in cases brought by the ACCC.

The Administration of the Act by the ACCC and Whether the Positions of Individuals and Corporations are Provided Sufficient Protection

There has been an obvious co-ordinated campaign by the BCA and some individual businesses alleging that the Commission, or rather the Chairman, Professor Alan Fels, pre-empts proper examination of alleged breaches of the Act by the ACCC and/or the courts by using the media as a pre-emptive strike in such situations. This activity, the BCA and others allege, is unfair and detrimental to themselves and/or their businesses.

While there is little doubt Professor Fels does use the media to further the quest for competition in the market place in some high profile cases, it is our understanding that hundreds of cases are handled by the ACCC, privately and/or by the courts, with little or no publicity. Indeed, there are many consumer and small business organisations that believe that Professor Fels is doing a "good job" of protecting them and attempting to restore the balance between small business/consumers and big business. Rather than muzzling Professor Fels (or any future Chairman), he should perhaps be given the power for "cease and desist orders" in rapidly emerging cases of possible misuse of market power and breaches of other competition provisions of the Act.

On another aspect of administration, we believe that in the consideration of mergers by the ACCC, other interested parties should be consulted at an earlier stage in considering their positions and/or possible undertakings. Further, if undertakings are involved, other parties should be given the opportunity to discuss them in detail with the parties to the merger and the ACCC. Most certainly, other parties should be provided with signed copies of any undertakings.

In summary, based on our own practical experience and from our examination of published material, we believe that some changes to the competition provisions and administration of the Act appear necessary to provide the proper balance between large and small businesses, and increase the transparency, timeliness and fairness of the Act.

We should be happy to elaborate further on this submission if the Committee wishes.

Yours Sincerely,

A. S. WOOD
President
Independent Paper Group