



Trade Practices Act 1974

Notice under section 91C(3)

In relation to Authorisation A90765
Royal Australasian College of Surgeons

1 September 2006

1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business. This results in a greater choice for consumers with regard to price, quality and service.
- 1.2. The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3. Broadly, the ACCC may ‘authorise’ parties to engage in anti-competitive conduct where it is satisfied that the public benefit flowing from the conduct outweighs any public detriment from any lessening of competition.
- 1.4. On 30 June 2003, the ACCC granted authorisation A90765 to the Royal Australasian College of Surgeons in relation to:
 - the selection, training and examining of basic and advanced surgical trainees (authorisation granted for six years);
 - the accreditation of hospitals for basic surgical training (authorisation granted for four years);
 - the accreditation of hospital posts for advanced surgical training (authorisation granted for four years); and
 - the assessment of overseas trained surgeons (authorisation granted for four years).
- 1.5. Authorisation A90765 was granted subject to a number of conditions.

Revocation and substitution of authorisations

- 1.6. Section 91C(3) of the TPA provides that the ACCC may initiate the revocation of an authorisation and substitution of a new authorisation if it appears to the ACCC that:
 - the authorisation was granted on the basis of evidence or information that was false or misleading;
 - a condition of the authorisation has not been complied with; or
 - there has been a material change in circumstances since authorisation was granted.
- 1.7. To initiate the revocation and substitution of an authorisation the ACCC is required to write to interested parties: advising them that it is considering the revocation and substitution of the authorisation; indicate the basis on which the revocation and substitution is being proposed; indicate the nature of the proposed substitute authorisation; and invite submissions in relation to the proposed action.
- 1.8. After considering any submissions received from interested parties in relation to the proposed action, the ACCC may make a determination revoking and substituting the authorisation. Alternatively, the ACCC may decide not to revoke the authorisation.
- 1.9. This document is a Notice to interested persons pursuant to section 91C(3) of the TPA, informing them that it appears to the ACCC that there has been a material change of circumstances in relation to authorisation A90765 since authorisation was granted. Accordingly, the ACCC is proposing to revoke authorisation A90765, and substitute it with a new authorisation.

2. Authorisation A90765

- 2.1. The Royal Australasian College of Surgeons (the College) is a non-government organisation which formed in 1927. Its primary functions are surgical education, training, professional development and support. Ninety percent of all surgeons practising in Australia and New Zealand are fellows of the College.
- 2.2. On 28 November 2000, the College lodged application for authorisation A90765 with the ACCC.
- 2.3. The College's application for authorisation followed a two-year investigation by the ACCC into allegations that the College's processes restricted entry to advanced medical training in breach of the Act.
- 2.4. After considering the application and extensive consultation, on 30 June 2003, the ACCC granted authorisation A90765 to the College in relation to:
 - the selection, training and examining of basic and advanced surgical trainees (authorisation granted for six years);
 - the accreditation of hospitals for basic surgical training (authorisation granted for four years);
 - the accreditation of hospital posts for advanced surgical training (authorisation granted for four years); and
 - the assessment of overseas trained surgeons (authorisation granted for four years).
- 2.5. A copy of the ACCC's determination is available on the ACCC website.
- 2.6. In granting the authorisation, the ACCC was satisfied that the College's training and assessment processes generate a significant public benefit by assisting to ensure that surgical training is of a high quality.
- 2.7. However, the ACCC also recognised that the College possesses significant influence over the number of surgeons entering surgical practice. Authorisation A90765 was therefore granted subject to a number of important conditions. The ACCC imposed conditions to address the potential of the College's training and assessment processes being used to inappropriately restrict entry into the surgical profession.
- 2.8. One of the conditions, and the matter which is the focus of this Notice, is Condition C12 which states:

Before finalising the limit on the number of basic surgical training posts for a particular year, and the distribution of these posts between states and territories, the College shall write to the Commonwealth, state and territory health ministers:

- *informing them of the limit it proposes to impose on the number of basic surgical training posts for the following year;*
- *explaining how this proposed limit has been calculated;*
- *informing ministers of the proposed distribution of basic surgical training posts by state and territory;*
- *explaining how this distribution process has been determined; and*
- *inviting ministers to comment on the proposed limit on and distribution of basic surgical training posts within a reasonable specified period determined by the College, and take these comments into account when finalising the limit and distribution.*

3. Material change of circumstances

- 3.1. In *Re Media Council of Australia*¹ the Australian Competition Tribunal (Tribunal) stated that when establishing a material change of circumstances the ACCC should:
- examine the circumstances as they existed at the time the authorisation was granted
 - move forward to the circumstances as they exist on the material before the ACCC at the time it is considering revocation
 - if the ACCC is satisfied that there has been a change of circumstances, it must decide whether or not that change is ‘material’.²
- 3.2. A material change of circumstances includes a change of circumstances which has an impact upon the benefits to the public or upon the detriment, including anti-competitive detriment.
- 3.3. The Tribunal also commented that “circumstances” is a word of wide import which includes all facts, matters and conduct relevant to an authorisation and to a revocation.³
- 3.4. The ACCC is of the view that since authorisation A90765 was granted, some changes have occurred that have had some impact or likely impact upon the public detriment resulting from the authorised conduct.
- 3.5. The basis for the ACCC’s view is discussed below.

Review of Authorisation A90765

- 3.6. On 8 February 2006, the ACCC received a letter from the Australian Health Ministers’ Conference (AHMC), requesting that the ACCC review and substitute Condition 12 of the authorisation, on the basis there has been a material change of circumstances since it was granted.
- 3.7. In response to this request, the ACCC has consulted extensively with the College, the AHMC, the Australian Health Workforce Officials Committee (AHWOC) and other appropriate parties.

¹ *Re Media Council of Australia & Ors* (1996) ¶ATPR 41-497

² *Re Media Council of Australia & Ors* (1996) ¶ATPR 41-497

³ *Re Media Council of Australia & Ors* (1996) ¶ATPR 41-497

Change in government policy – increased involvement of the Commonwealth, States and Territories in health workforce planning

- 3.8. The AHMC submitted that the policy of all Governments regarding their role in determining specialist medical workforce numbers has changed significantly since the authorisation was granted in 2003.
- 3.9. AHWOC provided details of a range of activities undertaken at the national and State levels since 2003 to support this claim. These activities relate to the determination of medical workforce issues, including the surgical workforce.
- 3.10. A sample of relevant initiatives include:
- in April 2004, the AHMC endorsed the National Health Workforce Strategic Framework. The framework was subsequently adopted by COAG in February 2006;
 - in 2004 the Australian Health Ministers' Advisory Council (AHMAC) engaged the Australian Medical Workforce Advisory Committee (AMWAC) to undertake a review of the entire surgical workforce supply and requirements. In 2005 AMWAC released the resulting report titled "The Surgical Workforce in Australia: An Overview of Supply and Requirements 2004-2015". It was the first time that AMWAC had conducted an overview of the entire surgical workforce in Australia;
 - since 2003, AMWAC has used a new methodology to undertake surgical workforce modelling. The new modelling allows for variations in growth rates amongst jurisdictions; and
 - a number of state and territory governments have made significant investment in workforce planning, which has led to increased capacity to undertake modelling of workforce numbers. In some cases this has included re-structuring units within their health departments and/or creating new positions.
- 3.11. Overall, the ACCC considers that since the authorisation, there has been a greater level of investment by Commonwealth, state and territory governments in collecting information and planning of the workforce to determine community need.
- 3.12. In addition to this increased investment, there has been a trend towards developing common positions by governments on medical workforce issues, including the surgical workforce, which was not apparent prior to the authorisation.
- 3.13. The material provided to the ACCC supports the AHMC's claim that governments' approach has now changed. Information available to the ACCC indicates that most governments have set up structures and developed

their capacity to determine workforce numbers and increase their involvement in setting basic surgical trainee numbers.

Impact on public benefit/detriment

- 3.14. When granting authorisation in 2003, the ACCC stated that any public detriment generated by the College's conduct flows from its potential to restrict entry into the market in which surgeons participate in.⁴ The ACCC expressed significant concerns that the College uses its processes to restrict the number of surgeons, and therefore the level of competition in the surgical profession. The determination highlighted the need for reform, particularly in light of an emerging surgical workforce shortage.
- 3.15. Workforce modelling by governments means that broad community issues such as demand, access, distribution and affordability are considered alongside appropriate training standards. The ACCC considers that more meaningful input by jurisdictions' in this regard impacts on the potential detriments flowing from the authorisation.
- 3.16. The ACCC accepts that governments are now better informed about workforce requirements as a result of their numerous initiatives. Therefore, in instances where governments have requested specific training numbers and those numbers are not provided by the College,⁵ the potential detriment is exacerbated.
- 3.17. Limiting Basic Surgical Trainee (BST) numbers in turn impacts on Specialist Surgical Trainee (SST) numbers, and ultimately the number of trained, qualified surgeons. If governments are now in a better position to determine workforce numbers, the College's continued ability to restrict numbers increases the detriment flowing from the conduct.
- 3.18. The ACCC therefore considers that there has been a material change in circumstances since A90765 was granted to the College in June 2003.

Development of the College's new Surgical Education and Training (SET) program

- 3.19. The College has made the ACCC aware of a new training model (SET) it is currently developing. SET is an integrated training program which will replace the separate Basic / Specialist Surgical Training model currently operating.
- 3.20. Prior to formal selection into SET, interested medical students and graduates can register for Preparation for Surgical Education and Training (Pre-SET). Pre-SET would allow potential trainees to begin surgical training without a binding commitment to the full program. Numbers into Pre-SET will not be limited.

⁴ ACCC, Determination - Application for Authorisation A90765, 30 June 2003 at 13.52

⁵ Which was the case for the 2006 BST intake

- 3.21. The College has indicated that it plans to introduce SET in 2008. From August 2007, candidates will be able to register for pre-SET. Therefore, 2007 is expected to be the final year the College runs the Basic Surgical Training program.
- 3.22. The ACCC has limited information about SET at this stage. However, the new program is currently impacting on the proposed BST intake for 2007, and therefore on the operation of C12 of the authorisation.
- 3.23. In a letter to Health Ministers dated 11 August 2006, the College stated that there will be approximately 190 BSTs accepted for 2007. Governments requested an intake of 313 BSTs. The College has provided the ACCC with some information about the transition to SET. However, the material is not detailed enough for the ACCC or governments to determine if the proposed intake is satisfactory.
- 3.24. Clearly, the introduction of an entirely new training system constitutes a material change in circumstances. The College has acknowledged that the change could not be accommodated within the current authorisation.
- 3.25. The ACCC notes that there may be merit in the new training program. In issuing this Notice, the ACCC does not intend to pre-judge SET on the limited information currently available. However, the ACCC's view is that the development of the program has already impacted on the authorised arrangements for BST intakes. The transition has significantly increased the disparity of BST positions sought by jurisdictions (313 for 2007) and those likely to be provided by the College (approximately 190).

4. The nature of the proposed substitute authorisation

4.1. The ACCC proposes to substitute A90765 with an identical authorisation, but with two amendments. The first amendment relates to Condition C12, whilst the second amendment is to the term of the authorisation. These are outlined below.

4.2. The ACCC proposes that the current Condition C12 be removed and replaced with:

To determine the number of basic surgical trainees accepted by the College in a particular year; the College shall invite Commonwealth, state and territory health ministers (or their representatives) to participate in a consultation process whereby:

- *governments will indicate to the College what their required intake is (along with an explanation of the method used to determine this);*
- *After considering governments' requests, the College will indicate to governments the number of trainees it is planning to accept (along with an explanation of the method used to determine this);*
- *the College and governments shall then make every effort, through negotiation, to decide on a mutually acceptable intake for each state and territory.*

In the event that the College and governments cannot reach an agreement, the number of basic surgical trainees to be accepted by the College will be the number requested by governments, subject to the availability of candidates who meet the College's entry criteria.

4.3. The ACCC proposes that in the substitute authorisation, authorisation for all elements of the conduct will now expire on 22 July 2007.

4.4. Some aspects (including the selection, training and examining of basic and advanced surgical trainees) were previously authorised until 22 July 2009, but the ACCC now proposes that the entire authorisation will expire on 22 July 2007. This will provide the ACCC with an opportunity to review the conduct in light of developments relating to SET.

5. Notice

- 5.1. The ACCC considers that the matters discussed in section 3 of this Notice constitute a material change of circumstances since authorisation A90765 was granted.
- 5.2. Pursuant to section 91C(3) of the TPA, the ACCC proposes to make a determination revoking authorisation A90765, issuing a substitute authorisation in the terms discussed in section 4 of this Notice .
- 5.3. Interested parties are invited to make submissions on the ACCC's proposal. Any submission should be lodged by close of business **Friday 22 September 2006**. The ACCC will be limited in its ability to consider submissions received after this date.
- 5.4. The ACCC requests that submissions focus on:
 - the operation of the current Condition C12; and
 - the ACCC's proposed substitute authorisation.
- 5.5. Submissions should be in writing and addressed to:

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602
- 5.6. Submissions may also be lodged by e-mail to adjudication@acc.gov.au or by facsimile to (02) 6243 1211.
- 5.7. Submissions will be placed on the ACCC's Public Register.