Patron: H.R.H. The Prince of Wales

ROYAL AUSTRALASIAN COLLEGE OF SURGEONS

ABN 29 004 167 766

OFFICE OF THE PRESIDENT
Professor Ian Gough

College of Surgeons' Gardens, Spring Street, Melbourne Vic 3000
Telephone +61 3 9276 7404 Facsimile +61 3 9249 1208
E-Mail: college.president@surgeons.org

8 December 2008

Mr Gavin Jones
Director, Adjudication Branch
Australian Competition & Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Jones

Application for authorisation A91106 by the Australasian College of Cosmetic Surgeons
Your ref: Trackit 35146

We refer to your letter dated 14 November 2008 in which you invited the Royal Australasian College of Surgeons ("**College**") to make submissions on the application by the Australasian College of Cosmetic Surgeon ("**ACCS**") for authorisation of its code of practice ("**Code of Practice**") and parts of its by-laws ("**By-laws**") pursuant to the *Trade Practices Act 1974* (Cth).

The ACCS seeks authorisation for its advertising guidelines (Code of Practice Rules 1 to 12) and informed consent guidelines (Code of Practice Rule 13), as well as supporting complaints and appeals processes in the By-laws necessary to enforce those guidelines.

The College has serious concerns that the proposed authorisation would generate public detriment which outweighs the public benefit of any higher standards, because the guidelines may cause confusion and affect the public's ability to assess a practitioner's experience. Authorisation under the *Trade Practices Act 1974* (Cth) is not the appropriate mechanism for encouraging higher standards in advertising and informed consent.

1 Market definition

The College's view is that the competitive market affected by the proposed application has been incorrectly identified by the ACCS. We provide the following background material to enable the Commission to correctly define the market affected by the proposed application.

1.1 Cosmetic surgery

The Commonwealth Minister for Health and Ageing, on the advice of the Australian Medical Council ("**AMC**"), is responsible for accrediting and recognising medical specialties.

Presently, "cosmetic surgery" is not recognised or accredited as a medical specialty. The College is not aware of any present application to the AMC by the ACCS to have "cosmetic surgery" recognised as a new medical specialty in Australia.

Unless the AMC recognises otherwise, the College's view is that "cosmetic surgery" refers to a sub-specialty forming part of "plastic and reconstructive surgery", which is recognised and accredited by the AMC as a medical specialty. For further details on this sub-specialty, please refer to the cosmetic surgery components of the Australian Society of Plastic Surgeons ("**ASPS**") training program. This is one of nine surgical training programs for which the College of Surgeons is accredited by the AMC.

The ACCS application does not use "cosmetic surgery" or "cosmetic surgeon" in accordance with the above meanings, yet it does not provide its own definition. This means that references to "cosmetic surgery" and "cosmetic surgeon" in the ACCS application, Code of Practice and By-laws are either confusing or possibly incorrect or misleading, and therefore the market is ill-defined.

1.2 Cosmetic procedures

In defining the competitive market affected by the proposed application, the Commission should also give further consideration to the term "cosmetic medical procedure" which is not defined in the ACCS application. The commonly accepted view is that a cosmetic procedure is for the purpose of improving a patient's appearance and self-esteem rather than as a result of medical need.

If "cosmetic medical procedure" encompasses both surgical/non-surgical and invasive/non-invasive (topical) procedures, then the public benefit and public detriment must also be assessed with reference to the impact on cosmetic surgery that forms part of "plastic and reconstructive surgery". This may have particular impact on Fellows of the College who practice in this area (see section 4).

2 Competition effects

In previous requests for authorisation considered by the Commission (and its predecessors), the need for non-discretionary tests for admission, expulsion, sanctions and enforcement has been emphasised. The Commission also recognises that the protection of public health should generally be left to public authorities.

The ACCS application notes that there are a number of competing associations with which ACCS members are associated. On the other hand, the ACCS application states that if a significant number of members were expelled, they would be unlikely to be a member of any association or form a new association.

In light of this possible contradiction there is insufficient research or empirical evidence to suggest that existing members place significant importance on retaining their membership with the ACCS. The Commission should not assess the competition effects of the ACCS application without such information.

The College's view, based on its experience, is that the competition effects on ACCS members would be significant for the following reasons.

2.1 In the College's view, the Code of Practice, By-laws and supporting governance regime are subjective and retain significant discretion as to whether or how a member of the ACCS might be sanctioned or expelled. Unless these are made objective and non-discretionary, the ACCS might be in a position to act anti-competitively.

2.2 Where a member of the ACCS is expelled or discontinues membership, the ACCS may be in a position to act anti-competitively when assessing a subsequent application for membership. The ACCS has not sought authorisation in respect of its membership rules. Without objective and non-discriminatory criteria for membership, the application should be refused.

2.3 Based on the College's own experience, the Code of Practice, By-laws and supporting measures does not sufficiently ensure:

2.3.1 natural justice (the right to receive allegations with sufficient particulars, the right to be heard, the right to have representation, the right to receive reasons, procedural fairness);

2.3.2 fair composition of the panel or tribunal (eg apprehended or actual bias, independence of persons appointed by the ACCS); and

2.3.3 no conflict of interest when considering complaints and appeals.

Unless the above measures are incorporated at the outset, the ACCS might be in a position to act anti-competitively in investigating complaints and appeals. Without evidence of how these principles were applied in previous sanction and expulsion cases, the application should be refused.

2.4 Expelled ACCS members who are not already Fellows of the College would be unlikely to be admitted due to the training required to be obtained and maintained by Fellows of the College as required for accreditation by the AMC. This is also likely to be the case for other fellowships recognised by the AMC or internationally.

2.5 Expelled ACCS members may have difficulty obtaining the necessary continuing medical education to ensure their professional development is up-to-date. They would have limited access to peer review and support (eg to conduct regular audits of their performance).

3 Public benefit

The ACCS application asserts there is public benefit in having its members act ethically and professionally in the industry. It also appears to assert (by lack of evidence of adverse complaints) that there is public benefit in proper enforcement of the Code of Practice.

The Commission has previously acknowledged that there may be public benefit in developing advertising codes relating to "fairness and honesty". It has also previously granted authorisations to codes of conduct and standards of conduct for medical and other industry associations.

The College does not believe there is public benefit in having the ACCS' Code of Practice authorised. In particular, authorisation would stifle the further development by the industry to encourage medical practitioners to comply with higher standards in advertising and informed consent.

Under the "future with-and-without test", the College's view is that the public benefit of the Code of Practice has been overstated for the following reasons.

3.1 Some of the advertising guidelines repeat provisions that exist in the *Trade Practices Act 1974* (Cth), state fair trading legislation, state legislation regulating medical practitioners and state medical board advertising guidelines. Where these provisions are not complied with, there can already be significant legal and financial consequences. Therefore, public benefits arising under the application are limited to:

3.1.1 any benefit to the public where the ACCS advertising guidelines are more stringent than the existing position (which does not clearly arise);

3.1.2 any benefit in improving the efficiency and cost of its members complying with advertising guidelines (which does not clearly arise);

3.1.3 any benefit to the public in resolving complaints through the proposed enforcement measures compared to alternatives (which does not clearly arise); and

3.1.4 the extent to which the public is "better informed" under the advertising guidelines (which does not clearly arise).

3.2 State medical boards are continuing to develop and improve restrictions and guidelines on advertising, which will gradually reduce public benefit of the ACCS advertising guidelines. There is a risk of public detriment in diluting the application of state advertising guidelines. Such developments have recently occurred in:

3.2.1 New South Wales (regulations for all medical practitioners);

3.2.2 Victoria (state medical board guidelines for all medical practitioners); and

3.2.3 Western Australia (regulations for all medical practitioners).

If the Commission approved the application, this would stifle such further development by the industry.

3.3 The informed consent guidelines only apply to a small subset of procedures which are invasive and "have a significant risk of an adverse long term outcome" (Code of Practice rule 13). Therefore, public benefit will be extremely limited.

3.4 The informed consent guidelines are generally consistent with standard medical practice, and failure to comply already constitutes misconduct by the medical practitioner. Therefore the public benefit by authorisation would be limited.

The ACCS application refers to instances of effective enforcement, including suspension and expulsion but does not provide any supporting evidence. The Commission should refuse the application given the lack of evidence to show there has been effective enforcement in practice.

4 Public detriment

The ACCS application fails to identify any detriment arising under the Code of Practice other than the competition effects discussed at section 2 of this submission.

The College has serious concerns that the advertising and informed consent guidelines may cause confusion and affect the public's ability to assess a practitioner's experience. Further, the guidelines do not address the knowledge imbalance between patient and medical practitioner in respect of cosmetic procedures.

When a member of public seeks "cosmetic surgery", they do not have the expertise to recognise whether the procedure involves surgical/non-surgical or invasive/non-invasive/topical techniques. If a patient consents to a practitioner without surgical training undertaking the procedure, they may be misled as to whether the "surgery" involves surgical or non-surgical techniques. This affects whether they would have otherwise obtained the services of a specialist with surgical training.

Research shows that advertisements often create a perception that "cosmetic surgery" is somehow a safer and more basic form of surgery. Even if a patient consents to invasive surgery by a practitioner without surgical training, they may be misled as to the apparent safety of cosmetic surgery, when all surgery involves inherent risks and hazards.

In the context of this public consumer perception, the College raises the following significant issues.

4.1 Confusion between "cosmetic procedure" and "cosmetic surgery"

In the past, the College has noted its concerns as to the misleading use of the terms "cosmetic surgery" and "cosmetic surgeon". Consistent with the experiences of the ASPS, we understand this continues to cause confusion in the public.

There continues to be a risk that the public is misled into thinking that a cosmetic surgeon is a specialist qualified with surgical training approved by the AMC and state medical boards. The extent to which the public is misled is high given the community's respect for a surgeon's training, capacity, skills and experience.

As discussed above, when a member of public seeks "cosmetic surgery", they do not have the expertise to recognise whether the procedure involves invasive (ie surgical) and non-invasive (ie non-surgical or topical) techniques. This means that references to "cosmetic surgery" and "cosmetic surgeon" in the ACCS application, Code of Practice and By-laws are either incorrect or misleading.

The approach taken in Queensland in relation to the use of "surgeon" is that it is an offence to use a registered specialist title when one does not hold the appropriate qualification. There have been prosecutions in respect of practitioners describing themselves as "cosmetic surgeons" when they were not qualified in surgery.

The Queensland approach is preferred in order to avoid the risk of public detriment.

4.2 Disclosure of how many times a procedure has been performed

Code of Practice Rules 11 and 13.4 require a member of the ACCS to disclose how many times they have performed a procedure if this is less than 100 times.

The College is concerned that:

4.2.1 the "number" does not adequately describe a practitioner's experience;

4.2.2 if this disclosure approach is widely adopted, consumers may suffer detriment by becoming reliant on this number as a measure of a practitioner's experience; and

4.2.3 practitioners in this and other areas may be further encouraged to use the number of times a procedure has been performed to market their experience where it may be inappropriate.

Whilst the ACCS claims to have implemented the recommendations in *The Cosmetic Surgery Report to the NSW Minister for Health* (October 1999), the Code of Practice is contrary to recommendation 11B which states that:

> Cosmetic surgery providers should give consumers the following information:
>
> - their qualifications, credentials and training;
> - their experience in performing the procedure(s);
> - the number of times they have performed the procedure recently;
> - their clinical outcomes, and number of adverse events.

The Code of Practice is also inconsistent with the ACCS' own processes to assess a member's clinical experience. According to the ACCS website, adequate clinical experience is demonstrated by recording a surgical log which shows:

- the number of procedures;
- the number of complications; and
- the patient outcome.

The College's experience is that the number of recently performed procedures, together with complication rates and patient outcomes is an indicator of performance which is less likely to mislead or cause public confusion.

4.3 Threshold for disclosure of how many times a procedure has been performed

When the College assesses candidates in medical sub-specialties, different experience thresholds need to be set for each medical procedure to ensure sufficient experience has been obtained. Thresholds often depend on the nature and extent of complications, and the frequency patients require the procedure.

The College is concerned that:

4.3.1 the ACCS has not presented any evidence to show how the "100 case" threshold was selected;

4.3.2 different cosmetic medical procedures may require varying levels of experience, which means a "100 case" threshold is unlikely to be appropriate across all types of procedures;

4.3.3 it is unclear how "100 cases" relates to the "minimum number of cases" for a procedure required under the ACCS credentialing process guidelines.

For example, if all ACCS members must complete 100 cases to satisfy the clinical experience requirements, then the number of cases is not a useful indicator of a practitioner's level of experience. This issue is competence in doing a procedure, not the number of procedures performed.

4.4 Accreditation by the AMC

Rule 8 of the Code of Practice provides that:

> The [ACCS] logo or Certification logo may only be used by doctors who are currently accredited Fellows of the [ACCS]. Additionally, the Certification logo can only be used if the doctor is currently compliant with the [ACCS] CME programme as evidenced by the CME certificate.

The College is concerned that the public will be confused by ACCS "accreditation".

As discussed at section 1 of this submission, the ordinary meaning of "accreditation" in the medical industry is accreditation by a medical college or association as authorised and recognised by the AMC. "Accreditation" by the ACCS in relation to the cosmetic procedures has no significance where the AMC does not recognise and does not impose any accreditation requirement for those services.

The public may be misled into believing that a practitioner is "accredited" by the AMC when this is not the case. Accreditation may also misrepresent that a practitioner has additional expertise or qualifications required to practice when this is not the case.

4.5 Certification by the ACCS

In the medical industry, the ordinary meaning of "certification" means that a person has met a defined standard of professional skill. Under the *Trade Marks Act 1995* (Cth) ("**Trade Marks Act**"), approved users may use a certification trade mark ("**certification mark**") to "certify" that goods or services supplied under the Certification mark are of a particular standard with respect to quality, accuracy or other characteristics, if they have complied with the owner's rules governing use of that certification mark.

Our searches of the Trade Marks Register found four trade marks registered to the ACCS. These trade marks comply the ACCS logo and the following words:

- "CERTIFIED IN COSMETIC SURGERY";
- "CERTIFIED COSMETIC MEDICINE";
- "CERTIFIED COSMETIC PHYSICIAN"; and
- "CERTIFIED COSMETIC SURGEON".

Rule 8 of the Code of Practice authorises use of the "certified cosmetic surgeon" trade mark registered to the ACCS by a member who has been admitted and complies with continuing medical education (CME) requirements.

However, none of ACCS' trade marks have been registered as certification trade marks, including "certified cosmetic surgeon" . We are not aware of any published rules governing use of "certified cosmetic surgeon". The Trade Marks Act requires the Commission to assess the competition effects of certification marks by reference to rules governing:

4.5.1 the requirements that must be met to apply that certification mark;

4.5.2 the process for meeting certification; and

4.5.3 the process for resolving a dispute about certification.

The trade marks have been registered in relation to expert certification services. The purpose of a trade mark is to denote the owner of the trade mark as the source of the services offered under the trade mark. However, these trade marks clearly create an impression that the person displaying the trade mark has been certified in respect of cosmetic surgery or is a cosmetic surgeon. This is the function of a certification trade mark, not an ordinary trade mark.

4.6 Authorisation from the Commission

We note that the Commission is the competition regulator, and is not responsible for regulating other aspects of the medical profession.

If the ACCS application were granted, the College has concerns that the ACCS could mislead the public in relation to the nature of the authorisation for its Code of Practice and By-laws. This is particularly the case given the number of bodies involved in the regulation of the medical profession.

If the Commission were to grant the application, the Commission should include a condition which requires the ACCS to make clear in any representation in respect of "authorisation" that such authorisation relates solely to competition issues and that the Commission is not otherwise a regulator for the medical profession.

On the basis of these issues, it is clear there is significant public detriment that could arise from the authorisation. When weighed against the public benefit, the Commission should refuse the application.

5 Deficiencies in the operation of the Code of Practice and By-Laws

The public benefit identified by the ACCS assumes that the Code of Practice and By-Laws provide clear and effective enforcement mechanisms.

The College has identified a number of problems with the operation of the Code of Practice and By-Laws which would severely reduce the effectiveness of their enforcement. This further reduces the level of public benefit which the ACCS claims can be achieved.

5.1 **Inconsistency with state regulation (Code of Practice Rule 5)**: Whilst the College has not analysed requirements in each state, we note that section 94(1)(c) of the *Health Profession Registration Act 2005* (Vic) makes it an offence to advertise a regulated health service in a manner which refers to, uses or quotes from testimonials or purported testimonials. This rule increase the risk of non-compliance where testimonials are prohibited by legislation or regulation.

5.2 **Lack of objective criteria (Code of Practice Rule 9)**: This rule provides for inclusion of certain members on registers for a procedure. However, these rules are not transparent:

5.2.1 in respect of the award of the FACCS in the first instance;

5.2.2 in relation to the additional accreditation and approved examinations for liposuction and laser procedures; and

5.2.3 in relation to the appropriate and approved background for FFMACCS.

In addition, it may be impossible in practice to make no mention of the ACCS in respect of invasive surgical procedures.

5.3 **No requirement to substantiate claims (Code of Practice Rule 11)**: This rule was discussed in detail at sections 4.2 and 4.3. Unless there is a requirement to substantiate claims, it will be difficult for the ACCS to enforce compliance. Substantiation details should be available to the ACCS and subject to independent audit by ACCS and the Commission.

5.4 **No ability to verify compliance with informed consent guidelines (Code of Practice Rule 13.4)**: The College queries how this rule is intended to work in practice. Unless the information is provided in writing (for example, as an acknowledgement forming part of the consent form), it will be difficult for the practitioner or the patient to prove whether or not the patient was informed, thereby affecting the enforceability of the rule.

5.5 **Unclear complaints processes (Code of Practice Rule 14, By-law clause 10)**: The operation of Code of Practice Rule 14, By-law clause 10, the patient satisfaction assurance pamphlet, and constitution clause 8.4, 9.1 and 9.2 is unclear, and this reduces the ACCS' ability to enforce compliance with the Code of Practice.

5.6 **Unclear appeals processes (Code of Practice Rule 15)**: The operation of appeals under the Code of Practice and appeals in relation to breaches of by-laws needs is clear, and this reduces the ACCS' ability to enforce compliance with the Code of Practice.

5.7 **Lack of natural justice (Code of Practice Rules 14, 16)**: All of the complaints and appeal procedures should accord natural justice to the parties: see section 2 on this letter. Rule 16 should make clear whether an appeal is a new hearing or a review of the previous decision. Otherwise, there is a risk that the ACCS has the ability to act anti-competitively in respect of appeals.

5.8 **Lack of transparency (Code of Practice Rule 17)**: In order to have proper enforcement of the Code of Practice, the President of the ACCS should not have discretion to suppress the name of the member involved in the complaint. For transparency, the public should have access to the decisions, not just the outcome of the complaint. Otherwise, there is a risk that the ACCS has the ability to act anti-competitively in respect of appeals.

5.9 **Unclear application of the Code of Practice (By-law clause 2)**: This clause is a high level policy statement but does not make reference to the Code of Practice. If the relationship between this clause and the Code of Practice is unclear, this reduces the ACCS' ability to enforce the Code of Practice.

5.10 **Unclear application of advertising guidelines (By-law clause 6.6)**: This clause requires members to comply with laws and also imposes further advertising requirements. If the relationship between this clause and the advertising guidelines is unclear, this reduces the ACCS' ability to enforce the guidelines.

In summary, the College's view is that the public detriment outweighs the public benefit. There are also significant deficiencies in the application which would prevent the claimed public benefits from being realised in practice. On this basis, the Commission should refuse to authorise the ACCS Code of Conduct and parts of its By-Laws.

We understand that the ACCS will be required to respond to the above issued by mid-December 2008. Please direct correspondence in relation to this matter to Dr David Hillis, Chief Executive Officer.

Yours sincerely

Ian Gough

Professor Ian Gough
President

cc: Dr David Hillis, Chief Executive Officer