



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Australasian College of Cosmetic Surgery

in respect of

**the ACCS Code of Practice and
some provisions of the ACCS Bylaws**

Date: 20 February 2009

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Martin
Willett

Authorisation no.: A91106

Public Register no.: C2008/1845

Summary

The ACCC proposes to deny authorisation to the Australasian College of Cosmetic Surgery (the College) Code of Practice (the Code) and relevant Bylaws.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The application for authorisation

The College seeks authorisation for its Code of Practice (the Code) and parts of its Bylaws. The Code of Practice and relevant Bylaws contain, amongst other things, advertising guidelines and guidelines for informed consent as well as processes for dealing with complaints under the Code and Bylaws.

Background

The College has a membership base of around 150 members which includes general surgeons, plastic surgeons, dermatologists, ear nose and throat surgeons, ophthalmologists and other doctors who specialise in cosmetic surgery.

While difficult to precisely define, cosmetic surgery generally involves reshaping normal structures of the body using surgical and non-surgical techniques.

Cosmetic surgery is not currently recognised as a medical speciality in Australia. However, the College currently has an application for the area of Cosmetic Medical Practice to be recognised as a speciality being considered by the Australian Medical Council (AMC).

Public consultation

The ACCC consulted with a range of interested parties in respect of the arrangements including state and federal government health departments and medical industry associations. A number of government health departments objected to the arrangements being authorised and/or raised significant concerns with some clauses of the Code. Similarly, a number of medical industry associations also raised concerns with numerous provisions of the Code.

Public benefit

The ACCC considers that arrangements that promote the provision of accurate and complete information to consumers, and the ethical and professional conduct of parties to the arrangement, are likely to produce a public benefit. However, the ACCC is concerned that a number of provisions of the Code are not effective in this regard. In particular the ACCC is concerned that the Code does not:

- address inconsistencies between College guidelines and Victorian legislation regarding the use of testimonials or adequately address the use of superlatives in advertising by College members

- require members to provide sufficient information regarding their qualifications, credentials and training, their recent experience in performing the procedure and their clinical outcomes and number of adverse effects, to allow patients to make a fully informed choice about procedures being contemplated, and indeed, by setting a low benchmark in this respect may in fact discourage provision of relevant information
- address the issue of how compliance by members with informed consent requirements will be verified
- include a sufficiently robust and well promoted complaints handling procedure to facilitate easy access to the process for consumers with complaints against College members
- provide a transparent external appeals process in respect of decisions of the College regarding complaints.

The ACCC considers that authorisation of these provisions within the Code will not generate a public benefit and may in fact, to the extent that authorising the arrangements encourages the College and its members to adopt these provisions, generate a public detriment.

Public detriment

The ACCC considers that the Code is unlikely to generate a significant public detriment constituted by a reduction in competition. While the Code provides for sanctions, including expulsion, to be applied against members, the ACCC considers it unlikely that, in the present environment, the loss of/or inability to obtain College membership would significantly impede a cosmetic surgeons ability to compete.

Balance of public benefit and detriment

As noted, the ACCC considers that arrangements that promote the provision of accurate and complete information to consumers, and the ethical and professional conduct of parties to the arrangements are likely to produce a public benefit. However, the ACCC considers that the Code as submitted to be underdeveloped in this regard. The College itself has stated that the Code would benefit from further revisions.

Overall, the ACCC is not satisfied that the conduct for which authorisation is sought, in its current form, is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

The College has stated that it would accept changes, or be prepared in the future to make its own changes to the Code, to address some of the concerns raised by interested parties. However, even if only those changes which the College has indicated that it is willing to consider were adopted, this would require a substantial re-write of the Code. While the ACCC is able to grant authorisation subject to conditions, the authorisation process is not the appropriate forum for significant revising of Codes of conduct to be undertaken through the ACCC imposing conditions on the authorisation.

Nor, given that the College has not provided any details about how it may amend its Code in the future to take account concerns raised, can the ACCC place any significant weight on the College's submission that it will consider some of the suggestions put forward by interested parties in further developing the Code. In this respect, the ACCC is required to assess the public benefits and detriments of the Code as submitted for authorisation.

However, it is open to the College to further develop the Code and, if necessary, submit a revised Code for authorisation.

The next steps

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	The Trade Practices Act 1974
AMC	Australian Medical Council
ASPS	Australian Society of Plastic Surgeons
The Code	The Australasian College of Cosmetic Surgery Code of Practice
The College	The Australasian College of Cosmetic Surgery
CPSA	Cosmetic Physicians Society of Australasia
DHHS	Department of Health and Human Services (Tasmania)
DHS	Department of Human Services (Victoria)
RACGP	Royal Australasian College of General Practitioners
RACS	Royal Australasian College of Surgeons

1. Introduction

Authorisation

- 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 Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

The application for authorisation

- 1.8 On 6 November 2008 the Australasian College of Cosmetic Surgery (the College) lodged application for authorisation A91106 with the ACCC.
- 1.9 The College applied for authorisation for its Code of Practice (the Code) and parts of its Bylaws. The Code of Practice and relevant Bylaws contain, amongst other things, advertising guidelines and guidelines for informed consent as well as processes for dealing with complaints under the Code.

1.10 The College seeks authorisation for five years.

Chronology

1.11 Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of application for authorisation A91106

DATE	ACTION
6 November 2008	Application for authorisation lodged with the ACCC.
5 December 2008	Closing date for submissions from interested parties in relation to the application for authorisation.
23 January 2009	Submission received from the College in response to interested party submissions.
20 February 2009	Draft determination issued.

2. Background to the application

The applicant

- 2.1 The College was inaugurated in 1999 in order, it states, to provide training and ethical standards for cosmetic surgery and related disciplines. The College has approximately 150 members. The College states that all its members are registered medical practitioners and that its membership base includes general surgeons, plastic surgeons, dermatologists, ear nose and throat surgeons, ophthalmologists and other doctors who specialise in cosmetic surgery.
- 2.2 The College states that its objectives include:
- (a) to enhance the knowledge of practitioners performing cosmetic and aesthetic surgery to allow accreditation and to recognise appropriate levels of expertise as either Fellows, Members or Associate Members of the College
 - (b) to accredit properly trained and experienced persons as members of the College
 - (c) to develop and promote cosmetic or aesthetic surgery as a separate specialty within the field of medicine
 - (d) to establish high standards of skill and practice in the field of cosmetic or aesthetic surgery
 - (e) to provide advice and information to consumers and to those practising in the field of cosmetic or aesthetic surgery
 - (f) to promote, and seek representation for, the field of cosmetic or aesthetic surgery in the appropriate academic, political and other forums
 - (g) to act as, and to promote itself as, an authoritative body in the field of cosmetic or aesthetic surgery and as a supporting body for members of the medical profession in general in relation to the field of cosmetic or aesthetic surgery
 - (h) to act as an adviser and information resource to government and others in matters concerning cosmetic or aesthetic surgery
 - (i) to promote relations between persons engaged in training or practice in the field of cosmetic or aesthetic surgery

Cosmetic surgery

- 2.3 *The Cosmetic Surgery Report, Report to the NSW Minister for Health, October 1999* considered in detail the cosmetic surgery industry. The information in paragraphs 2.4 to 2.6 of this draft determination is taken from this report.
- 2.4 With respect to the types of procedures that could be classified as cosmetic surgery the report concluded that while cosmetic surgery is difficult to define precisely, it has a

number of key characteristics. It involves reshaping normal structures of the body using surgical and non-surgical techniques.

- 2.5 The report noted that a central characteristic of cosmetic surgery is that it is generally initiated by the consumer to improve their appearance and self-esteem and that cosmetic surgery covers a wide range of surgical and non-surgical procedures. The findings of the report in this regard are discussed in greater detail at paragraph 6.7
- 2.6 The report also noted that cosmetic surgery procedures are mostly performed by doctors with a wide range of qualifications, but dentists, nurses and beauty therapists are also represented. The medical practitioners performing cosmetic surgery include plastic surgeons, cosmetic surgeons, cosmetic physicians, general practitioners (GPs), dermatologists, ophthalmologists (eye surgeons), otolaryngologists (ear, nose and throat specialists) and to a lesser extent oral and maxillofacial surgeons. Plastic surgeons have specialist surgical training and experience in plastic and reconstructive procedures, and perform cosmetic surgery. Cosmetic surgeons do not necessarily have specialist surgical qualifications, and tend to be specifically trained in cosmetic procedures, usually in the USA. Dermatologists have specialist training in and experience in the skin, and may perform dermabrasion, injections, peels and laser resurfacing, in combination with liposuction, cheek implants and other surgical procedures. Ophthalmologists have specialist training in eye surgery, and most perform blepharoplasty (eyelid surgery), eye lifts and some brow lifts. Otolaryngologists have specialist training and experience in the ear, nose and throat, and they perform facelifts, brow lifts and rhinoplasty (nose surgery) and laser skin treatments. General practitioners performing cosmetic medicine may provide collagen and other injections, peels, laser skin treatments and dermabrasion. In the USA other specialties, particularly gynaecology and oral surgery, have a significant profile in the cosmetic surgery industry.¹

Recognition of medical specialities in Australia

- 2.7 Schedule 4 of the *Health Insurance Regulations 1975* lists names of specialties, relevant organisations and relevant qualifications that are recognised by the Minister for Health and Aging for the purposes of attracting Medicare rebates at the specialist level under the *Health Insurance Act 1973*.
- 2.8 The Australian Medical Council (AMC) also lists medical specialties including those organisations, specialties and qualifications that are recognised as medical specialties in Australia by the Minister. However, the AMC List of Australian Recognised Medical Specialties does not relate to the Health Insurance Act. Listing by the AMC permits medical specialist training providers to participate in the AMC's accreditation of specialist medical education, training and professional development programs.

Application for recognition of cosmetic surgery of a medical specialty

- 2.9 Cosmetic surgery is not currently recognised as a specialty under either Schedule 4 of the Health Insurance Regulations or on the AMC List of Australian Medical Specialties.

¹ *The Cosmetic Surgery Report, Report to the NSW Minister for Health, October 1999, p 4*

- 2.10 The College has submitted an initial application to the AMC for the area of Cosmetic Medical Practice to be recognised as a speciality. The AMC advised that the College's application is in its early stages and it is not possible for the AMC to comment on the possible outcomes of the application at this stage.
- 2.11 The Department of Health and Ageing has advised that if the application is successful, the College would then be required to apply to the Specialist Education Accreditation Committee of the AMC to be accredited as the provider of standards, training and certification in the proposed speciality.

Plastic and reconstructive surgery as a medical speciality

- 2.12 Plastic and reconstructive surgery is recognised as a medical speciality under both Schedule 4 of the Health Insurance Regulations and on the AMC List of Australian Medical Specialties.
- 2.13 The Australian Society of Plastic Surgeons (ASPS) is authorised by the Royal Australasian College of Surgeons (RACS) to administer post graduate surgical training programs for the specialty of plastic and reconstructive surgery. This training program is one of nine surgical training programs for which RACS is accredited by the AMC.
- 2.14 Plastic and reconstructive surgeons handle cases of trauma and emergency, burns, breast reconstruction, hands, head and neck cancer, cranio maxilla facial deformity and scar revision.
- 2.15 Plastic and reconstructive surgeons also perform cosmetic and anaesthetic procedures such as breast augmentation and reduction, face lifts, abdominoplasty, rhinoplasty and liposuction.

3. The application for authorisation

- 3.1 The College seeks authorisation for its Code of Practice and clauses 2, 6.6 and 10 of its Bylaws. The Code of Practice and relevant Bylaws contain, amongst other things, advertising guidelines and guidelines for informed consent as well as processes for dealing with complaints under the Code of Practice. A copy of the Code of Practice and relevant Bylaws is at Appendix A to this draft determination.
- 3.2 The Code of Practice sets out the guidelines the College requires its Fellows and Members to adhere to.

Advertising and other representations

- 3.3 Clauses 1 to 12 of the Code deal with advertising and other representations made to patients. Clause 1 of the Code prohibits false, misleading or deceptive statements about a doctor or clinic or the services offered. Clauses 2 through 7 contain guidelines for the use of:
- superlatives
 - comparative advertising
 - before and after photographs
 - testimonials, and
 - spruikers, brokers or other forms of soliciting business.
- 3.4 Clause 6 of the Code also bans the use of inducements or prizes in competitions as a means of generating business.
- 3.5 Clauses 8 and 9 of the Code concern the manner in which members may represent their College accreditation(s) to patients.
- 3.6 Clauses 10 and 11 of the Code concern interviewing and explaining procedures to patients and disclosure, where an invasive procedure has been performed less than 100 times, of the number of times the procedure has been performed.
- 3.7 Clause 12 prohibits the offer of financial arrangements, except for credit card facilities or credit facilities provided by the member.

Guidelines for informed consent

- 3.8 Clause 13 of the Code contains guidelines for informed consent in respect of invasive procedures which have a significant risk of an adverse long term outcome and include guidelines for:
- pre procedure consultations between member and patient
 - provisions of procedure specific consent forms

- circumstances in which second opinions should be encouraged and
- circumstances in which a ‘cooling off’ period should be provided.

Complaints and appeals

- 3.9 Clauses 14 to 17 of the Code concern processes for dealing with complaints in respect of the Code and appeals against decisions regarding breaches of the Code. The Code provides for the President of the College to appoint a Committee to assess complaints and specifies timeframes for considering complaints.
- 3.10 Contravention of the Code may lead to censure and loss of the right to use the College logos for a specified period. Repeated contravention may lead to removal from the College registers and/or expulsion. The Code also provides that in appropriate circumstances a member can be ordered to pay the costs resulting from a complaint against them.
- 3.11 The Code also provides that appeals against decisions regarding breaches of the Code can be made in writing to the President for referral to an External Appeal Tribunal. The Code provides for the Tribunal to consist of an independent person with legal qualifications and others as considered appropriate. The Tribunal can, at its discretion, seek technical advice from members of the College not involved in the matter.
- 3.12 The Code provides that determinations of the Tribunal are final and for the outcome of complaints to be published on the College website. The president maintains discretion about whether the name of the relevant member will be made public, however all expulsions from the College are made public.

Review of the Code

- 3.13 Clause 18 provides for regular review of the Code by the College Council in consultation with relevant regulatory bodies.

ACCS Bylaws

- 3.14 Clause 2 of the College Bylaws requires members to:
- practice with integrity and honour, in the best interest of their patients, with the patient’s safety and quality of care being of the highest concern
 - conduct their professional affairs in accordance with all applicable laws and ethics and in a manner that upholds the good reputation of the medical profession, and
 - strive for the furtherment of the speciality of cosmetic or aesthetic surgery through research and development and ensure the maintenance of the highest standards through continued medical education and training.

3.15 Clause 6.6 of the Bylaws states that members are expected to comply with the advertising codes as set out by their respective state medical board. Clause 6.6 also provides that members not conduct advertising which:

- improperly denigrates the business, work or reputation of any other member
- is liable to mislead the public as to the availability, nature, characteristics or suitability for their purposes of any service or facility, or
- breaches any laws, regulations or guidelines which may from time to time be in force for the proper regulation of the sub-specialty.

3.16 Clause 10 of the Bylaws details processes for considering complaints and appeals in relation to refusal to accredit an applicant or breaches of the laws or rules of conduct of the College.

4. Submissions received by the ACCC

- 4.1 The College provided a supporting submission with its application for authorisation and has since provided a submission in response to issues raised by interested parties in their submissions.
- 4.2 The ACCC sought submissions from a range of interested parties, and federal and state government bodies. The ACCC received public submissions from:
- The Australian Society of Plastic Surgeons (ASPS)
 - The Department of Health and Ageing
 - The Department of Human Services – Victoria (DHS)
 - SA Health
 - NSW Health
 - The Cosmetic Physicians Society of Australasia (CPSA)
 - The Australian Medical Council (AMC)
 - The Department of Health and Human Services – Tasmania (DHHS) and
 - The Royal Australasian College of Surgeons (RACS).
- 4.3 The views of the College and interested parties are outlined in the ACCC’s evaluation of the arrangements in Chapter 6 of this draft determination. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the ‘Public Registers’ and ‘Authorisations Public Registers’ links.

5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.
- 5.2 The ACCS lodged application for authorisation A91106 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- i. the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - ii. this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 5.4 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.²
- 5.5 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.³
- 5.6 Consequently, given the similarity of wording between section 90(6) and 90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

² *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

³ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

Definition of public benefit and public detriment

5.7 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁴

5.8 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁵

Future with-and-without test

5.9 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁶

5.10 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation

5.11 The ACCC can grant authorisation for a limited period of time.⁷

Conditions

5.12 The Act also allows the ACCC to grant authorisation subject to conditions.⁸

Future and other parties

5.13 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁶ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

⁷ Section 91(1).

⁸ Section 91(3).

- i persons who become party to the contract, arrangement or understanding at some time in the future⁹
- ii persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁰

⁹ Section 88(10).

¹⁰ Section 88(6).

6. ACCC evaluation

- 6.1 The ACCC's evaluation of the proposed arrangements is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed arrangements.

The market

- 6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

Submissions

- 6.3 The College submits that the relevant market in which to assess the arrangements is that for cosmetic medical procedures undertaken by registered medical practitioners.
- 6.4 RACS submits that, unless the AMC recognises otherwise, 'cosmetic surgery' is a sub-speciality forming part of 'plastic and reconstructive surgery' which is recognised and accredited by the AMC as a medical speciality.

ACCC view

- 6.5 The ACCC is not in a position to assess whether, as contended by RACS 'cosmetic surgery' should, unless or until the AMC recognises otherwise, be considered as a sub-speciality forming part of plastic and reconstructive surgery. However, the ACCC notes that, whether a sub-specialty of plastic and reconstructive surgery or not, the Code and Bylaws for which authorisation is sought are intended to be applied only in respect of College members performing cosmetic procedures.
- 6.6 Accordingly, for the purpose of assessing this application, the ACCC considers the relevant area of competition affected by the proposed conduct is that for the provision of cosmetic procedures.
- 6.7 As noted in *The Cosmetic Surgery Report, Report to the NSW Minister for Health, October 1999* discussed in chapter 2 of this draft determination:

While cosmetic surgery is difficult to define precisely, it has a number of key characteristics. It involves reshaping normal structures of the body using surgical and non-surgical techniques.

A central characteristic of cosmetic surgery is that it is initiated by the consumer to improve their appearance and self-esteem. Other medical procedures are performed for therapeutic reasons, as a result of medical need. However, delineating procedures performed for therapeutic reasons from those that are performed for cosmetic reasons is difficult. Another important feature is the subjective nature of judgements about improvement in appearance.

Cosmetic surgery covers a wide range of procedures, including surgical procedures, non-surgical procedures and dental procedures. Surgical procedures include breast enlargement, rhinoplasty (nose surgery), surgical face-lifts, abdominoplasty (tummy tuck) and liposuction. Procedures such as chemical peels, collagen injections, laser skin resurfacing, vein removal and laser hair removal

are collectively referred to as cosmetic medicine. Cosmetic dentistry is another category of procedures that are regarded as part of cosmetic surgery.¹¹

- 6.8 The ACCC notes that such procedures are, depending on the procedure, performed by a range of parties but generally by doctors. With respect to cosmetic surgical procedures the Cosmetic Surgery Report noted that medical practitioners performing cosmetic surgery include plastic surgeons, cosmetic surgeons, cosmetic physicians, general practitioners, dermatologists, ophthalmologists (eye surgeons), otolaryngologists (ear, nose and throat specialists) and to a lesser extent oral and maxillofacial surgeons.

The counterfactual

- 6.9 As noted in Chapter 5 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.

Submissions

- 6.10 The College submits that the likely counterfactual if the arrangements are not authorised is that College members will not be clearly guided by ethical rules and the College will not sanction or expel members who are found to have committed misconduct as set out in the Code and Bylaws.
- 6.11 SA Health and NSW Health state that they do not support the application as they do not consider authorisation to be necessary as the College is not the only professional association operating in this field of medicine and loss of College membership would not significantly impede a cosmetic surgeons ability to compete.
- 6.12 In response to the issues raised by SA Health and NSW Health the College submits that the effective implementation of the Code is dependent on the Code being effectively enforced. The College states that while membership is voluntary, once members have joined the College they must adhere to the Code. The College considers that there is a small risk that its arrangements may raise concerns under the Act in that the Code potentially constitutes an anti-competitive agreement and a primary boycott and that while the risk of the Code contravening the Act is small, opponents of the College are likely to raise concerns under the Act if the Code is not authorised.

ACCC view

- 6.13 The ACCC notes the views expressed by the College that some elements of the Code could raise concerns under the Act. Given that the ACCS has such concerns, the ACCC considers that absent authorisation the College would be less likely to enforce the Code through disciplinary action and complaints handling.

¹¹ *The Cosmetic Surgery Report, Report to the NSW Minister for Health*, October 1999, p 4

Public detriment

Effect on cosmetic surgeon's ability to compete

Submissions

- 6.14 The College states that public detriment arising from a lessening of competition may flow from the disciplinary processes for the enforcement of a code of an industry association where membership of the association is necessary to compete or significantly assists a business to compete in an industry, and either:
- the Code contains broadly expressed provisions open to subjective interpretation and the Code's disciplinary processes do not provide for procedural fairness such that risk could arise of members being expelled for anti-competitive purposes, and that this would happen enough times to reduce the intensity of competition within the market, or
 - there is evidence that the number of members likely to be expelled for actually acting unethical is likely to constitute such a proportion of the market that the expulsion of these businesses from the association would reduce the intensity of competition in the market.
- 6.15 In this respect the College submits that College membership is not mandatory for cosmetic surgeons. The College states that the major association with which it competes is the ASPS.
- 6.16 In addition, the College notes that some cosmetic surgeons are members of one or more other industry associations such as the Cosmetic Physicians Society of Australasia, New Zealand College of Appearance Medicine, Australian Skin Cancer Society, Australian College of Phlebology, RACS, Australian College of Dermatologists, Royal Australasian College of General Practitioners (RACGP), or the Royal College of Surgeons.
- 6.17 The College submits that it is unlikely that loss of College membership would significantly impede a cosmetic surgeon's ability to compete. The College states that if it did attempt to expel a significant number of members for anti-competitive reasons these members would be likely to not be a member of any association or to form a new association.
- 6.18 The ASPS considers that the application for authorisation is unlikely to have any adverse effect on competition or any particular public detriment. In particular, the ASPS submits that as the training and accreditation role performed by the College is not currently accredited or recognised by the AMC it does not consider membership of the College as of financial or professional significance.
- 6.19 Similarly, SA Health and NSW Health submit that loss of College membership would not significantly impede a cosmetic surgeons' ability to compete. NSW Health notes that the College is not the only professional association operating in this field of medicine.

ACCC view

- 6.20 The ACCC is of the view that the purpose of an industry code of conduct should be to improve the efficiency of business and strengthen the confidence of consumers in that industry. Adherence to a recognised code of conduct can constitute an important selling point for a business to attract new customers and may increase the bargaining power of the business when entering into arrangements with other parties.
- 6.21 Membership of a recognised industry association, in itself, can also be an important marketing tool for businesses. In respect of the current application, the ACCC notes that membership of the College is contingent on the member complying with the Code and Bylaws.
- 6.22 The College and interested parties who commented on the issue all expressed the view that loss of College membership would not significantly affect a cosmetic surgeons' ability to compete. In particular interested parties submitted that:
- cosmetic procedures are performed by a wide range of medical practitioners many of whom are not College members
 - the training and accreditation role undertaken by the College is not currently recognised by the AMC, and
 - the College is not the only profession association available to medical practitioners performing cosmetic surgery.
- 6.23 Given this, the ACCC considers it unlikely that, in the present environment, the loss of/or inability to obtain College membership would significantly impede a cosmetic surgeons' ability to compete.
- 6.24 The ACCC does note however that the College currently has an application before the AMC for the area of Cosmetic Medical Practice to be recognised as a speciality. The Department of Health and Ageing has advised that if this application is successful the College would then be able to apply to the Specialist Education Accreditation Committee of the AMC to be accredited as the provider of standards, training and certification in this proposed speciality.
- 6.25 If Cosmetic Medical Practice was recognised as a speciality, and the College accredited as the provider of standards, training and certification in the speciality, then it would be likely that College membership would significantly assist persons competing to perform many cosmetic procedures. That is, in these circumstance the loss of/or inability to obtain College membership could significantly impede a cosmetic surgeons ability to compete. In these circumstances the potential anti-competitive detriment generated by the Code would be significantly greater.
- 6.26 The ACCC is not in a position to comment on the College's application to have Cosmetic Medical Practice recognised as a speciality and/or on any potential application for the College to be accredited as the provider of standards, training and certification in this proposed speciality. However, the ACCC does note that was such recognition of the speciality and accreditation of the College as the provider of

standards, training and certification forthcoming, this may constitute a material change of circumstance which, were authorisation granted, could cause the ACCC to review the authorisation.

- 6.27 This is not to suggest that recognition of Cosmetic Medical Practice as a speciality or accreditation of the College as the provider of standards, training and certification in this proposed speciality would or would not be appropriate. These are matters for the AMC and Commonwealth Minister for Health to consider.
- 6.28 Irrespective of the outcome of the current application before the AMC, the College objectives include to promote itself as an authoritative body in the field of cosmetic and aesthetic surgery and medicine. While it is not currently the case that College membership is a significant factor impacting on a cosmetic surgeons ability to compete, if over time the College was successful in achieving a position in the market as an authoritative body in the field of cosmetic surgery then, potentially, College membership could become important to cosmetic surgeons ability to compete.

Impact of granting authorisation on AMC consideration of Cosmetic Medical Practice as a speciality

Submissions

- 6.29 The Department of Health and Ageing submits that there is a risk that if authorisation were granted prior to the recognition and accreditation process for the proposed speciality of Cosmetic Medical Practice being completed, this might be construed as a form of recognition of the College and the proposed speciality, placing undue and inappropriate pressure on the AMC process.

ACCC view

- 6.30 The ACCC notes the concerns expressed by the Department of Health and Ageing. However, the test the ACCC is required to apply in assessing applications for authorisation is very different from the criteria considered by the AMC in assessing applications for recognition of medical specialities, as is the context in which such assessments are made.
- 6.31 The role of the ACCC, in the authorisation context, is to assess whether the public benefit from potentially anti-competitive conduct for which authorisation is sought, outweighs any public detriment. The ACCC's role in this respect is limited to considering the public benefits and detriments of the conduct for which authorisation is sought. Accordingly, any decision by the ACCC in respect of the current application could not, and should not, be construed as any form of comment on whether recognition of Cosmetic Medical Practice as a speciality is appropriate. As noted, the ACCC is not in a position to comment on this issue.
- 6.32 The AMC has also expressed the view that it is not in a position to comment on the application for authorisation of the College's Code because of the application before it for speciality recognition. However, the AMC has not raised any concerns that the ACCC's decision in respect of the application for authorisation may place undue and inappropriate pressure on its process.

Code sanction provisions

Submissions

- 6.33 RACS submits that the competition effects of the Code on College members would be significant because the Code's provisions regarding sanctioning of members are not sufficiently objective, non-discretionary and do not ensure natural justice, fair composition of disciplinary panels and tribunals or that no conflict of interest exists when considering complaints and appeals.

ACCC view

- 6.34 The ACCC notes the concerns expressed by RACS regarding the provision contained in the Code for imposing sanctions of members. However, for the reasons outlined above in paragraphs 6.22 and 6.23 the ACCC does not consider, in the current environment, that sanctions imposed by the College, including potentially expulsion, would significantly impact on competition between cosmetic surgeons.
- 6.35 The ACCC does however have concerns with the adequacy of the Code's provisions regarding sanctioning of members, which may impact on the effectiveness of the Code. These concerns are discussed at paragraphs 6.121 to 6.138.

ACCC conclusion on public detriments

- 6.36 The ACCC considers that, in the current environment, the Code is unlikely to generate a significant public detriment constituted by a reduction in competition. While the Code provides for sanctions, including expulsion, to be applied against members, the ACCC considers it unlikely that, in the present environment, the loss of/or inability to obtain College membership would significantly impede a cosmetic surgeons ability to compete.
- 6.37 However, if in the future, Cosmetic Medical Practice was recognised as a speciality and the College accredited as the provider of standards, training and certification in the speciality and/or the College was successful in promoting itself as the authoritative body in the field of cosmetic surgery, there would be a greater potential for loss of/or inability to obtain College membership to significantly impede a cosmetic surgeons ability to compete.

Public benefit

Submissions

- 6.38 The College states that its rules generate a public benefit by assisting members to act ethically and professionally. The College submits that while it is difficult to estimate the precise size of the public benefit the public benefit is likely to be more than minimal.
- 6.39 The CPSA submits that disciplining of doctors who do not follow appropriate codes of conduct, as proposed by the College, would be in the public interest.

6.40 RACS submits that authorisation of the Code would stifle further development by the industry to encourage medical practitioners to comply with higher standards in advertising and informed consent.

ACCC view

6.41 Consumers have a right to accurate and complete information from businesses about their purchases. This is particularly pertinent in relation to health and medical services where often there is a marked disparity in the amount of information available to consumers and service providers. The ACCC has previously considered this issue, in relation to medical and health services, in its publication, *Guide to the Trade Practices Act for the Advertising or promotion of medical and health services*.¹²

6.42 As discussed in this guide, the consequences of the disparity in the amount of information available to consumers and service providers may include:

- the temptation to oversupply services
- the temptation to create unrealistic expectations through promotional activities
- incentives to decrease overall quality where consumers are not able to effectively judge quality differences, and
- the potential for consumers to make incorrect choices which risk their financial, psychological and physical welfare.

6.43 Reducing this information imbalance is essential to improving the protection of consumers.

6.44 To make informed decisions about whether to purchase medical services (and particularly elective services such as cosmetic surgery) consumers need reliable and accurate information about the service or procedure. Practitioners are already obliged by common law and professional practice obligations to provide sufficient information to ensure informed consent by patients. This includes information about:

- risks, side effects, permanency of outcome, and other aspects of the nature of the quality of treatment
- the consequences of not having treatment and alternative treatment options
- post treatment care and complications, and
- charges (including charges for ancillary and add on services).

6.45 The guide also notes that, in addition to information about the service or procedure, consumers would also benefit from more information about medical and health practitioners, in particular their qualifications and experience.

¹² Copies of the Guide to the Trade Practices Act for the Advertising or promotion of medical and health services are available from the ACCC's website www.accc.gov.au

- 6.46 In this respect, the College's Code is primarily concerned with requirements College members must comply with in advertising their services to consumers, guidelines for informed consent and processes for considering complaints and appeals in respect of breaches of the guidelines.
- 6.47 Any arrangement which promotes the provision of accurate and complete information to consumers, assisting them in making informed choices about cosmetic procedures, is likely to produce a public benefit. Such arrangements also assist in raising practitioners' awareness of their professional and ethical responsibilities and, where backed by effective complaints and sanctions processes, act as a mechanism for ensuring that parties to the arrangements act ethically and professionally.
- 6.48 Accordingly, the key considerations for the ACCC in assessing the public benefits generated by the Code are:
- do the provisions of the Code foster the provision of accurate and complete information to consumers and encourage College members to act ethically and professionally and if so,
 - whether the Code is likely to be adhered to.

The Code provisions

- 6.49 Interested parties raised concerns with various provisions of the Code. The concerns raised are considered below.

Use of testimonials

Submissions

- 6.50 The DHS submits that a number of clauses of the Code that relate to advertising do not appear to accord with the Advertising Guidelines for Medical Practitioners issued by the Medical Practitioners Board of Victoria. Further, the DHS and RACS submit that clause 5, which refers to circumstances in which testimonials should be used, appears to breach section 94(1)(c) the *Health Professions Registration Act 2005 (Vic)*.
- 6.51 In response, the College states that while laws vary from state to state it wishes to have a nationally consistent Code and its Victorian members must adhere to their states' guidelines as the Code mandates. The College also states that it will consider the concerns raised, that originally the Code did not allow for testimonials, the College does not favour them and that if the ACCC was to authorise a provision in the Code banning testimonials the College would welcome this.

ACCC view

- 6.52 Clause 5 of the Code provides that testimonials should only be used in advertisements if they relate to the advertiser's own patients and must be correct and not create a misleading impression.
- 6.53 Section 94(1)(c) the *Health Professions Registration Act 2005 (Vic)* states that a person must not advertise a regulated health service or a business providing regulated health

services in a manner which refers to, uses or quotes from testimonials or purported testimonials.

- 6.54 The ACCC also notes the submission by the College that it does not favour testimonials and would welcome a ban on them.
- 6.55 A restriction on the use of testimonials of the type prescribed in clause 5 goes some way towards reducing concerns about the use of testimonials. However, in falling short of the outright ban which Victorian legislation prescribes, and which the College has argued that it would like to see in place in respect of its members, the clause as drafted does not address the inconsistency with the Victorian Legislation.
- 6.56 The ACCC assumes that the statement by the College that if the ACCC was to authorise a provision in the Code banning testimonials the College would welcome this to mean that the College would like the ACCC to impose a condition of authorisation requiring clause 5 to be re-drafted to ban the use of testimonials.
- 6.57 As discussed in further detail below, the College has adopted a similar approach in respect of a number of concerns raised by interested parties regarding specific clauses in the Code, stating either that, it would welcome a requirement that the relevant clause be amended or that it is considering, or will consider at its next annual review, amending the relevant clause itself.
- 6.58 The ACCC is required to assess the public benefits and public detriments of arrangements for which authorisation is sought as submitted by the applicants. While the ACCC is able to grant authorisation subject to conditions it is not the role of the ACCC to engage in a substantive re-write of arrangements for which authorisation is sought, through the imposition of conditions, to address concerns with the arrangements. This issue is discussed in greater detail at paragraphs 6.164 to 6.172.

Use of superlatives and methods employed to solicit business

Submissions

- 6.59 The DHHS submits that clause 2 of the Code should require that the use of superlatives in advertising be banned rather than, as currently drafted, require that superlatives should be used with caution. The DHHS also contends that the use of methods designed to solicit business should be banned.
- 6.60 The College notes the concerns expressed by the DHHS and states that the Code does not allow superlatives to be used unless they are matters of fact which can be 'readily proven.'
- 6.61 With respect to the DHHS contention that the use of methods to solicit business should not be employed the College argues that such a prohibition would be too generic to have any utility. The College notes, for example, that all advertising is designed to solicit business.
- 6.62 The College submits that the DHHS may be concerned with the use of paid agents and states that the College does not condone or encourage the use of such agents but that agents are commonly employed by plastic surgeons and cosmetic surgeons. The

College states that to it would be encouraging a third party boycott if it were to ban such arrangements.

ACCC view

6.63 Clause 2 of the Code reads:

Superlative should be used with caution in descriptions of persons or procedures, and should not suggest that a practitioner is superior to other qualified practitioners either through training or performance of a skill unless that can be readily proven.

6.64 The assertion by the College that the Code does not allow superlatives to be used unless they are matters of fact which can be ‘readily proven’ only applies in respect of the use of superlatives in comparing the training or performance of practitioners. The clause as drafted does not, as the College contends, contain a more general prohibition on the use of superlatives unless in relation to matters of fact that can be readily proven. Accordingly, the ACCC does not consider that the response provided by the College directly addresses the issues raised by the DHHS.

6.65 Clause 7 of the Code provides that spruikers, brokers and other similar forms of soliciting business should be used with great caution.

6.66 While the DHHS has identified this clause in expressing its concerns the concern expressed by the DHHS is a more general one, that the use of methods designed to solicit business should be banned.

6.67 The ACCC agrees an outright ban on soliciting business would be impractical and not necessarily desirable as any form of advertising could be construed as soliciting business.

6.68 However, the ACCC would welcome further submissions interested parties may wish to make on the merits of the Code including a ban on employing spruikers, brokers and other similar forms of soliciting business.

Procedures in respect of which the informed consent guidelines apply

Submissions

6.69 Clause 13 of the Code provides that the Code’s guidelines regarding informed consent apply in respect of ‘invasive procedures which have a significant risk of an adverse long term outcome’.

6.70 The DHS submits that cosmetic surgeons should consult a patient and obtain their informed consent prior to any procedure. Similarly, RACS notes that the informed consent guidelines only apply to a small subset of procedures, which RACS submits, limits the public benefit of these guidelines. Further, RACS submits that the guidelines are consistent with standard medical practice and failure to comply already constitutes misconduct by a medical practitioner.

6.71 The College submits that an informed consent process is required for all procedures, is normal medical practice, and while not specified in the Code can be if necessary. Further, the College submits that requirements regarding what constitutes informed consent vary according to the type of intervention under consideration. For example,

for a botox injection, which has a low risk of an adverse outcome and virtually no risk of an adverse long term outcome, a cooling off period is not mandatory. If however, a patient was considering breast augmentation the requirements for the consent to be fully informed are more onerous and a cooling off period is mandatory.

ACCC view

- 6.72 The ACCC accepts that different informed consent thresholds will be appropriate depending on the procedure being contemplated. In this respect, the College has developed a set of guidelines which it considers appropriate in respect of invasive procedures which have a significant risk of an adverse long term outcome.
- 6.73 The Code does not contain any guidelines with respect to informed consent for other types of procedures. However, as noted, practitioners are already obliged by common law and professional practice obligations to provide sufficient information to ensure informed consent by patients in relation to all procedures.
- 6.74 Accordingly, while the public benefits of the Code would be likely to be greater if the Code contained appropriate standards in respect of informed consent for all procedures, there is still a public benefit in requiring appropriate standards in respect of only invasive procedures which have a significant risk of an adverse long term outcome, particularly considering that these are the more serious types of procedures that patients will undertake.
- 6.75 As with all provisions of the Code relating to informed consent, to the extent that such guidelines mirror practitioners existing legal obligations to provide sufficient information to ensure informed consent by patients, the guidelines may produce some public benefit by reinforcing the need to comply with these obligations.
- 6.76 In addition, guidelines which require College members to go beyond existing legal obligations in providing information to patients about procedures being contemplated will produce a public benefit by facilitating more fully informed decision making on the part of patients.
- 6.77 In this respect, the ACCC considers that there would be a public benefit in the Code containing appropriate standards in respect of informed consent for invasive procedures which have a significant risk of an adverse long term outcome. However, the ACCC has concerns with the specific details of the informed consent guidelines developed by the College which mitigate against these guidelines generating a public benefit. These concerns are discussed below.

Informed consent – disclosure of the number of times a procedure has been performed

Submissions

- 6.78 Clause 13.4 of the Code provides that if a doctor is inexperienced in a procedure this should be disclosed to the patient. Clause 13.4 specifically requires the doctor to disclose to the patient if he or she has performed the procedure less than 100 times. The DHS, RACS and the DHHS all raised concerns that such an arbitrary cut off point does not appropriately inform the patient of the education, training and procedural experience of the doctor.

- 6.79 The DHS argues that rather than informing the patient if the doctor has performed the procedure less than 100 times there should be a process in place to ensure the independent assessment of the practitioner's competence, and it is the results of this assessment that the patient should be informed of.
- 6.80 RACS submits that this Code requirement is contrary to recommendation 11B of the Cosmetic Surgery Report of the NSW Minister for Health which recommends that cosmetic surgery providers should give consumers information regarding their qualifications, credentials and training, their experience in performing the procedure, the number of times they have performed the procedure recently and their clinical outcomes and number of adverse effects.
- 6.81 RACS also contends that a single threshold is not appropriate across all types of procedures and that this requirement is inconsistent with the College's own processes to assess a member's clinical experience which require the member to demonstrate the number of procedures, number of complications and patient outcomes.
- 6.82 RACS also raises concerns that there is no procedure for verifying that the disclosure requirements in clause 13.4 of the Code have been complied with.
- 6.83 More generally, the DHHS argues that the Code does not adequately reflect that appropriate informed consent is based on the quality of information provided, the objectivity of the information source and the ability of the consumer to interact with the provider in obtaining answers to questions raised in relation to the procedure.
- 6.84 The College contends that criticisms of the Code requirement that a doctor disclose to the patient if he or she has performed the procedure less than 100 times are misplaced as they are predicated on the erroneous belief that this disclosure is isolated and does not form part of a wider provision of information about the training, qualifications and competence of the practitioner.
- 6.85 Further, the College states that it introduced this requirement in response to research commissioned by it, conducted by the Galaxy organisation, which showed that 95% of Australians wanted to be told how many times a doctor had performed a procedure under consideration.
- 6.86 The College contends that the Code does provide for informed consent based on the quality of information provided, the objectivity of the information source and the ability of consumers to interact with the provider in obtaining answers to questions raised in relation to the procedure. Specifically, the College argues that the Code requires extensive information both in oral and written format and provides for this written information to be procedure specific and not generic as is the case with many consent forms currently used by the medical profession. The College further contends that the Code provides for an appropriate cooling off period for the patient to be able to assess this information and encourages second opinions and/or further consultation.
- 6.87 With respect to the RACS contention that the Code does not provide for the verification of compliance with informed consent guidelines, the College submits that such verification will be part of the review process under the Code.

ACCC view

- 6.88 As noted at paragraphs 6.41 to 6.45, to make informed decisions about whether to purchase medical services (and particularly elective services such as cosmetic surgery) consumers need reliable and accurate information about the service or procedure. Practitioners are already obliged by common law and professional practice obligations to provide sufficient information to ensure informed consent by patients in relation to issues such as the nature and quality of the treatment, consequences of not having the treatment, post treatment care and cost of treatment. As the ACCC has noted previously, in addition to this information consumers would also benefit from more information about medical and health practitioners, in particular their qualifications and experience.
- 6.89 The concerns of interested parties in respect of the requirement that College members disclose to the patient if he or she has performed the procedure less than 100 times is that this information does not adequately inform the patient of the education, training and procedural experience of the doctor.
- 6.90 The College argues that this requirement should not be considered in isolation and that the Code also contains provisions requiring the provision to the patient of extensive oral and written information.
- 6.91 A copy of the Code is at appendix A to this draft determination. In summary, with respect to informed consent clause 13 of the Code requires:
- an initial consultation between the patient and the doctor performing the procedure (clause 13.1 and 13.2)
 - disclosure if the doctor is inexperienced in the procedure contemplated, with a specific requirement to disclose if the doctor has performed the procedure less than 100 times (clause 13.4)
 - the provision to the patient of a procedure specific consent form (clause 13.5)
 - the patient to be informed to contact the doctor if they have any questions about the procedure and to seek a second opinion if they express any doubts about the appropriateness of the procedure (clause 13.6 and 13.7)
 - a cooling off period (clause 13.8).
- 6.92 However, nothing beyond the general statement in clause 13.4 that a doctor disclose to a patient if they are inexperienced in the procedure, requires College members to provide patients with information such as their qualifications, credentials and training, their recent experience in performing the procedure and their clinical outcomes and number of adverse effects.
- 6.93 Informing a patient if the doctor has performed a procedure less than 100 times is likely to be useful to the patient in deciding whether to go ahead with a procedure. However, as submitted by a number of interested parties, a range of other information regarding the doctors qualifications, experience and the outcomes when the doctor has undertaken

the procedure is likely to be of far greater use to the patient in deciding whether to go ahead with the procedure.

- 6.94 The Code does not preclude College members from providing this information, and all members are required by law to provide sufficient information to ensure informed consent by patients. However, some College members may adopt the requirements of the Code as the benchmark to which they adhere.
- 6.95 To the extent that this does occur there is a risk that in requiring that College members inform a patient if a procedure has been performed less than 100 times, while remaining silent on provision of other information of the type noted above, some members may consider that compliance with this requirement as sufficient to constitute a satisfactory explanation of their experience in performing the procedure.
- 6.96 To the extent that this did occur it is likely that some patients would be receiving less information about the members experience than they would absent the requirement, as absent adopting of the requirement as a minimum standard the member may be more likely to turn their mind to a more considered explanation of their qualifications and experience.
- 6.97 RACS has also raised concerns that there is no procedure for verifying that the disclosure requirements in clause 13.4 of the Code have been complied with. The College submits that such verification will be part of the review process under the Code. However, the College has provided no information about how this will occur.
- 6.98 As already noted, the ACCC is required to assess the Code as submitted for authorisation. To the extent that concerns with particular clauses do arise, the ACCC can not, in assessing whether the arrangements would be likely to result in a net public benefit, rely on generally expressed assertions that the applicants will at some time in the future review the process in respect of which concerns have been raised in the future.

Initial consultations conducted by telephone

Submissions

- 6.99 Clause 13.2 of the Code provides that, as an initial consultation, a cosmetic surgeon may examine photographs of a patient and then consult with them by phone. The DHS submits that such a form of consultation is inappropriate in any circumstances pertaining to cosmetic surgery even if it is considered to be an initial consultation.
- 6.100 The College contends that the use of telemedicine is well established and underutilised and is important in providing equity of access to cosmetic medical opinions to people in country and remote areas.
- 6.101 The College submits that its Code is specifically designed to facilitate such equity and that if telemedicine was unavailable patients in remote areas would be unable to obtain an initial opinion without the expense and inconvenience of travelling a long distance. The College further states that for all patients the Code still requires a face to face consultation prior to the procedure and that in the unlikely event that the findings of the face to face consultation are so different to the initial consultation that the procedure is deemed inappropriate the procedure can be cancelled.

ACCC view

- 6.102 The ACCC notes the conflicting views regarding the appropriateness of consultation by telephone. In many cases a more considered assessment is likely to be facilitated by a face to face meeting. However, there may also be instances, particularly in respect of routine or straight forward procedures where at least as an initial consultation, a phone conference may provide other benefits, particularly in the form of time and cost saving, to patients in remote locations.
- 6.103 Similarly, for patients in remote locations, the availability of a phone conference for an initial consultation may also allow them to more readily consider the services of a variety of practitioners before deciding whether to undertake a procedure, and if so, who will perform the procedure.
- 6.104 The ACCC is not in a position to reach a concluded view on the circumstances in which a phone consultation may or may not be satisfactory as an initial consultation. Indeed, it would be difficult to imagine a set of criteria that would provide guidance in this respect that would not involve a degree of subjectivity.
- 6.105 However, the ACCC does note that the Code requires, where an initial consultation is by phone, that the patient and doctor supplement this with a face to face meeting before going ahead with the procedure.

Cooling off periods

Submissions

- 6.106 Clause 13.8 of the Code provides that, generally, there should be a ‘cooling off’ period of at least five days between the initial consultation and the procedure. The Code states that for practical reasons this may not always be possible but that the cooling off period should never be less than one night. The DHS argues that in order to give patients sufficient time to consider all the information provided at an initial consultation, both about the procedure and any associated risks and the likely cost of the procedure, this clause should be tightened to require a mandatory cooling off period.
- 6.107 In response the College contends that the Code provides for an appropriate cooling off period for the patient to be able to assess this information and encourages second opinions and/or further consultation. The College notes that under the Code it is expected that a five day cooling off period will be provided but states that there are some circumstances where this is inappropriate, particularly in regard to treatment of complications.

ACCC view

- 6.108 The Code provides that, generally, the cooling off period should be five days, while also stating that there will be some cases where this will not be practical but that the cooling off period should never be less than one night. As such, while the Code provides guidance it does not mandate a specific cooling off period. The DHS submits that a cooling off period should be mandated but has not provided any information as to what an appropriate minimum cooling off period should be.

- 6.109 The ACCC notes that the Code provides considerable scope to avoid the requirement for a cooling off period and that the cooling off period would be very difficult to enforce given the given the high degree of subjectivity in the cooling off provisions. The ACCC considers that cooling off periods are most effective as a consumer protection mechanism where they apply in all circumstances or with only very limited and clearly specified exceptions.
- 6.110 The ACCC would welcome further submissions from interested parties regarding whether a cooling off period should be mandated, and if so, what an appropriate minimum cooling off period should be.
- 6.111 The ACCC also considers that if, as the College contends, short cooling off periods, such as overnight, could be appropriate in some circumstances the Code would benefit from a mechanism for recording instances in which smaller cooling off periods are employed, including documentation in writing of the reason for a shorter period with clear consent of the consumer. This would allow monitoring of whether shorter cooling off periods were only being employed as the exception, where specific circumstances warrant, or being adopted more broadly.

Advice to patients about fees and charges

Submissions

- 6.112 The DHS expresses concerns that the Code does not provide any instruction about the need to provide patients with comprehensive advice about fees and charges prior to a procedure being undertaken.
- 6.113 The College states that it is College practice that such advice be given and the College would agree to add this to the Code.

ACCC view

- 6.114 The ACCC considers that any public benefit resulting from adoption of the Code by College members could potentially be enhanced by the Code providing clarification and guidance about providing patients with information about fees and charges prior to a procedure being undertaken. However, the extent of any such benefit would be dependant on the guidelines developed, noting that College members are already obliged by law to provide sufficient information, including information regarding charges, to ensure informed consent by patients.
- 6.115 With respect to the College assertion that it would be agreeable to guidelines regarding advice to patients about fees and charges being added to the Code, as noted, the ACCC is required to assess the application for authorisation as submitted by the College. This issue is discussed in greater detail at paragraphs 6.164 to 6.172.

Complaints and appeals processes

Submissions

- 6.116 The College submits that for its governance regime to be effectively enforced a process for effective progression of complaints and the imposition of sanctions for those found

to have breached the Codes is required. The College states that no independent party has suggested that:

- the College has not effectively enforced the Code in the past
- it is too expensive for complainants to effectively progress their complaint, or
- the College has failed to impose sanctions sufficient to deter breaches.

6.117 The ASPS, RACS and the DHHS raise concerns that the Codes complaints processes, including processes for hearing appeals in respect of complaints, are all internal to the College and do not provide for referral to an independent arbiter.

6.118 The ASPS and the DHHS also suggest that there should be a process for referring, serious complaints, such as in relation to professional misconduct, to relevant authorities.

6.119 RACS argues that the Code's governance regime is subjective with the College retaining significant discretion as to how members may be sanctioned. RACS also submits that the Code's complaints and appeals processes are unclear and do not sufficiently ensure natural justice, fair composition of the panel or tribunal and that there is no conflict of interest in considering applications and appeals.

6.120 In response to the concerns expressed by the DHHS the College states that the actions which may be taken by it are not limited and include advising the complainant of their right to complain to statutory bodies or the College itself complaining to the relevant body. The College also contends that its appeals process does provide for external independent review.

ACCC view

6.121 The Code's complaints and appeals processes are contained in clauses 14 to 17. Broadly, these clauses provide for the President of the College to appoint a Committee to assess a complaint and specify timeframes for considering complaints.

6.122 Contravention of the Code may lead to censure and loss of the right to use the College logos for a specified period. Repeated contravention may lead to removal from the College registers and/or expulsion. The Code also provides that in appropriate circumstances a member can be ordered to pay the costs resulting from a complaint against them.

6.123 Appeals against decisions regarding breaches of the Code can be made in writing to the President for referral to an External Appeal Tribunal. The Code provides for this Tribunal to consist of an independent person with legal qualifications and others as considered appropriate. The Tribunal can, at its discretion, seek technical advice from members of the College not involved in the matter.

6.124 The Code provides that determinations of the Tribunal are final and for the outcome of complaints to be published on the College website. The President maintains discretion about whether the name of the relevant member

- 6.125 Clause 10 of the of the College Bylaws sets out further details of the administrative processes for considering complaints and appeals in relation to refusal to accredit an applicant or breaches of the laws or rules of conduct of the College. This clause provides for complaints from patients to be handled in accordance with a patient satisfaction assurance pamphlet which is included as an attachment to the Bylaws.
- 6.126 The College provided a copy of its Bylaws, including the pamphlet, to the ACCC with its application. However, the College did not provided any details of how consumers are made aware of this pamphlet, or of how consumers are made aware of the College's processes for handling complaints more generally. The Code and Bylaws do not contain any provisions regarding how the public is made aware of these processes and the pamphlet, or other details of how complaints can be made do not appear to be readily available on the College website.
- 6.127 The ACCC sought clarification from the College regarding how patients are made aware of its complaints procedures. The College stated that some, albeit limited, information about its complaints procedures is available from its website. The College further stated that its website is being extensively revamped and that the revamped website will have prominent information about its complaints procedures.
- 6.128 The ACCC notes the information provided by the College regarding the proposed redevelopment of its website. However, the ACCC is not in the position to assess the effectiveness of a process for advising consumers about the College complaints handling process that is yet to be developed and about which no further information has been provided. As noted at paragraph 6.98 the ACCC is required to assess the proposed arrangements as submitted for authorisation.
- 6.129 In addition, the ACCC does not consider that providing information about its complaints handling process on its website, even prominently placed, without also making this information available through other means, is likely to sufficiently ensure that patients are aware of the process.
- 6.130 Accordingly, on the basis of the information provided by the College, the ACCC is not satisfied that the availability of the complaints handling process is sufficiently well promoted by the College so as to facilitate easy access to the process for consumers that may have complaints in respect of College members.
- 6.131 On the basis of the information available the ACCC considers that apparent lack of promotion of the complaints process for consumers seriously compromises the effectiveness of the complaints process.
- 6.132 As noted, interested parties have also raised concerns that the complaints and appeals processes are all internal to the College. Concerns have also been raised regarding the lack of a process for referring, serious complaints to relevant authorities.
- 6.133 The College contends that its appeals process does provide for external independent review and that the actions which may be taken by it are not limited and include advising the complainant of their right to complain to statutory bodies or the College itself complaining to the relevant body.
- 6.134 The Code provides for appeals against College decisions in respect of breaches of the Code to be referred to an External Appeal Tribunal consisting of 'an independent

person with legal qualifications and others as considered appropriate.’ No further details regarding the make up of this Tribunal, such as how the Tribunal would operate, how the independent person is chosen or what constitutes and independent person are specified in the Code or were otherwise provided.

- 6.135 The College Bylaws specify the process for appealing College decision in respect of breaches of the Bylaws, including consideration of complaints lodged by patients in accordance with the patient satisfaction assurance pamphlet. This process does not provide for any external party to be involved in consideration of appeals.
- 6.136 While the College contends that the actions which may be taken by it are not limited and include advising the complainant of their right to complain to statutory bodies or the College itself complaining to the relevant body, the Code and Bylaws do not provide a process for this to occur.
- 6.137 Accordingly, the ACCC places little weight on the arguments put forward by the College that its complaints process are subject to external review. The ACCC considers that the apparent lack of external review mechanisms has the potential to undermine the effectiveness of the Code’s provisions for considering appeals.
- 6.138 The ACCC also notes the inconsistency between the processes for handling complaints and appeals in the Code and Bylaws and that it is not clear in what circumstances each process applies. If it is the case that the processes in the Code apply in respect of complaints regarding potential breaches of the Code and the processes in the Bylaws apply in respect of complaints regarding potential breaches of the Bylaws then the ACCC is concerned that the Code contains no guidance regarding how consumers can bring complaints in respect of breaches of the Code.

Post operative care

Submissions

- 6.139 The DHS expresses concerns that the Code does not set out any expectations as to the surgeon’s role in immediate post-operative care. In response the College states that it would agree to add this to the Code.

ACCC view

- 6.140 As discussed in detail in paragraphs 6.164 to 6.172, the ACCC is required to assess the application for authorisation as submitted by the College. In this respect, the Code and clauses of the Bylaws for which the College have sought authorisation do not contain guidelines concerning the surgeon’s role in immediate post-operative care.
- 6.141 However, the ACCC does note that clause 6.5 of the College Bylaws, for which authorisation has not been sought, does contain such guidelines. Clause 9 of the Bylaws, for which authorisation is also not sought, provides that a member that does not comply with clause 6.5 may be suspended from the College, and ultimately may have their membership terminated.

Conducting procedures in regulated settings

Submissions

- 6.142 The DHS contends that it would be prudent for the College to encourage, if not mandate, that procedures only be conducted in regulated settings and not in the cosmetic surgeon's rooms. The College contends that this would be appropriate for some procedures such as breast augmentation but not for other such as botox injections or most laser treatments.

ACCC view

- 6.143 The ACCC notes that many cosmetic procedures are performed in cosmetic surgeons' rooms. As a general observation the ACCC notes that the risk involved in a procedure, and accordingly the appropriate setting in which to perform the procedure, will vary depending on the procedure being undertaken. However, the ACCC is not in a position to form a specific view on technical medical issues such as what, if any types of cosmetic procedures, can or should be conducted in surgeons rooms.
- 6.144 The ACCC considers that this is an issue that would be more appropriately addressed by relevant medical authorities in each jurisdiction.

Adherence to the Code

ACCC view

- 6.145 Ensuring wide spread adherence to the Code by College members depends on both effective enforcement of the Code's provisions, and in particular effective processes for applying sanctions in respect of breaches of the Code, but also on the available sanctions being a sufficient deterrent to College members breaching the Code.
- 6.146 As discussed in the ACCC's consideration of the public detriment generated by the proposed arrangements, while the Code provides for sanctions, including expulsion, to be applied against members, the ACCC considers it unlikely that, in the present environment, the loss of/or inability to obtain College membership would significantly impede a cosmetic surgeons ability to compete.
- 6.147 Accordingly, for many members, the possibility of having sanctions applied against them is unlikely, in itself, to provide sufficient incentive to comply with the Code.
- 6.148 However, it is likely that many College members will adhere to the Code irrespective of any process requiring compliance, both because many members are likely to consider the Code's provisions to be appropriate, and out of a desire to see the Code successfully implemented in the hope or expectation that successful implementation will enhance the standing of the College and the value of their membership.
- 6.149 Further, as also discussed in the ACCC's consideration of the public detriment of the proposed arrangements, if in the future, Cosmetic Medical Practice is recognised as a speciality and the College accredited as the provider of standards, training and certification in the speciality and/or if the College was successful in promoting itself as the authoritative body in the field of cosmetic surgery, there would be a far greater

potential for loss of/or inability to obtain College membership to significantly impede a cosmetic surgeons ability to compete.

- 6.150 In these circumstances, the possibility of having sanction applied against them would likely, in itself, provide sufficient incentive for members to comply with the Code, and indeed for other cosmetic surgeons to seek to join the College and comply with the Code. However, as noted, in the current environment, the possibility of having sanctions applied against the member is unlikely, in itself, to provide sufficient incentive for some members to comply with the Code.

The Code and AMC accreditation

Submissions

- 6.151 The Department of Health and Ageing submits that the likely public benefits of the proposed arrangements would only accrue if recognition of the proposed speciality of Cosmetic Medical Practice and of the College as the provider of standards, training and certification was confirmed. In response the College submits that realisation of the public benefits of the Code is not contingent on Cosmetic Medical Practice being recognised as a speciality as the Code will protect consumers.

ACCC view

- 6.152 The ACCC considers that to the extent that the Code does generate public benefits, these public benefits would be likely to result even if Cosmetic Medical Practice is not recognised as a speciality by the AMC.
- 6.153 Irrespective of whether the proposed specialty is recognised College members will continue to perform cosmetic procedures. Accordingly, any benefits which would result from implementation of the Code would continue to be realised.

ACCC conclusion on public benefits

- 6.154 The ACCC considers that arrangements that promote the provisions of accurate and complete information to consumers, assisting them in making informed choices about cosmetic procedures, are likely to produce a public benefit. Such arrangements also assist in raising practitioners' awareness of their professional and ethical responsibilities and, where backed by effective complaints and sanctions processes, act as a mechanism for ensuring that parties to the arrangements act ethically and professionally.
- 6.155 However, the ACCC is concerned that a number of provisions of the Code are not effective in this regard. In particular the ACCC is concerned that the Code does not:
- address inconsistencies between College guidelines and Victorian legislation regarding the use of testimonials or adequately address the use of superlatives in advertising by College members
 - require members to provide sufficient information regarding their qualifications, credentials and training, their recent experience in performing the procedure and their clinical outcomes and number of adverse effects, to allow patients to make a fully informed choice about procedures being contemplated, and indeed, by

setting a low benchmark in this respect may in fact discourage provision of relevant information

- address the issue of how compliance by members with informed consent requirements will be verified
- include a sufficiently robust and well promoted complaints handling procedure to facilitate easy access to the process for consumers with complaints against College members
- provide a transparent external appeals process in respect of decisions of the College regarding complaints.

6.156 The ACCC considers that authorisation of these provisions within the Code will not generate a public benefit and may in fact, to the extent that authorising the arrangements encourages the College and its members to adopt these provisions, generate a public detriment.

6.157 Further, authorisation of these provisions may discourage development of guidelines that more adequately address these issues.

Balance of public benefit and detriment

6.158 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit that will outweigh any public detriment.

6.159 In the context of applying the net public benefit test at section 90(8)¹³ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹⁴

6.160 The ACCC considers that, in the current environment, the Code is unlikely to generate a significant public detriment constituted by a reduction in competition. While the Code provides for sanctions, including expulsion, to be applied against members, the ACCC considers it unlikely that, in the present environment, the loss of/or inability to obtain College membership would significantly impede a cosmetic surgeons ability to compete.

6.161 However, as discussed, the ACCC has concerns with a number of clauses of the Code, in particular those in relation to:

- the use of testimonials and superlatives
- informing patients of the practitioners level of experience

¹³ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹⁴ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

- verifying compliance with informed consent requirements
 - complains handling and appeals processes.
- 6.162 The ACCC considers that authorisation of these provisions within the Code will not generate a public benefit and may in fact, to the extent that authorising the arrangements encourages the College and its members to adopt these provisions, generate a public detriment.
- 6.163 Further, authorisation of these provisions may discourage development of guidelines that more adequately address these issues.
- 6.164 The ACCC notes that, in respect of a number of these concerns, the College has stated that it would not object to the ACCC imposing conditions of authorisation amending the relevant clauses or that it has/will consider changes to the Code to address the concerns. As well as specifically addressing some concerns raised by interested parties in this way the College has also stated more generally that it will consider some of the suggestions put forward by the ASPS and DHHS regarding changes to the Code, without specifically identifying which suggestions the College is referring to.
- 6.165 The College has also advised that the policies and regulations contained in the Code have been developed over 10 years and that over the years policies have been updated or enhanced in response to matters raised by third parties or by members.
- 6.166 The College states that it has held round tables with various stakeholders and produced papers to help formulate future policy concerning the Code. The College states that stakeholders with which it has consulted include state governments in Queensland, South Australia, New South Wales and Victoria, the Medical Boards of Queensland, NSW and Victoria, Choice Magazine, the Australian Medical Association, RACGP, RACS, ASPS, Australasian Academy of Facial Plastic Surgery, the Royal Australasian College of Dental Surgeons, and the Medical Council of New Zealand.
- 6.167 In addition, clause 18 of the Code provides for the Code to be reviewed annually in consultation with ‘relevant regulatory bodies.’
- 6.168 While the College has indicated a willingness to take on board some of the suggestions of interested parties, and to consult in respect of future development of the Code, the ACCC is required to assess the public benefits and detriments of the Code as submitted for authorisation.
- 6.169 In this respect, the ACCC notes that, even if only those changes which the College has indicated that it is willing to consider were adopted, this would require a substantial re-write of the Code. While the ACCC is able to grant authorisation subject to conditions, the authorisation process is not the appropriate forum for significant revising of Codes of conduct to be undertaken through the ACCC imposing conditions on the authorisation.
- 6.170 Nor, given that the College has not provided any details about how it may amend its Code in the future to take account concerns raised, can the ACCC place any significant

weight on the submission by the College that it will consider some of the suggestions put forward by interested parties in further developing the Code.

- 6.171 If the College is of the view that some of the changes to the Code suggested by interested parties and/or those highlighted by the ACCC in this draft determination have merit, the College should redraft the Code and, if necessary, submit a revised Code for authorisation.
- 6.172 However, in respect of the current application, as noted, the ACCC is required to assess the public benefits and detriments of the Code as submitted for authorisation.
- 6.173 For the reasons outlined above, the ACCC considers that the Code is unlikely to generate a significant public detriment constituted by a reduction in competition. However, the ACCC also considers that a number of provisions within the Code will not generate a public benefit and may in fact, to the extent that authorising the arrangements encourages the College and its members to adopt these provisions, generate a public detriment.
- 6.174 As noted, the ACCC considers that arrangements that promote the provision of accurate and complete information to consumers, and the ethical and professional conduct of parties to the arrangements are likely to produce a public benefit. However, the ACCC considers that the Code as submitted to be underdeveloped in this regard. The College itself has stated that the Code would benefit from further revisions.
- 6.175 On balance, the ACCC is not satisfied that the public benefits of the arrangements as they currently stand will be likely to outweigh the public detriment.

7. Draft determination

The application

- 7.1 On 6 November 2008, the Australian College of Cosmetic Surgery (the College) lodged application for authorisation A91106 with the Australian Competition and Consumer Commission (the ACCC).
- 7.2 Application A91106 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 7.3 In particular, the College seeks authorisation for its Code of Practice and parts of its Bylaws. The Code of Practice and relevant Bylaws contain, amongst other things, advertising guidelines and guidelines for informed consent as well as processes for dealing with complaints under the Code of Practice.

The net public benefit test

- 7.4 For the reasons outlined in Chapter 6 of this draft determination, the ACCC is not satisfied that the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 7.5 The ACCC therefore **proposes to deny** authorisation to application A91106.
- 7.6 This draft determination is made on 20 February 2008.

Further submissions

- 7.7 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.