

27 March 2009

Dr Richard Chadwick  
General Manager  
Adjudication Branch  
ACCC  
Email: [adjudication@acce.gov.au](mailto:adjudication@acce.gov.au)

**Re: Australasian College of Cosmetic Surgery application for authorisation A91106  
-PRE-DECISION CONFERENCE**

Thank you for your invitation to present a written comment for distribution at the conference in Sydney on 30 March 2009.

**The position of ASPS is:**

- That it does not regard the ACCS Authorisation application as being necessary.
- That the subject of the authorisation application does not raise issues in relation to anticompetitive conduct having regard to the limited role and function of the ACCS.
- That notwithstanding this, ASPS as a good citizen believes that it should comment on the issues in the draft Code that create difficulties either for the ACCS or its members.

**Comments on the Code:**

It is asserted that "in the absence of a national approach the ACCS Code is the sole set of formal standards specifically developed to protect cosmetic surgery and cosmetic medical patients".

- We note that Australian Society of Plastic Surgeons (ASPS) and the Australasian Society of Aesthetic Plastic Surgeons (ASAPS) both have standards which relates to members of such organisations who perform cosmetic surgery and cosmetic medical services to patients.
- Other organisations whose members also perform these services may also be subject to their standards. Thus the above assertion needs to be placed in this context.

The ACCS maintains that its Code sets additional and higher standards for members of the ACCS than those set out in State laws and guidelines.

- This statement is misleading to the extent that it suggests that the ACCS is unique in some way. However we note that various professional associations of medical practitioners in different specialties will have codes of conduct which are



likely to impose additional and possibly higher standards for their members than the standards set out in the legislation.

We note the clause which requires members of the ACCS who have performed a particular procedure less than 100 times, to disclose this at the initial consultation and tell the patient how many times that member has performed the procedure.

- The inference to be drawn from having such a provision is that a person who has performed the procedure more than 100 times must ipso facto be competent to perform it. This in ASPS' opinion is a fallacy.
- A practitioner who performs a particular procedure may either have not been properly taught or have been self-taught and may not perform the procedure properly even though they have performed it numerous times (and in particular more than 100 times).
- They may in fact perform the procedure in a far less competent fashion than a practitioner who has been taught properly (e.g. under the auspices of RACS) and who has performed the procedure on only a limited number of occasions but performed it correctly and in a textbook fashion.

Clause 5.28 purports to give the Panel the power to impose a "penalty" of \$10,000 "for the first instance" and \$20,000 for a subsequent breach. The enforceability of this provision is based on contract law. That is to say the member's agreement to be bound as a matter of contract law to the rules and codes of the ACCS.

- It is ASPS' view that this issue should be carefully considered. Under contract law, a term of a contract which seeks to impose a financial sanction is unenforceable if, at law, it is to be regarded as a penalty as opposed to a "genuine pre-estimate of loss". If it is unenforceable, its inclusion in the Code is arguably misleading.

Under clause 5.33 the Panel may take into consideration any penalty imposed upon a member as a result of external legal proceedings being brought against that member in relation to the same matter.

- There is a disconnect between clause 5.33 and clause 5.6. Under clause 5.6(c) the Chairman of the Complaints Panel shall not refer the matter to the Panel if it is more appropriate that the complaint be dealt with by a Court or an external complaints, disciplinary, conciliation or arbitration body or procedure (e.g. "external legal proceedings"). Under clause 5.6(h) the Chairman of the Complaints Panel shall not refer the matter to the Panel if the matter is being handled by a medical insurer. A medical insurer would of course be likely to be

handling any matter in which court proceedings or disciplinary proceedings before the Medical Board were in progress.

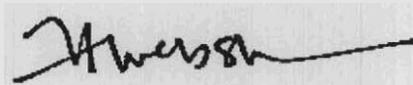
Clause 5.50 - the power of the Chair of the Appeals Committee.

- In ASPS' view the Chair of the Appeals Committee, on their own, to determine that the material submitted by the appellant does not support a valid appeal and to dismiss the appeal, detracts from the power of the other two members of the committee and clearly undermines the concept of there being 3 persons (preferably) not 1 person, deciding the fate of the member. It also detracts from the natural justice protections no doubt intended to be present.

Clause 5.50 would seem to be in conflict with clause 5.62 which provides: 'A decision of the Appeals Committee shall not be invalidated in consequence of a vacancy in its membership or the absence of any member provided that the decision is made by at least 2 members including the Chair of that Committee.'

Finally, in respect of Clause 8.2, it is unclear what legislative function of the ACCC would be engaged, in respect of it receiving a copy of Annual Reports of the ACCS.

Yours sincerely



Howard Webster, MBBS (Hons) FRACS (Plast) MBA  
President