RUSSELL KENNEDY
MEMBER OF THE KENNEDY STRANG LEGAL GROUP

Your Ref
Our Ref MWG 159576-1675

Contact
Michael Gorton
Tel 61 3 9609 1625
Fax 61 3 9609 6825
mgorton@rk.com.au

30 March 2009

BY HAND AND BY EMAIL: adjudication@accc.gov.au

Commissioner Ed Willett
Australian Competition and Consumer Commission
c/- Level 35, The Tower
360 Elizabeth Street
MELBOURNE VIC 3000

Dear Commissioner

Australasian College of Cosmetic Surgery ("ACCS") - Application for Authorisation A91106
Submissions at pre-decision conference - 30 March 2009 at 10:00am

We refer to the ACCC's letter dated 11 March 2009 in which the Royal Australasian College of Surgeons ("**RACS**") was invited to the pre-decision conference for the above application.

As previously advised, Dr David Hillis, Chief Executive Officer of the RACS will personally represent the RACS at the pre-decision conference and make oral submissions. We **enclose** written submission by the RACS for the pre-decision conference which are intended to complement the oral submissions to be made by the RACS.

We refer to section 1 of the RACS written submissions and note that the RACS reserves the right to make further submissions in relation to the revised code of practice submitted by the ACCS on 16 March 2009, and the ACCS submission dated 23 January 2009.

Yours faithfully
RUSSELL KENNEDY

Michael Gorton
Principal

Enclosures

Copy to Professor Ian Gough, President, Royal Australasian College of Surgeons

Copy to David Hillis, Chief Executive Officer, Royal Australasian College of Surgeons

AUSTRALASIAN COLLEGE OF COSMETIC SURGERY ("ACCS")
APPLICATION FOR AUTHORISATION A91106

SUBMISSIONS BY THE ROYAL AUSTRALASIAN COLLEGE OF SURGEONS ("RACS")
AT THE PRE-DECISION CONFERENCE 30 MARCH 2009 AT 10:00AM

1 Proposed decision to deny the ACCS' application

The RACS fully supports the ACCC's draft determination and the proposed decision to deny the ACCS' application for authorisation.

Further, in light of the submissions below, the RACS considers that the conclusion in the ACCC's draft determination should stand. Therefore, the ACCC should make a final determination that it 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.

Inappropriate to consider the revised code of practice

Russell Kennedy, the solicitors for RACS, noted in their letter to the ACCC dated 3 March 2009 that the ACCS' proposal to substitute a substantially amended code should not be allowed. The RACS subsequently received on 17 March 2009 a revised Code of Practice, now titled "Consumer/Patient Code of Practice" submitted by the ACCS on 16 March 2009 ("**Revised Code**").

On a preliminary review, the Revised Code has been significantly restructured, contains substantial amendments and introduces new issues and ambiguities. The RACS remains concerned that the ACCS intended from the outset to submit the original code of practice, and then revised it to the minimum level necessary to address any concerns raised by interested parties. This is not an appropriate use of the authorisation process under Part VII of the *Trade Practices Act.*

Consistent with the ACCC's reasoning in paragraphs 6.168 to 6.172 of the draft determination, the RACS seeks that the Revised Code should not be further considered by the ACCC.

However, if the ACCC proceeds to consider the Revised Code, the RACS notes that it has not had sufficient time prior to the pre-decision conference to fully consider the impact of the numerous changes to the Revised Code. Therefore, the RACS reserves the right to make further written submissions in relation to the Revised Code and the ACCS submission dated 23 January 2009 ("**ACCS Submission**") by 9 April 2009 in accordance with the ACCC's timetable.

3 Competition effects

At section 2 of the RACS' submission dated 8 December 2008 ("**RACS Initial Submission**"), the RACS submitted its concerns that the competition effect on ACCS members would be significant.

In particular, the ACCC has previously emphasised the need for non-discretionary tests for admission, expulsion, sanctions and enforcement. Unless these are made objective and non-discretionary, the ACCS might be in a position to act anti-competitively.

At paragraph 6.25 of the draft determination, the ACCC acknowledges the potential anti-competitive detriment of the ACCS code of practice in the context of Australian Medical Council ("**AMC**") accreditation.

4 Natural justice

At section 2.3 of the RACS Initial Submission, it is noted that the code of practice, bylaws and supporting measures do not sufficiently ensure:

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

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

4.3 no conflict of interest when considering complaints and appeals.

The ACCC has noted similar concerns regarding complaints and appeals processes, particularly in respect of the fair composition of the panel or tribunal at paragraph 6.134 of the draft determination.

5 Informed consent

At section 4 of the RACS Initial Submission, the RACS submitted that it has serious concerns that the advertising and informed consent guidelines may cause confusion and affect the public's ability to assess a practitioner's experience. Further, the guidelines do not address the knowledge imbalance between patient and medical practitioner in respect of cosmetic procedures.

The RACS was particularly concerned that disclosure of how many times that a member of the ACCS has performed a procedure is not appropriate as:

5.1 the "number" in isolation does not adequately describe a practitioner's experience;

5.2 consumers may become reliant on this number as a measure of a practitioner's experience; and

5.3 practitioners may be encouraged to use the number of times a procedure has been performed to market their experience.

The RACS' views are strongly supported by the ACCC at paragraphs 6.95 and 6.96 of the draft determination, and it is clear that other information is likely to be of far greater use to the patient in deciding whether to go ahead with the procedure.

6 Issues with Revised Code

Subject to the RACS' objections in section 1, the RACS notes the following issues with the Revised Code.

6.1 Inconsistency between the application and the Revised Code

The ACCS application is for authorisation of its code of practice and relevant bylaws containing advertising guidelines, guidelines for informed consent and processes for

dealing with complaints. However, it is unclear whether the Revised Code is intended to supersede parts of the bylaws and constitution and what precisely the ACCC is now being asked to authorise.

6.2 Inconsistency between constitution and Revised Code

Both the bylaws and constitution of the ACCS would need to be changed in order to accommodate the Revised Code. It is also questionable whether the ACCS' constitution authorises the adoption of the Revised Code given that it purports to impose substantial financial penalties and appeal costs on its members.

6.3 AMC Application

The AMC advised the ACCC that the ACCS application for recognition as a specialty is in its early stages and it is not possible to comment on the possible outcomes of the application (paragraph 2.10 of the draft determination). However, part A of the Revised Code states that:

> "An application to the AMC by the College for such recognition has been accepted by the AMC for full assessment. The formal recognition of this separate specialty will not automatically recognise any qualification or training body".

From a consumer's perspective, it is misleading for the ACCS to give the impression that the application will be successful when receipt of an application is only a procedural step in a long process and the application might not succeed.

6.4 Frequency of reviews and involvement of interested parties

The Revised Code proposes a tri-annual review in consultation with relevant regulatory bodies. It is unclear whether the review will occur once every three years or three times per year.

The Revised Code also does not reflect the ACCS Submission that it will agree to consider the submissions of interested parties which may not be regulatory bodies.

6.5 Advertising and promotion

At paragraph 6.54 of the draft determination, the ACCC notes the ACCS submitted it does not favour testimonials and would welcome a ban on them (consistent with the *Health Professions Registration Act 2005* (Vic)).

However, contrary to that statement, the ACCS has retained clause 2.7 of the Revised Code in which "[t]estimonials should not be used in advertisements". The RACS has not had an opportunity to confirm whether there are other statements of the ACCS relied upon by the ACCC in its draft determination which have not been reflected in the Revised Code.

6.6 Face to face consultations

The introduction to the Revised Code refers to "a face to face consultation with the Member offering a procedure before any procedure is undertaken". However, clause 3.9 of the Revised Code only requires the doctor to "see the patient face to

face before the procedure, preferably at least one day before", which might not be a consultation.

6.7 Composition of Complaints Panel and Appeals Committee

It remains unclear whether the Complaints Panel is intended to be fully independent or have input from independent members. For example, if under clause 5.10 the panel consists of five members, the majority of panel members could be members of the ACCS.

It is also unclear whether the Appeals Committee constituted under clause 5.40 is intended to be fully independent or have input from independent members.