



SWAAB

7 April 2009

Contact Richard Ottley
Partner
DL: 02 9777 8380
rbo@swaab.com.au

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

File ref RBO:280430



Dear Mr Jones

Australasian College of Cosmetic Surgery (ACCS) Application for Authorisation - A91106

We refer to previous correspondence and in particular your letter to us dated 16 March 2009. We also refer to the pre-decision conference on 30 March 2009 held by the ACCC at the request of the Australasian College of Cosmetic Surgery (*the ACCS*) in relation to the application the ACCS has made for authorisation of its Code of Practice (*the Code*).

We note that the ACCC has invited any further submissions by 9 April 2009.

On behalf of the Australian Society of Plastic Surgeons Inc (*ASPS*) we make various observations in relation to the Code (some of which already appear in the letter from ASPS to the ACCC of 27 March 2009).

We also propose to make some comments in relation to the assertion by Dr Daniel Fleming on behalf of the ACCS, that failure by the ACCC to approve the Code would have significant adverse consequences for consumers in relation to cosmetic surgery.

Firstly turning to the Code we would say by way of introduction that:

- ASPS does not regard the ACCS Authorisation Application as being necessary (or appropriate).
- 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 considers that it should comment on issues in the draft Code, some of which may create difficulties either for the ACCS or its members.

ASPS' comments are as follows:

1 Comments on Code

A. Introduction

1.1 On page 2 reference is made to

- *"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"*.

SWAAB ATTORNEYS ABN 71 028 846 652
Level 1, 20 Hunter Street, Sydney NSW 2000 DX 522 Sydney NSW
T +61 2 9233 5544 F +61 2 9233 5400

PLEASE NOTE
Send all mail to: GPO Box 35, Sydney NSW 2001

Liability limited by a scheme approved under Professional Standards Legislation

- 1.2 It is noted that ASPS and ASAPS both have standards which relates to members of such organisations who perform cosmetic surgery and provide cosmetic medical services to patients. There are no doubt other organisations whose members also perform these services subject to their standards. Thus the above assertion needs to placed in this context.
- 1.3 It is noted that directly below the reference which is set out above, 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.
- 1.4 This may be correct (although ASPS has not undertaken an examination of all relevant laws and guidelines), however in a sense it is misleading to the extent that it suggests that the ACCS is unique in some way, because 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.
- 1.5 **Clause 1.3** - "*speciality*" should be "*specialty*".
- 1.6 **Clause 3.6** - ASPS has concerns about this 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.
- 1.7 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 is, in ASPS' opinion, a fallacy.
- 1.8 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).
- 1.9 They may in fact perform the procedure in a far less competent fashion than a practitioner who has been taught properly (eg. 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.
- 1.10 **Clause 5.5** - at the beginning of clause 5.5 it is necessary to add the words "*Subject to clauses 5.6 and 5.7 below*". This is because in some circumstances contrary to what is said in clause 5.5, complaints will not be referred to the Complaints Panel, eg because such complaints fall within clauses 5.6 or 5.7.
- 1.11 **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.
- 1.12 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*".
- 1.13 It is difficult to see on what basis the financial sanction (which is expressed to be a "penalty") would be regarded as a genuine pre-estimate of loss. If it is indeed a penalty (in contract law) the provision is unenforceable. If it is unenforceable, its inclusion in the Code is arguably misleading.

- 1.14 This issue should be carefully considered by the ACCS with its advisers, and it should be satisfied that this provision will not create these difficulties.
- 1.15 **Clause 5.33** - it is noted that 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. This clause is inconsistent with clause 5.6(c) and (h).
- 1.16 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 (eg "*external legal proceedings*").
- 1.17 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.
- 1.18 Therefore there is a disconnect between clause 5.33 and clause 5.6.
- 1.19 **Clause 5.36** - this clause is missing something. In ASPs' view the second paragraph should read:

*"The member involved in an appeal must apply to the Panel for a stay and **the Panel must provide reasons for agreeing to or declining a stay or partial stay**" [missing words appear in bold]*

It is also considered it may be appropriate for the Appeals Committee to have power to grant a stay.

- 1.20 **Clause 5.50** - the power of 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.
- 1.21 Furthermore Clause 5.50 is directly 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.*
- 1.22 **Clause 6.1-** the end of this clause has a *non sequitur*
- *"otherwise make available....."*
- 1.23 **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.

2 **Other Comments**

- 2.1 We now turn to comment upon Dr Fleming's assertion made at the pre-decision conference on 30 March 2009, that a failure by the ACCC to accede to the Authorisation Application by the ACCS would potentially have a significant and adverse impact upon consumers in relation to the provision of cosmetic surgery (and cosmetic physician) services (presumably on the basis that without the authorisation, the ACCS would not be able to or feel comfortable about enforcing its Code).

- 2.2 The first point to be made is that, "at the end of the day", it is of course, a matter for the ACCC to determine the Authorisation Application by the ACCS according to the legal principles and requirements which underpin the operation of the Trade Practices Act and in particular the potential for "anti-competitive conduct".
- 2.3 In the above regard, ASPS has noted that, unlike the RACS, the trading and accreditation role said to be performed by the ACCS is not currently formally acknowledged or recognised by the AMC. Whether or not a specialist or other medical practitioner is a member of the ACCS is not presently regarded by ASPS therefore, as of financial or professional significance, and ASPS therefore does not see any serious scope for competition issues or public detriment arising from the matters the subject of the Authorisation Application.
- 2.4 ASPS notes that the ACCC in its draft determination considers (at **paragraph 6.160**) 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 surgeon's ability to compete".*
- 2.5 Notwithstanding the ACCC's above views in relation to the likely lack of impact of the Code on competition, the ACCS appears to believe (for reasons which are elusive) that if the ACCC does not approve its Code, it means *ipso facto*, that the ACCS cannot or should not seek to enforce a disciplinary code amongst its membership. This in turn would be to the detriment of the public.
- 2.6 It should be appreciated that at the present time, there are many professional associations (probably in the order of hundreds) which have their own codes of conduct and rules which they enforce in practice, without the efficacy of such enforcement resting upon any decision by the ACCC with respect to an Authorisation Application.
- 2.7 Indeed on the question of whether an Authorisation Application is necessary, in ASPS' view and in the view of certain other stakeholders it is unnecessary. For example, the SA Department of Health stated in its public submission of 12 December 2008:
- "SA Health does not support this Application for authorisation as it is not seen to be required. This is due to the fact that membership of the College is voluntary and according the ACCS's own submission, it is unlikely that loss of ACCS membership would significantly impede a cosmetic surgeon's ability to compete". [Emphasis added]*
- 2.8 The NSW Health Department stated in its public submission of 2 December 2008:
- "The content of the Australasian College of Cosmetic Surgeons Bylaws and Code of Practice do not appear to be inconsistent with the competition provisions of the Trade Practices Act 1974 and it is not clear why 'authorisation' of these documents from the ACCC is required". [Emphasis added].*
- 2.9 Given the above setting (as noted in para 2.6 above) and in particular, the ACCC's view as noted in para 2.4 above, that loss of membership of the ACCS is unlikely to significantly impede a cosmetic surgeon's ability to compete in the present environment (a view shared by the ACCS), it is unclear why the ACCS considers that any failure of its Authorisation Application means that it will not be able to implement its Code.
- 2.10 The ACCS would in the above scenario, be like every other organisation which has a code, set of rules or bylaws which have not been the subject of an Authorisation Application to the ACCC. That is to say like such other associations, it will still be able to implement its Code, but will, like other professional associations, remain subject to the provisions of the Trade Practices Act (without having obtained any authorisation).

2.11 As to the concern expressed that the public will be significantly disadvantaged by the Code not being authorised by the ACCC, this is, in the submission of ASPS, not correct. It is not correct, because the Code does not need the authorisation of the ACCC for it to be binding and enforceable upon its members who agree to be bound by it as a matter of contract law. The ACCS (like other professional associations) must not act contrary to the Trade Practices Act, but will not necessarily be breaching the Act, simply by having a code and seeking to enforce it fairly.

ASPS appreciates the opportunity to make further comment.

Yours faithfully
Swaab Attorneys

A handwritten signature in black ink, appearing to read 'R Ottley', is written over a light grey rectangular background.

Richard Ottley
Partner