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BY EMAIL adjudication@accc.gov.au

Mr Gavin Jones
Director, Adjudication Branch
Australian Competition & Consumer Commission
Level 35, The Tower
360 Elizabeth Street
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Dear Mr Jones

Australasian College of Cosmetic Surgery ("ACCS") - Application for Authorisation A91106
Revised code of practice ("Revised Code")

We refer to your letter to the Royal Australasian College of Surgeons ("**RACS**") dated 16 March 2009, our letter to Commissioner Willett dated 30 March 2009, and the submissions of Dr David Hillis, Chief Executive Officer of the RACS at the pre-decision conference held on 30 March 2009.

The RACS previously reserved the right to make further submissions in relation to the Revised Code. We are instructed to provide the following submissions on behalf of the RACS, some of which have been raised in previous submissions.

1 Need for the Revised Code

1.1 The RACS is of the view that the Revised Code does not need to be placed before the ACCC. We refer to the submissions by Mr Richard Ottley of Swaab Attorneys on behalf of the Australian Society of Plastic Surgeons Inc ("**ASPS**") dated 7 April 2009. The RACS supports and accepts those submissions, in particular section 2 of those submissions.

1.2 It is accepted that professional associations and societies expect a certain standard of professional behaviour. Members are expected to maintain the profession's standing and avoid bringing the profession into disrepute. This enables the association to build public confidence in and respect for the profession.

1.3 We note that objective codes of conduct are an integral part of professional associations, and do not ordinarily give rise to anti-competitive conduct. If it did, most of the professional associations who have made submissions, including the RACS, would need to themselves submit an application for authorisation.

1.4 Further, if there is an identified need to develop specific standards as suggested by the ACCS, then the RACS submits it should be undertaken by an accredited training and standards group. This would follow on from recognition and accreditation. As the ACCC is aware, the ACCS is not accredited by the AMC.

1.5 In the RACS Initial Submission, competition concerns were raised in the context of querying whether loss of ACCS membership would impede a surgeon's ability to compete. In light of the ACCC's draft determination at paragraphs 6.20 to 6.28, the RACS supports the view that authorisation does not appear to be required.

2 Issues with Revised Code

We note that the Revised Code has not been previously implemented or adopted by the ACCS. In light of this, it is understandable that the Revised Code contains ambiguities and inconsistencies which would reduce the overall public benefit of implementing the Revised Code. We comment on key aspects of the Revised Code below.

2.1 Introduction (section A)

2.1.1 In paragraph 1, the reference to "highest standards" is inconsistent with the restrictions on the use of superlatives under clause 2.3 of the Revised Code itself. The ACCS cannot readily prove that the Revised Code is the highest standard ascribed to. Further, we have identified instances (see eg 2.3.2, 2.3.4 and 2.4.1 below) where the Revised Code is not of the highest standard.

2.1.2 In paragraph 2, the reference to "only body" is misleading. A consumer may be mislead into the belief that no other body provides training in cosmetic surgery and cosmetic procedures. It was acknowledged at the ACCC's pre-decision conference that other bodies provide such training Further, a consumer would not appreciate that the statement refers to the alleged amalgam of cosmetic medicine and cosmetic surgery claimed by the ACCS to be a distinct speciality.

2.1.3 Paragraph 3 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.

2.1.4 In paragraph 4, the ACCS refuses to recognise any overlap between existing recognised specialist areas and the alleged specialist area for which they seek Australian Medical Council ("**AMC**") recognition.

2.1.5 In paragraph 5, the ACCS asserts 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.

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). 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.

2.1.6 Further, in paragraph 5, the ACCS asserts that "the ACCS Code is the sole set of formal standards specifically developed to protect cosmetic

surgery and cosmetic patients". This is incorrect as it implies there are no other standards to protect cosmetic surgery and cosmetic medical patients.

2.1.7 In paragraph 6, the ACCS asserts it sets "additional and higher standards" than relevant laws and guidelines for its members. This is not correct when there are instances where the Revised Code sets a standard lower than relevant laws and guidelines (see eg 2.3.2, 2.3.4 and 2.4.1 below).

2.1.8 The ACCS has not provided a copy of the guide described in paragraph 7. We submit that the ACCC should not recognise the public benefit of this guide without first considering its content.

2.2 Code Administration Committee (section C)

2.2.1 In paragraph 1, the words "such as the Australian Consumer Association" make the nomination of a consumer representative uncertain.

2.2.2 In paragraph 2, 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 dated 23 January 2009 (response to submissions from interested parties by Spier Consulting) ("**ACCS Submission**") that it will agree to consider the submissions of interested parties which may not be regulatory bodies.

2.3 Advertising and promotion (section 2)

2.3.1 In clause 2.6, the Revised Code endorses the use of "before and after photographs". This is a lower standard than the Medical Practitioner Board of Victoria's advertising guidelines which state at section 7.1 that

> "The Board considers that the use of 'before and after' photographs has significant potential to be misleading or deceptive, to convey to a member of the public inappropriately high expectations of a successful outcome and to encourage the unnecessary use of medical services. photographs to be used to display the results of treatment and or complications."

2.3.1 In relation to clause 2.7, 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".

2.3.2 Further, clause 2.7 provides an example where the Revised Code sets a lower standard than other relevant laws and guidelines.

2.3.3 In clauses 2.8 and 2.10, we note that the use of medical or surgical procedures as inducements or prizes and discounts is discouraged but not prohibited. This is inconsistent with *Health Professions Registration Act 2005* (Vic) section 94(1)(b) which makes such conduct an offence.

2.3.4 Further, clauses 2.8 and 2.10 provide examples where the Revised Code sets a lower standard than other relevant laws and guidelines.

2.3.5 In relation to clauses 2.13 and 2.14, we note that the "CERTIFIED IN COSMETIC SURGERY" and other ACCS trade marks have been registered in relation to expert certification services. The purpose of a trade mark is to denote the owner of the trade mark as the source of the services offered under the trade mark. However, these trade marks clearly create an impression that the person displaying the trade mark has been certified in respect of cosmetic surgery or is a cosmetic surgeon. This is the function of a certification trade mark, not an ordinary trade mark.

2.4 Guidelines for informed consent (section 3)

2.4.1 In clause 3.1, the recommendation that "Members should give information about the risks of any intervention, especially those that are likely to influence the patient's decisions" should be mandatory. The clause sets a lower standard that required by law.

2.4.2 The ACCS has not provided a copy of the guide referred to in clause 3.2. We submit that the ACCC should not recognise the public benefit of this guide without first considering its content.

2.4.3 In clause 3.16, the "general" requirement for there to be a five day cooling off period remains vague and would be unenforceable.

2.5 Number of procedures performed (section 3.6)

2.5.1 At section 4 of the RACS initial submission dated 8 December 2008 (**"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.

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

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

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

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

2.5.3 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.

2.6 Complaints processes (section 5)

2.6.1 Under the Revised Code, the ACCS does not appear to have the power to commence its own investigations without a person pursuing a complaint. This affects the ability to investigate claims the ACCS is aware of when a complaint was withdrawn or not received.

2.6.2 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 ACCS members.

2.6.3 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.

2.6.4 Clause 5.28(g) requires a member to pay penalties of no more than $10,000 for the first breach and no more than $20,000 for any subsequent breach. If the ACCS constitution is treated as a contract between the ACCS and each member, it is not possible under contract law to agree to pay penalty or punitive amounts unless they are a genuine pre-estimate of a contractual loss. If the penalty is unenforceable, its inclusion in the Revised Code may mislead consumers.

2.6.5 In clause 5.50, we note that the chair should not have sole power to dismiss an appeal. This defeats the purpose of establishing an appeal committee consisting of three persons.

2.6.6 In clause 6.1, we note that the public should be entitled to access all determinations made by the Complaints Panel and the Appeals Committee.

3 Response to ACCS Submission

The RACS responds to the ACCS Submission as follows

3.1 The ACCS Submission makes substantial reference to the AMC application in reply to concerns raised by interested parties. However, we understand that the AMC application was not made public until as late as 2 April 2009. The RACS has not had an opportunity to review almost 300 pages of the AMC application and associated materials, nor identify concerns which impact on this ACCC application.

3.2 The ACCS alleges that the RACS Initial Submission contained false statements. We note that the RACS has been aware of the ACCS' intent to submit an application to the AMC for several years. As noted at 3.3 above, the details of the AMC submission have only recently been confirmed made available for public comment.

3.3 At section 3 of the RACS Initial Submission, the RACS noted that the ACCS did not provide supporting evidence of instances where enforcement has been effective. We note that the ACCS continues to assert it has successfully expelled and suspended members without providing specific details. For example, the three examples cited by the ACCS do not appear to have resulted in a final decision or nor any appeal.

3.4 The ACCS claims that the RACS has confused certification and accreditation. The RACS understands the distinction between the terms, but merely note that an ordinary consumer might not.

3.5 In relation to the substantiation of claims by ACCS members, the ACCS states that this "may be added to the Code once the TPA is amended accordingly". A possible future amendment of the Revised Code does not address the concerns identified by the RACS.

3.6 Similarly, in relation to the ability to verify compliance with informed consent guidelines, the ACCS states that "this will be part of the review process under the Code". A possible future amendment of the Revised Code does not address the immediate concerns raised by the RACS.

3.7 The RACS rejects the ACCS assertion that it is "seeking to undermine what the ACCS is doing" or that its concerns are somehow not genuine. In relation to the RACS concerns in regards to the enforcement of the code, we refer to paragraphs 6.35 and 6.121 to 6.138 of the ACCC's draft determination in which the ACCC identifies similar concerns with enforcement.

We understand that the ACCS will have the opportunity to respond to the above issues by 30 April 2009. The RACS look forward to the ACCC finalising its determination in this matter.

Yours faithfully
RUSSELL KENNEDY

Michael Gorton
Principal

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

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