Australian Competition
&
Consumer Commission

Authorisation application A91106
Lodged by Australasian College of Cosmetic Surgery

PRE-DECISION CONFERENCE

30 March 2009

Minutes

This minute is not intended to be a verbatim account of the pre-decision conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

Authorisation application A91106 lodged by Australasian College of Cosmetic Surgery
Pre-Decision conference 30 March 2009

Australian Competition & Consumer Commission
Level 7, Angel Place
123 Pitt St
Sydney NSW

Video-conference-linked to the ACCC's Melbourne offices

Attendees:

Australian Competition and Consumer Commission
(all in Sydney)

Ed Willett, Commissioner
Richard Chadwick, General Manager Adjudication Branch
Gavin Jones, Director Adjudication Branch
John Rouw, Project Officer Adjudication Branch

Applicant – Australasian College of Cosmetic Surgery
(all in Sydney)

Dr Daniel Fleming, President
Dr Mary Dingley, Council Member
Dr Rita Kirby, Registrar
Dr Colin Moore, Council Executive Member/Vice President
Ms Jenny Valance, General Manager
Dr Michael Zacharia, Council Executive Member/Secretary
Alan Jones, Advisor
Hank Spier, Advisor

Interested parties

Australian Publishers' Bureau
(in Sydney)

Ms Lianne Richards, Executive Director

Australian Society of Plastic Surgeons

Mr Howard Webster, President (in Melbourne)
Ms Gaye Phillips, Chief Executive Officer (in Melbourne)
Richard Ottley, Advisor - Swaab Lawyers (in Sydney)

Royal Australasian College of Surgeons
(all in Melbourne)

Dr David Hillis, Chief Executive Officer

Mr Michael Gorton, Russell Kennedy Solicitors - Advisor
Mr Jonathan Teh, Russell Kennedy Solicitors Advisor

Conference commenced: 10 am

Introduction

Commissioner Willett made introductory remarks, including that the conference gave attendees the opportunity to discuss the draft determination issued by the ACCC proposing to deny authorisation to the Australasian College of Cosmetic Surgery (the College) Code of Practice (the Code); and the revised Code of Practice the College submitted on 16 March 2009. Commissioner Willett noted, among other things, that he could not make a final decision today but, rather, a decision on the amended application would be made by the full Commission.

Commissioner Willett said the conference participants had not assembled to make judgments about the efficacy of cosmetic surgery services or any other services; they were here to hear and express views about the College's proposed Code and the application to have the Code authorised under the *Trade Practices Act* 1974 (TPA).

Commissioner Willett opened the conference and invited a representative of the party that called it, the College, to make an opening statement.

Opening remarks for the party requesting the conference

Dr Daniel Fleming, for the College, said he hoped participants had attended today to help devise a Code of Conduct to protect consumers.

Dr Fleming said that the College accepted the initial Code submitted for authorisation was underdeveloped (as the ACCC had described it). It was the first, and only, Code submitted for authorisation in the industry and now the College knew how developed a Code had to be to be authorised. Dr Fleming submitted that the revised Code was no longer underdeveloped and met the test for authorisation to be granted.

Dr Fleming expressed concerns about some of the wording the ACCC had used in its draft determination. Dr Fleming argued that the use of the term 'detriment' in the draft determination was unnecessary in the context used in the draft determination and that the term detriment was generally equated with harm. Dr Fleming said that use of the term detriment had had very serious anti-competitive effects as the Royal Australasian College of Surgeons (RACS) had quoted the use of the term in the ACCC draft determination as a political tool in lobbying against the College.

Dr Fleming said he wanted to put the Code in context. In making his remarks he did not intend to suggest that plastic surgeons were not good at cosmetic surgery. Dr Fleming said that some of the best cosmetic surgeons were plastic surgeons, some were College members and some were not.

Dr Fleming said he first wished to outline the College and its role. The College has about 150 members, two-thirds of whom are cosmetic physicians and about one-third surgeons. Dr Fleming stated that the College was created to fill a gap in providing

training, standards and accreditation. Dr Fleming said that the College was an authoritative body in the field of cosmetic surgery and expressed concerns with comments in the ACCC's draft determination relating to this point. Dr Fleming explained that the College was, for example, consulted by health authorities in Queensland and by many in the industry more generally. Dr Fleming said that the College was the only body to train and examine cosmetic surgery practitioners and recertify them annually and the only body with a Code for cosmetic surgeons.

Dr Fleming explained that the College had applied to the Australian Medical Council (AMC) for cosmetic medical practice to be recognise as a specialty, as it was already an established specialist practice and the College wanted to bring this practice in to the mainstream. Dr Fleming stated that once the AMC recognised the specialty, any body including the College could apply to the AMC to be a designated body conducting training in cosmetic medical practice.

Dr Fleming contended that the College had always been opposed by RACS and the Australian Society of Plastic Surgeons (ASPS).

Dr Fleming said that to enter the College's training program trainees needed five years of general surgical training, three years of which had to be in related disciplines. Trainees were then required to undertake two years of training in cosmetic surgery and pass four exams.

Dr Fleming noted that the College had amended the Code in response to the draft determination. Dr Fleming contended that the amended Code was exemplary and exceeded the requirements set out in the ACCC draft determination. Dr Fleming said that the amended Code took into account the comments of the ACCC and interested parties including on the points of:

- member obligations
- external review and appeals
- tighter advertising standards
- use of superlatives
- prohibiting testimonials
- credit arrangements
- matching Victorian warning-statement requirements
- rules for post-operative care
- external compliance-audit mechanisms (Dr Fleming believed other organisations did not have such mechanisms)
  strengthened sanctions.

Dr Fleming said that the Code provided for three separate oversight mechanisms for an organisation of just 150 members and was transparent, promoted accountability and was fair. Dr Fleming argued that the ACCC should authorise the Code so the College could enforce it. Dr Fleming said that the College would publicise the Code extensively, in publications and via the internet, despite the burdens, including cost, that this would place on such a small organisation.

Dr Fleming contrasted this with RACS which he contended had a 'two-line' advertising standard.

Dr Fleming said there were essentially four types of practitioners conducting cosmetic surgery in Australia: College practitioners, RACS fellows/ASPS practitioners, RACS fellows who were not (ASPS) plastic surgeons and others. Dr Fleming argued that the AMC had accepted an application for cosmetic surgery to be recognised as a specialty because there is no existing recognised specialty of cosmetic surgery.

Dr Fleming argued that while some, such as RACS and the ASPS, had argued that cosmetic surgery was covered by other medical specialities it was not.

Dr Fleming said that the College had lodged a detailed submission in support of recognition of cosmetic medical practice with the AMC and that the submission contained discussion of monopolistic and anti-competitive practices by its competitors. Dr Fleming said that the AMC would be making this submission public on Wednesday 1 April 2009.

Dr Fleming said that if the Code was not authorised this would provide a competitive advantage to RACS and the ASPS. Dr Fleming said that they had already used the draft determination as a lobbying tool to attempt to discredit the College.

Dr Fleming said that if the Code is not authorised, then there will be no benchmark for the industry to aim for.

Dr Fleming noted that a *Choice* survey of cosmetic surgery practices had been released. Dr Fleming argued that the kind of behaviours said to have been uncovered in the Choice survey would be disciplined under the College's Code if authorised.

Dr Fleming presented examples of what, he contended, were unacceptable practices occurring in the field of cosmetic surgery including:

- offering financial inducements to undertake procedures
- practitioners participating in botox parties
- botox being advertised online.

Dr Fleming said that such practices would not be allowed under the College's Code.

Dr Fleming cited the experience of one patient who, he said, had consented to Dr Fleming providing details of her case at the pre-decision conference. Dr Fleming said that the patient had received breast implants that were incorrectly implanted and that the ASPS had not adequately dealt with her complaint.

In summary, Dr Fleming said that the Code represented best practice and created a public benefit compared with the counterfactual of patients having to rely on just legal-minima protections. Dr Fleming said that the revised Code addressed the issues raised by the ACCC in its draft determination.

Dr Fleming argued that RACS and the ASPS were opposing the Code not because it was against the public interest for it to be authorised but because it was not in their interest for it to be authorised.

Dr Fleming argued that denying the Code authorisation would damage competition and that if authorisation was denied there would be no protection for consumers beyond the legal minima. Dr Fleming said that RACS and the ASPS should drop their opposition to the Code and work with the College to develop appropriate standards for the industry.

Comments from other parties and general discussion

Mr Webster, for ASPS, said Dr Fleming had talked about the repute of the College as an organisation but had not talked about the Code.

Mr Webster said that ethical medicine was a highly regulated environment but that the College wanted to create an 'alternate universe'. Mr Webster said that if the ACCC was to authorise the Code, it would be the first body to give its imprimatur to the College and that the College would use this imprimatur to promote itself as an organisation.

Mr Webster argued that the College was predominately composed of GPs, being cosmetic physicians who undertook procedures such as botox injections and skin-care procedures. Mr Webster said that around 100 of the College's 150 members performed these types of procedures.

Mr Webster contended that the Code would not ensure the standards set out in it were met. Rather, it would create an unenforceable but highly marketable tool for the College. Mr Webster argued that the while in its submission the College describes itself as the only provider of training in the area there were at least four other bodies providing relevant training.

Mr Webster said that, as an analogy, if in the field of orthopaedics there was a body called the Australian College of Hip Surgery, it would not be entitled to say that it was the only body providing relevant training. Mr Webster argued that cosmetic medicine practices and elements of aesthetic surgery sit within existing AMC-recognised specialties such as dermatology, plastic and reconstructive surgery and ear, nose and throat specialisations.

Mr Webster said that a lot of what the College is proposing to require through its Code is already required by law: for example, where the Code demands practitioners see a patient first before contracting for treatment.

Mr Webster said that the statements Dr Fleming had made about RACS and the ASPS were not correct.

With respect to the Code itself, Mr Webster said that there are applicable codes of ethical practice already in existence. Mr Webster said that the College has added a very complex complaints-review process to its Code and the ASPS had not seen evidence of it being put in place. Mr Webster stated that the Code is not in place, not enforceable and not affordable for an organisation with 150 members.

Mr Webster said the College should focus on training.

Mr Webster said that the College's submissions make almost no mention of conventional Medical Practice Board processes or the strict code of ethics for medical practitioners.

Dr Hillis, for RACS, noted that RACS had tabled a further submission in respect of the Code in Melbourne this morning.

Dr Hillis said that RACS supported the ACCC's proposal to deny authorisation for the Code. RACS supported improving practices but considered that the Code was not a document that should be before the ACCC for consideration.

Dr Hillis argued that the authorisation process was not the appropriate mechanism to examine medical codes of practice and that these types of issues were already considered by Medical Boards and Health Commissioners.

Dr Hillis argued that while cosmetic surgery may one day be recognised by the AMC as a specialty, unless or until that happened, it was a sub-specialty of existing medical specialties.

Dr Hillis said that the revised Code had been developed hastily and on 3 March 2009 RACS had written to the ACCC expressing concerns with the timeframes for consideration of the revised Code. Dr Hillis said that more time was required to fully consider the revised Code.

Dr Hillis said that RACS' initial assessment of the revised Code was that it was not deliverable and that its implementation would require changes to the College's constitution.

Lianne Richards, for the APB, said any initiatives that would assist publishers in determining the types of advertisements that were and were not appropriate for publication would be useful.

Ms Richards noted that APB members had to review numerous advertisements for cosmetic services and some of them could not be run because they did not meet required standards. In particular, Ms Richards stated that some of these advertisements included inappropriate claims about the service being advertised.

Given this, Ms Richards said that any Code that provided guidance regarding appropriate advertising would be welcomed.

Commissioner Willett asked whether anyone else wished to make comments or pose questions.

Dr Fleming, responding to comments made by Mr Webster, said that he had referred to the Code in his presentation. Dr Fleming said that the College recognised that all doctors were already covered by regulations and the Code did not ignore these regulations, but rather, was underpinned by them and went beyond regulatory requirements.

Dr Fleming said that the College had today provided examples of instances where current regulations had not worked, for example, in considering complaints by patients, and that the Code's processes would be over and above existing requirements.

Dr Fleming argued that opponents of the Code could not have it both ways, arguing that the Code is no good and then also saying that it is so good that the College will not be able to enforce it. Dr Fleming stated that the College could enforce the Code.

Dr Fleming said that despite Mr Webster's assertion that practitioners are already required to meet with patients prior to procedures this does not always happen. Dr Fleming cited as an example botox procedures administered by nurses without the patient ever seeing the doctor. Accordingly, Dr Fleming said, the requirement in the Code that doctors have face to face meetings with patients is extremely relevant.

Dr Fleming asked Ms Richards to clarify some of her comments about the Code.

Ms Richards (APB) said statements such as 'you would look fabulous' could be classified as superlatives and that the meaning behind these sorts of statements could be misconstrued. Ms Richard said that the Code would benefit from providing further clarification in respect of these types of issues.

Ms Richards said that the APB wanted something that could assist industry members in assessing the suitability of ads.

Dr Fleming continued, stating that it was not true that the ACCC would be the first body to give its approval to the College. Dr Fleming said that Queensland health authorities had decided that the College should be consulted when credentialing cosmetic surgery in hospitals and that RACS had attacked this development.

On the issue of whether the College would use any ACCC authorisation as a marketing device, Dr Fleming said it would not and that the Code was designed to enforce standards, quality of care and quality of information to consumers. Dr Fleming said that the Code would stand on its merits and that if the College could not enforce it, the College would be answerable to the ACCC.

Commissioner Willett said that the ACCC would be very concerned about any misrepresentation of its authorisation processes and would follow up if any authorisation granted was misrepresented.

Commissioner Willett said the ACCC noted RACS' comments about timing of consideration of the application. Commissioner Willett noted that the ACCC had requested further submissions on the revised Code by 9 April 2009, that the ACCC's current intention was to issue a final determination in May but that if the ACCC felt that it needed longer to consider the application it would consider seeking to extend the timeframe for consideration of the application.

Commissioner Willett asked whether anyone else wished to make any additional comments. No party indicated that they wished to make additional comments.

Commissioner Willett asked the representatives of RACS and ASPS whether there were other specialised areas of medical practice that were not recognised as 'specialties'.

Dr Hillis said RACS presided over nine specialist qualifications and the AMC recognised 12 other colleges. Dr Hillis said that other groups were putting forward applications to the AMC for specialty recognition and that this was the appropriate way to achieve recognition.

Dr Hillis noted that qualified practitioners' careers may evolve into sub-specialities. For example, orthopaedic surgeons may specialise in shoulder surgery. However, such practitioners first achieve the broader qualification and then specialise.

Dr Hillis said that many organisations and colleges had Codes but that these codes were not brought to the ACCC as the codes related to issues of professional standards issues, not competition issues.

Dr Fleming contended that cosmetic surgery was not a sub-speciality of plastic and reconstructive surgery in the same way that shoulder surgery was a sub-specialty of orthopaedic surgery.

Commissioner Willett confirmed that no other person wished to speak.

Closing remarks

Commissioner Willett stated that the ACCC would accept further written submissions on the draft determination and the revised Code and asked that these be received by 9 April 2009. Commissioner Willett explained that all conference participants would receive a copy of the summary of the conference; and that, at this stage, the ACCC anticipated issuing a final determination in this matter in May 2009.

Commissioner Willett closed the conference at 11:25 am.