

14 May 2009

BY EMAIL adjudication@accc.gov.au

Mr Gavin Jones
Director, Adjudication Branch
Australian Competition & Consumer Commission
Level 35, The Tower
360 Elizabeth Street
MELBOURNE VIC 3000

Dear Mr Jones

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

We refer to your letter to the Royal Australasian College of Surgeons ("RACS") dated 4 May 2009.

We understand that Mr Peter Kell, Deputy Chair of the ACCC, raised several issues with the ACCS application, many of which reaffirm concerns raised by the RACS in its previous submissions dated 8 December 2008, 30 March 2009 and 9 April 2009.

The RACS considers that the ACCS submission dated 27 April 2009 ("**ACCS Submission**") does not adequately address the ACCC's concerns as follows.

1 Disclosure of specific training and experience

At paragraph 6.93 of the ACCC draft determination, the ACCC noted that

a range of other information regarding the doctors qualifications, experience and the outcomes when the doctor has undertaken the procedure is likely to be of far greater use to the patient in deciding whether to go ahead with the procedure.

Despite the ACCS Submission, proposed clause 3.3 of the Further Revised Code does not address the ACCC's concern that the code "does not provide for the disclosure of a Member's specific training and experience to patients". The "must have available" standard in clause 3.3 is weaker than the disclosure requirements:

- 1.1 for the ACCS pamphlet (clause 3.2 – "must make available");
- 1.2 for the number of times the procedure was performed (clause 3.7 – "must disclose");
and
- 1.3 under common law.

In light of this approach, the public detriment identified at paragraphs 6.95 and 6.96 of the ACCC draft determination would continue to subsist.

2 Compliance audits

Given the absence of practical details from the ACCS, the RACS notes that implementation considerations (including legal and financial implications) have not been carefully considered in the development of the compliance audit provisions.

ACCS members may be restricted by confidentiality, privacy, security and statutory obligations from giving access to an independent auditor needed to achieve the compliance audit objectives. Further, the RACS queries whether the ACCS and the independent auditors have contractual rights of access to undertake any audit.

The RACS notes that the cost of ensuring a "statistically significant random sample" of members are audited each year might be substantial. The ACCS does not appear to have considered the budget and financial implications of its approach.

3 Independence of Appeals Committee

In our letter dated 9 April 2009, the RACS submitted that:

2.6.3 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.

2.6.4 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.

In the ACCS Submission, it is claimed that the chair of the Appeals Committee will be independent, and that the chair selects the other two members, only one of whom is to be an ACCS Member.

However, clauses 5.40 and 5.41 do not expressly require the chair to be independent. The inclusion of "external" in the name of the appeals committee makes this only an implicit requirement. While clause 5.41 requires the chair to select one ACCS member, that clause does not specify that the second person selected must not be an ACCS member.

In light of these ambiguities, the ACCC cannot be assured that the Appeals Committee is "primarily independent". The RACS also notes that the ACCS has not clarified whether the complaints panel is intended to be independent or have input from independent members.

The RACS notes that the cost of ensuring a primarily independent complaints panel and/or appeals committee with legal professional experience might be substantial. The ACCS does not appear to have considered the budget and financial implications of its approach.

4 Publication of expulsion

The RACS queries how the public will be able to ascertain whether an ACCS member was expelled rather than resigned. If the ACCS is concerned that publication in cases of "expulsion for reasons other than issues concerning patient safety" would be unfair, this is more appropriately addressed by stating the reasons for the expulsion, rather than providing a discretion for non-publication of the expulsion.

5 Misleading, deceptive and false claims in the Further Revised Code

The RACS is deeply concerned at the ACCS' response to the Medical Practitioners Board of Victoria submission. The explanation given by the ACCS makes it highly misleading, deceptive and false for the ACCS to make the following claims:

Membership of the Australasian College of Cosmetic Surgery (ACCS) provides patients with an assurance that ACCS Members meet the highest standards ...

Whilst all medical practitioners must adhere to relevant laws and guidelines, which vary from state to state, the Code highlights those responsibilities and sets additional and higher standards for Members of the ACCS.

The clear implications drawn from the above statements are as follows

Implication	Reason implication is misleading, deceptive or false
It is the Further Revised Code which is the reason why ACCS members meet the highest standards.	<p>This is false and misleading where the Further Revised Code sets a lower standard than relevant laws and guidelines. In such a case, a higher standard exists because of the law or guideline, even if the Further Revised Code did not exist. Therefore, the Further Revised Code itself is not the reason for the highest standards.</p> <p>Further, it is not appropriate for the ACCS to make an "overall" claim that the Further Revised Code constitutes the highest standards.</p>
Where the ACCS Code sets a standard, the standard is either equivalent or additional/higher than a relevant law or guideline.	<p>The wording in the Further Revised Code excludes the idea that parts of the code may set a lower standard. The wording also excludes the idea that the code might set a lower standard which is then overridden by a relevant law or guideline.</p> <p>The Further Revised Code contains state-specific provisions (eg clause 3.12) which reinforces the idea that each standard is either equivalent or additional/higher than a relevant law or guideline.</p> <p>The average member of the public would not have the medical or legal skills to recognise the applicable standard. In absence of that skill, the public would be misled to believe that the Further Revised Code itself encapsulates the highest standards.</p>

The ACCS Submission refers to a draft brochure containing the "information required under the Code". As this does not appear to have been submitted as part of the ACCS application, the ACCC should satisfy itself that such draft brochures do not contain representations which may similarly mislead or deceive.

6 Medical qualifications

When the Medical Practitioners Board of Victoria developed its current advertising guidelines in July 2007, the RACS made the following submissions in relation to the use of medical qualifications:

In the College's view, only specialist qualifications approved by the Minister (see registration requirements in *Health Practitioners Registration Act 2005* s 27) should be acceptable advertising. Alternatively, specialist qualifications should only be stated where they are accredited or recognised by the Australian Medical Council.

A practitioner should not state professional qualifications which do not clearly relate to their practice as a medical practitioner. This misrepresents the number of qualifications held, and the experience of the practitioner, particularly where the public cannot distinguish between relevant and irrelevant qualifications.

Where a qualification can be referred to in different ways, a practitioner should not include that qualification more than once. This misrepresents the number of qualifications held, and the experience of the practitioner.

Practitioners should not include memberships (which are not qualifications) in a manner that suggests they are qualifications.

In the Further Revised Code, on its face it appears that the "FACCS" and "FFMACCS" post nominals are intended to signify that a person is a member of the ACCS. However, the ACCS Submission specifically suggests that the post nominals are intended to be regarded by the public as "ACCS qualifications":

If the Board's position was followed a patient could be informed, in the context of advertising cosmetic medical services, that the doctor has a specialist qualification without being informed that that qualification has never been assessed or accredited for any cosmetic medical services including the services being offered.

In its submission the Board wants to prevent that same patient from knowing that a doctor has a qualification specifically in cosmetic medicine or cosmetic surgery and under the Code, being provided with a clear explanation of what that qualification means.

The RACS is particularly concerned at the prospect that the ACCS and its members are representing to the public that its post nominals are somehow "specialist qualifications", "medical qualifications" or "qualifications", notwithstanding that:

- 6.1 they are not specialist qualifications approved by the Victorian Minister for Health under section 27 of the *Health Practitioners Registration Act 2005* (Vic);
- 6.2 they are not a "relevant qualification" for the purposes of section 3D of the *Health Insurance Act 1973* (Cth);
- 6.3 the "qualification" is not otherwise recognised by any government authority which administers or recognises educational or professional qualifications;
- 6.4 the Australian Medical Council has not recognised cosmetic surgery or cosmetic medicine as a medical specialty; and
- 6.5 the Australian Medical Council has not accredited any qualification in cosmetic surgery or cosmetic medicine.

This would give rise to significant public detriment in the form of confusion as to the difference between membership and qualifications.

7 Anti-competitive conduct

The ACCS Submission adopts Professor Peter Haertsch's comments as to the "monopopoly held by them on cosmetic surgery". This implies that the RACS and/or the Australian Society of Plastic Surgeons Inc ("ASPS") have engaged in monopolistic conduct.

If the ACCS feels that the RACS and/or the ASPS have breached the restrictive trade practice provisions of the *Trade Practices Act 1974* (Cth) or conspired against the ACCS contrary to law, the ACCS should take up that matter with the ACCC or a relevant court.

8 Questions directed at the RACS and ASPS

At paragraph 6.31 of the ACCC draft determination, the ACCC indicated that it is not in a position to comment on whether the recognition of cosmetic medical practice as a specialty is appropriate. For the purposes of the ACCS application, the RACS considers it is inappropriate and unnecessary to respond to the list of nine questions in the ACCS Submission directed at the RACS and the ASPS.

The RACS has now commented on three major revisions (November 2008, March 2009 and May 2009) to the Further Revised Code. This constitutes an unprecedented level of revision to a proposed medical code while the subject of public consultation.

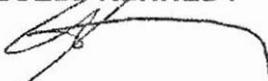
In our letter dated 3 March 2009 and the RACS submissions at the pre-decision conference on 30 March 2009, it was submitted that the ACCC should not entertain major revisions to the ACCS' Further Revised Code. The RACS seeks the ACCC's assurance that it will not entertain any further major or minor revisions to the ACCS Further Revised Code, and that it will not extend the relevant period for consideration of the application.

The RACS reiterates its concern that the ACCS is undertaking "policy development" on the run, and that an application for authorisation before the ACCC is not an appropriate forum to do this. The submissions at sections 1-6 also suggest that the ACCS' policy development process has been less rigorous and considered such that it would not generate the public benefit claimed, and in some cases would generate significant public detriment.

The RACS also reiterates 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. The ACCS will not necessarily breach the *Trade Practices Act 1974* (Cth) merely by having an objective code and properly enforcing it.

The RACS looks forward to the ACCC finalising its determination in this matter as soon as possible.

Yours faithfully
RUSSELL KENNEDY



Michael Gorton
Principal

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

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

Copy to Medical Practitioners Board of Victoria