



Australian  
Competition &  
Consumer  
Commission

# Determination

## Application for authorisation

**lodged by**

**Australasian College of Cosmetic Surgery**

**in respect of**

**the ACCS Code of Practice**

**Date: 18 June 2009**

**Authorisation no.:** A91106

**Public Register no.:** C2008/1845

**Commissioners:** Kell  
Schaper  
Court  
Dimasi  
Willett

## Summary

The ACCC grants conditional authorisation to an agreement between members of the Australasian College of Cosmetic Surgery (the College) in relation to the adoption of and giving effect to the College's Code of Practice (the Code). Authorisation is granted for three years.

The Australasian College of Cosmetic Surgery sought authorisation for an agreement between its members to adopt and give effect to the College's Code of Practice. The Code contains, amongst other things, advertising guidelines and guidelines for informed consent as well as processes for dealing with complaints under the Code and processes for disciplining College members who do not comply with the Code.

On 20 February 2009 the ACCC released a draft determination proposing to deny authorisation to the Code in the form originally provided to the ACCC in the application for authorisation. In proposing to deny authorisation the ACCC stated that it considered that arrangements that promote the provision of accurate and complete information to consumers, and the ethical and professional conduct of parties to the arrangements are likely to produce a public benefit. However, the ACCC considered that the Code, as submitted for authorisation, was underdeveloped at that time.

Since the release of the draft determination the College has substantially revised its Code to address the ACCC's concerns.

The ACCC is satisfied that adoption of many of the provisions in the revised Code by College members will generate a public benefit by assisting consumers in making informed choices about cosmetic procedures and by assisting in raising College members' awareness of their professional and ethical responsibilities. The ACCC considers the revised Code to be a significant improvement of the Code for which authorisation was originally sought.

However, it is important that the Code is complied with by members and is seen to be effectively enforced by the College. The ACCC has some concerns about how widely the Code will be adopted by College members and how effectively it will be enforced.

The ACCC also remains concerned about the effectiveness of some provisions of the Code. In particular the ACCC is concerned about the effectiveness of the Code's complaints and appeals processes.

The ACCC also notes that there remains some inconsistencies between the Code and Victorian *Advertising Guidelines for Registered Medical Practitioners* (the Victorian Advertising Guidelines) that have been developed by the Medical Practitioners Board of Victoria to advise medical practitioners about the provisions of the *Health Professions Registrations Act 2005 (Vic)* (the HPR Act).

The ACCC has imposed a number of conditions, as summarised below, to address these concerns and ensure consistency between the Code and the HPR Act. Subject to these conditions, the ACCC grants authorisation for College members to adopt the Code.

### *Summary of conditions*

The conditions of authorisation imposed by the ACCC are outlined in full in Chapter 7 of this determination. In summary these conditions require:

- amendments to the processes for providing information to consumers about the College and its members' qualifications and experience to ensure that this information is provided to all consumers who consult a College member
- amendments to the Code's complaints and appeals processes to provide for greater external oversight of these processes and public reporting of general information about the outcome of complaints and appeals
- that the Code be implemented in accordance with the College's Code Implementation Plan at appendix B of this determination
- that the independent auditing checks of compliance with the Code the College proposes to undertake occur annually with the results of the checks reported to the ACCC
- amendments to the Code to ensure consistency with the HPR Act.

*Other proposed amendments to the Code*

The ACCC notes that a number of interested parties expressed concerns with the Code and recommended improvements and/or additions to the Code. The ACCC has granted authorisation subject to conditions addressing some of these concerns. However, while the ACCC notes the additional concerns expressed by interested parties with other aspects of the Code, it is the role of the ACCC in assessing applications for authorisation to consider the arrangements before it.

In the context of the ACCC's discretion to grant authorisations subject to conditions, the Australian Competition Tribunal (the Tribunal) has commented that it is not for the ACCC to use the conditioning power and its discretion in order to construct and impose its ideal or preferred system of self-regulation.<sup>1</sup> Accordingly, it is not the role of the ACCC through the authorisation process to craft an 'ideal' code.

*Authorisation is not endorsement*

The authorisation process is set out in the Act and only indicates that a code passes a certain legal test. In this case the ACCC is satisfied that subject to a number of conditions being complied with this legal test is satisfied. Authorisation does not indicate that a code is best practice, and this conditional authorisation can in no way be held out as an endorsement or approval by the ACCC of the College's Code of Practice.

*Date the authorisation comes into effect*

If no application for review of this determination is made to the Australian Competition Tribunal it will come into force on 9 July 2009.

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<sup>1</sup> Application by Medicines Australia Inc [2007] ACompT 4, p. 49.

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## List of abbreviations

|              |   |
|--------------|---|
| ACCC         | Australian Competition and Consumer Commission                                    |
| The Act      | The Trade Practices Act 1974  |
| AMA          | Australian Medical Association  |
| AMC          | Australian Medical Council  |
| APB          | The Australian Publishers' Bureau   |
| ASPS         | Australian Society of Plastic Surgeons  |
| CHF          | The Consumer Health Forum   |
| The Code     | The Australasian College of Cosmetic Surgery Code of Practice                     |
| The College  | The Australasian College of Cosmetic Surgery                                      |
| CPSA         | Cosmetic Physicians' Society of Australasia                                       |
| DHHS         | Department of Health and Human Services (Tasmania)                                |
| DHS          | Department of Human Services (Victoria)   |
| FACCS        | Fellow of the Australasian College of Cosmetic Surgery                            |
| FFMACCS      | Fellow of the Faculty of Medicine of the Australasian College of Cosmetic Surgery |
| The HPR Act  | Health Professions Registrations Act 2005 (Vic)                                   |
| MPBV         | The Medical Practitioners' Board of Victoria                                      |
| RACGP        | Royal Australasian College of General Practitioners                               |
| RACS         | Royal Australasian College of Surgeons  |
| The Tribunal | The Australian Competition Tribunal   |

# 1. Introduction

## Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## The application for authorisation

- 1.8 On 6 November 2008 the Australasian College of Cosmetic Surgery (the College) lodged application for authorisation A91106 with the ACCC.
- 1.9 The College applied for authorisation for its Code of Practice (the Code) and parts of its Bylaws. The Code of Practice and relevant Bylaws contain, amongst other things, advertising guidelines and guidelines for informed consent as well as processes for dealing with complaints under the Code.

1.10 The College seeks authorisation for five years.

## **Draft determination and amendments to the application**

- 1.11 On 20 February 2009 the ACCC released a draft determination proposing to deny authorisation for the Code in the form originally provided to the ACCC in the application for authorisation.
- 1.12 In proposing to deny authorisation the ACCC stated that it considered that arrangements that promote the provision of accurate and complete information to consumers, and the ethical and professional conduct of parties to the arrangements are likely to produce a public benefit. However, the ACCC considered that the Code, as submitted for authorisation, was underdeveloped in this regard.
- 1.13 Overall, the ACCC was not satisfied that the conduct for which authorisation was sought would be 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.
- 1.14 In proposing to deny authorisation the ACCC noted that it was open to the College to further develop the Code, and if necessary, submit a revised Code for authorisation.
- 1.15 On 16 March 2009 and 28 April 2009 the College provided revised versions of the Code to the ACCC. The College now seeks authorisation for its revised Code of Practice as provided to the ACCC on 28 April 2009. Authorisation is no longer sought for any provisions of the College's Bylaws. A copy of the revised Code is at appendix A of this determination.
- 1.16 The ACCC's draft determination and the revised Code, as amended on 28 April 2009, are discussed in greater detail in chapter 3 of this determination.

## **Chronology**

- 1.17 Table 1.1 provides a chronology of significant dates in the consideration of this application.

**Table 1.1: Chronology of application for authorisation A91106**

| <b>DATE</b>      | <b>ACTION</b>  |
|------------------|--|
| 6 November 2008  | Application for authorisation lodged with the ACCC.  |
| 5 December 2008  | Closing date for submissions from interested parties in relation to the application for authorisation. |
| 23 January 2009  | Submission received from the College in response to interested party submissions.                      |
| 20 February 2009 | Draft determination issued.  |
| 16 March 2009    | Amended Code provided by the College.  |
| 30 March 2009    | Pre decision conference held.  |

| DATE          | ACTION   |
|---------------|--|
| 9 April 2009  | Closing date for submissions from interested parties in relation to the draft determination and amended Code.        |
| 28 April 2009 | Further amended Code provided by the College.  |
| 20 May 2009   | Closing date for submissions from interested parties in relation to the further amendments to the Code. <sup>2</sup> |
| 18 June 2009  | Final determination issued.  |

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<sup>2</sup> Some interested party submissions were provided after 20 May 2009.



## 2. Background to the application

### The applicant

- 2.1 The College was inaugurated in 1999 in order to provide training and ethical standards for cosmetic surgery and related disciplines. The College has approximately 150 members. The College states that all its members are registered medical practitioners and that its membership base includes general surgeons, plastic surgeons, dermatologists, ear nose and throat surgeons, ophthalmologists and other doctors who specialise in cosmetic surgery.
- 2.2 The College states that its objectives include:
- (a) to enhance the knowledge of practitioners performing cosmetic and aesthetic surgery to allow accreditation and to recognise appropriate levels of expertise as either Fellows, Members or Associate Members of the College
  - (b) to accredit properly trained and experienced persons as members of the College
  - (c) to develop and promote cosmetic or aesthetic surgery as a separate specialty within the field of medicine
  - (d) to establish high standards of skill and practice in the field of cosmetic or aesthetic surgery
  - (e) to provide advice and information to consumers and to those practicing in the field of cosmetic or aesthetic surgery
  - (f) to promote, and seek representation for, the field of cosmetic or aesthetic surgery in the appropriate academic, political and other forums
  - (g) to act as, and to promote itself as, an authoritative body in the field of cosmetic or aesthetic surgery and as a supporting body for members of the medical profession in general in relation to the field of cosmetic or aesthetic surgery
  - (h) to act as an adviser and information resource to government and others in matters concerning cosmetic or aesthetic surgery
  - (i) to promote relations between persons engaged in training or practice in the field of cosmetic or aesthetic surgery

### Cosmetic surgery

- 2.3 *The Cosmetic Surgery Report, Report to the NSW Minister for Health, October 1999* considered in detail the cosmetic surgery industry. The information in paragraphs 2.4 to 2.6 of this determination is taken from this report.
- 2.4 With respect to the types of procedures that could be classified as cosmetic surgery the report concluded that while cosmetic surgery is difficult to define precisely, it has a

number of key characteristics. It involves reshaping normal structures of the body using surgical and non-surgical techniques.

- 2.5 The report noted that a central characteristic of cosmetic surgery is that it is generally initiated by the consumer to improve their appearance and self-esteem and that cosmetic surgery covers a wide range of surgical and non-surgical procedures. The findings of the report in this regard are discussed in greater detail at paragraph 6.10
- 2.6 The report also noted that cosmetic surgery procedures are mostly performed by doctors with a wide range of qualifications, but dentists, nurses and beauty therapists are also represented. The medical practitioners performing cosmetic surgery include plastic surgeons, cosmetic surgeons, cosmetic physicians, general practitioners (GPs), dermatologists, ophthalmologists (eye surgeons), otolaryngologists (ear, nose and throat specialists) and to a lesser extent oral and maxillofacial surgeons. Plastic surgeons have specialist surgical training and experience in plastic and reconstructive procedures, and perform cosmetic surgery. Cosmetic surgeons do not necessarily have specialist surgical qualifications, and tend to be specifically trained in cosmetic procedures, usually in the USA. Dermatologists have specialist training in and experience in the skin, and may perform dermabrasion, injections, peels and laser resurfacing, in combination with liposuction, cheek implants and other surgical procedures. Ophthalmologists have specialist training in eye surgery, and most perform blepharoplasty (eyelid surgery), eye lifts and some brow lifts. Otolaryngologists have specialist training and experience in the ear, nose and throat, and they perform facelifts, brow lifts and rhinoplasty (nose surgery) and laser skin treatments. General practitioners performing cosmetic medicine may provide collagen and other injections, peels, laser skin treatments and dermabrasion. In the USA other specialties, particularly gynaecology and oral surgery, have a significant profile in the cosmetic surgery industry.<sup>3</sup>

#### *Recognition of medical specialties in Australia*

- 2.7 Schedule 4 of the *Health Insurance Regulations 1975* lists names of specialties, relevant organisations and relevant qualifications that are recognised by the Minister for Health and Ageing for the purposes of attracting Medicare rebates at the specialist level under the *Health Insurance Act 1973*.
- 2.8 The Australian Medical Council (AMC) also lists medical specialties including those organisations, specialties and qualifications that are recognised as medical specialties in Australia by the Minister. However, the AMC List of Australian Recognised Medical Specialties does not relate to the Health Insurance Act. Listing by the AMC permits medical specialist training providers to participate in the AMC's accreditation of specialist medical education, training and professional development programs.

#### *Application for recognition of cosmetic surgery as a medical specialty*

- 2.9 Cosmetic surgery is not currently recognised as a specialty under either Schedule 4 of the Health Insurance Regulations or on the AMC List of Australian Medical Specialties.

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<sup>3</sup> *The Cosmetic Surgery Report, Report to the NSW Minister for Health*, October 1999, p 4.

- 2.10 The College has submitted an application to the AMC for the area of Cosmetic Medical Practice to be recognised as a speciality. The AMC advised that it is not possible for the AMC to comment on the possible outcomes of the application at this stage.
- 2.11 The Department of Health and Ageing has advised that if the application is successful, any body wanting to be accredited as a provider of standards, training and certification in the proposed speciality would be required to apply to the Specialist Education Accreditation Committee of the AMC.

*Plastic and reconstructive surgery as a medical specialty*

- 2.12 Plastic and reconstructive surgery is recognised as a medical specialty under both Schedule 4 of the Health Insurance Regulations and on the AMC List of Australian Medical Specialties.
- 2.13 The Australian Society of Plastic Surgeons (ASPS) is authorised by the Royal Australasian College of Surgeons (RACS) to administer post graduate surgical training programs for the specialty of plastic and reconstructive surgery. This training program is one of nine surgical training programs for which RACS is accredited by the AMC.
- 2.14 Plastic and reconstructive surgeons handle cases of trauma and emergency, burns, breast reconstruction, hands, head and neck cancer, cranio maxilla facial deformity and scar revision.
- 2.15 Plastic and reconstructive surgeons also perform cosmetic and anaesthetic procedures such as breast augmentation and reduction, face lifts, abdominoplasty, rhinoplasty and liposuction.

### **3. The application for authorisation**

#### **The initial application**

- 3.1 The College initially sought authorisation for its Code of Practice and relevant clauses of its Bylaws. The Code of Practice and relevant Bylaws contained, amongst other things, advertising guidelines and guidelines for informed consent that the College requires its Fellows and Members to adhere to as well as processes for dealing with complaints under the Code of Practice.
- 3.2 As discussed below, the ACCC issued a draft determination on 20 February 2009 proposing to deny authorisation to the Code of Practice and relevant Bylaws. After the release of the draft determination the College amended its application, seeking authorisation for a substantially revised Code.
- 3.3 The amended Code, for which authorisation is now sought, is summarised at paragraphs 3.10 to 3.42.

#### **The draft determination**

- 3.4 On 20 February 2009 the ACCC issued a draft determination proposing to deny authorisation to the original application.
- 3.5 In the draft determination the ACCC stated that it considered that arrangements that promote the provision of accurate and complete information to consumers, and the ethical and professional conduct of parties to the arrangement, are likely to produce a public benefit. However, the ACCC was concerned that a number of provisions of the Code were not effective in that regard and that the Code was underdeveloped. In particular the ACCC was concerned that the Code did not:
  - address inconsistencies between College guidelines and Victorian legislation regarding the use of testimonials or adequately address the use of superlatives in advertising by College members
  - require members to provide sufficient information regarding their qualifications, credentials and training, their recent experience in performing the procedure and their clinical outcomes and number of adverse effects, to allow patients to make a fully informed choice about procedures being contemplated, and indeed, by setting a low benchmark in this respect may in fact discourage provision of relevant information
  - address the issue of how compliance by members with informed consent requirements will be verified
  - include a sufficiently robust and well promoted complaints handling procedure to facilitate easy access to the process for consumers with complaints against College members
  - provide a transparent external appeals process in respect of decisions of the College regarding complaints.

- 3.6 The ACCC considered that authorisation of the clauses of the Code raising concerns would not generate a public benefit and may in fact, to the extent that authorising the arrangements encouraged the College and its members to adopt these provisions, generate a public detriment.
- 3.7 The ACCC considered that the Code was unlikely to generate a significant public detriment constituted by a reduction in competition. While the Code provided for sanctions, including expulsion, to be applied against members, the ACCC considered 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.
- 3.8 Overall, the ACCC was not satisfied that the conduct for which authorisation was sought at that time was 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.
- 3.9 The ACCC did note however that it was open to the College to further develop the Code and, if necessary, submit a revised Code for authorisation.

### **The amended application**

- 3.10 On 16 March 2009 and 28 April 2009 the College provided revised versions of the Code to the ACCC. The College now seeks authorisation for its Code of Practice as provided to the ACCC on 28 April 2009. The Code is attached at appendix A of this determination and summarised below.
- 3.11 The College has also developed a Code Implementation Plan. This plan is also summarised below and a copy of this plan is at appendix B of this determination.

#### *Code Administration Committee*

- 3.12 The Code provides for the establishment of a Code Administration Committee consisting of at least three members including an independent Chair with experience in developing Codes, a member who is a consumer representative nominated by an organisation such as the Australian Consumers' Association and at least one member representing the College.
- 3.13 The Committee is required to review the Code tri-annually and report to the College on its findings. The Committee is able to make recommendations to the College about the Code and the Code provides that the College will adopt the Committee's recommendations unless it gives written reasons why any recommendation is not accepted.
- 3.14 The Code provides for Committee reviews, and the College's response, to be placed on the College's website and provided to the ACCC.

#### *General consideration*

- 3.15 Section one of the Code contains general provisions requiring that College members must practice with integrity and honour in the best interest of patients, conduct their professional affairs in accordance with applicable laws and relevant professional

guidelines, strive for the advancement of the speciality of cosmetic medical practice and adhere to the College Constitution, ByLaws and Codes.

### *Advertising and promotion*

- 3.16 Section two of the Code deals with advertising and other representations made to patients. Section two of the Code prohibits false, misleading or deceptive statements about a doctor or clinic or the services offered as well as providing that:
- members must not mislead consumers about the need for any procedure
  - superlatives should not be used unless they can be readily proven and are not misleading
  - claims made in advertising must be able to be substantiated
  - comparative advertising should only be used if correct and readily proven
  - testimonials should not be used in advertising
  - procedures should not be offered as inducements or prizes in competitions or as a way of generating business
  - other gifts or inducements (for example, time sensitive discounts) should not be offered as a way of generating business
  - discounts for early payment should not be used as an inducement
  - financial facilities, other than credit card facilities, should not be offered as part of the services College members provide
- 3.17 Section two of the Code also includes provisions about the use of before and after photos and use of the College's post nominals.

### *Guidelines for informed consent*

- 3.18 Section three of the Code contains provisions regarding informed consent processes for all procedures and additional provisions in relation to more invasive procedures with a significant risk of an adverse long term outcome.
- 3.19 Informed consent provisions in respect of all procedures require:
- disclosure about the risk of the proposed procedure
  - that a College produced information brochure about, amongst other things, cosmetic procedures, the College, what its qualifications mean and the College's complaints process, be made available to all patients before a procedure is agreed to<sup>4</sup>

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<sup>4</sup> The College provided a confidential draft of this brochure to the ACCC.

- members to make available to all patients a written summary of their own training and experience
- full disclosure of fees and charges
- the provision of information about the procedure
- that no procedure should take place unless the member has consulted the patient beforehand and fully explained associated risks
- disclosure of the number of times the member has performed the procedure if the procedure is invasive and the member has performed the procedure less than 100 times.

3.20 Additional provisions in respect of more invasive procedures with a significant risk of an adverse long term outcome require, amongst other things:

- at least one consultation before the day of the surgery
- where, for geographical reasons, an initial consultation is by phone or video conference, and a face to face meeting does not occur until the day of the surgery, this should not be considered the norm and reasons for this must be properly documented
- a clear statement to the patient that the members fees will be fully refunded if either the member or the patient decides at their meeting that the procedure will not go ahead
- that the patient be encouraged to obtain a second opinion if the patients has doubts about the most appropriate procedure or about having the procedure
- provision of a procedure specific consent form including contact details for the member if questions arise
- a cooling off period of at least five days between the initial consultation and the procedure unless this is not practical
- where the cooling off period is less than five days, documentation of the reasons for this, signed by both the member and the patient.

#### *Post-operative care*

3.21 Section four of the Code requires the provision of full and adequate post-operative care for patients including provision for emergency after hours care and appropriate post-operative surveillance.

#### *Complaints and appeals processes*

3.22 Sections five through nine of the Code detail the College's processes for dealing with complaints alleging breaches of the Code by College members.

- 3.23 The Code provides for the College Council to appoint a Complaints Panel consisting of a minimum of three people, at least one of whom must have legal qualifications and at least two of whom must not be College members. The Chair of the Complaints Panel is required to be independent of the College and have legal qualifications. At least one member of the Complaints Panel must be a College member.
- 3.24 Complaints must be made in writing and will be referred to the Chair of the Complaints Panel. The Code provides for the complaint to not be referred to the Complaints Panel in certain circumstances such as, for example, if the complaint does not allege a breach of the Code or is more appropriately dealt with by a Court.
- 3.25 The Code also outlines processes for the consideration of complaints by the Complaints Panel and procedures to be followed during complaints hearings.
- 3.26 The Complaints Panel is required to provide a written decision to the College Council outlining the reasons for the decision and any sanctions to be imposed.
- 3.27 Where the Complaints Panel determines that a College member has breached the Code it may impose one or more of the following sanctions:
- reprimand the member
  - admonish the member publicly
  - counsel the member
  - suspend the member from membership of the College, or if the member is already suspended, extend the suspension, for such period and on such terms as the Panel thinks fit
  - require the member to take such steps as the Panel may determine to correct the effect of any breach
  - a payment to the College, to be used as the Panel recommends, of no more than \$10,000 for the first breach and no more than \$20,000 for subsequent breaches
  - require the member to undertake education or compliance programs to reduce the likelihood of further breaches
  - expulsion from the College
  - adjourn the proceedings subject to compliance with such conditions as to sanctions as the Panel may otherwise impose in accordance with College rules
  - order the member to reimburse the patient
  - impose any order that the Panel thinks fit.
- 3.28 If any suspended member breaches conditions of suspension the Code provides that the member will be expelled from the College.



- 3.29 The Complaints Panel can also award reasonable costs at its discretion against the member.
- 3.30 The Complaints Panel has a pre-sentence process to relay likely sanctions to the member and give the member an opportunity to state any objections to likely sanctions.
- 3.31 The member complained of, and the complainant, are required to be informed in writing of the decision within 30 days of the decision and advised of their rights of appeal.
- 3.32 The Code also provides for the establishment of an Appeals Committee to consider appeals about the Complaints Panel's decisions.
- 3.33 The Appeals Committee, appointed from time to time as needed by the College Council, will be a three member committee including a Chair who must have legal qualifications.
- 3.34 The Chair will recommend the other two members of the Appeals Committee to the College Council and the Council must accept the recommendations unless any appointments raise conflict of interest issues. One member of the Appeals Committee must be a College member with experience in the matter before the Committee.
- 3.35 Where the Chair of the Appeals Committee is of the view that the material submitted by the appellant does not support a valid appeal, the Chair can dismiss the appeal and inform the parties in writing.
- 3.36 The Code also outlines processes for the consideration of Appeals by the Appeals Committee and procedures to be following during appeal hearings.
- 3.37 The Appeals Committee must give written reasons for its decision and the College Council can not overrule or vary a decision of the Appeals Committee. Reasonable costs of the appeal can be awarded either in favour of or against the appellant.
- 3.38 The Code requires the College to maintain a register of all determinations made by the Complaints Panel and Appeals Committee and to make this register available for inspection by members and relevant regulatory authorities. The Code also provides that the College will regularly publish information about the outcome of disciplinary matters including an annual overview of the operation of the College disciplinary regime. The Code provides that where a member is suspended or expelled the College shall advise the relevant state or territory medical board.
- 3.39 The Code stipulates that the Complaints Panel and Appeals Committee will submit an annual report to the College and that these reports will be provided to the ACCC and the Code Administration Committee.

#### *Compliance audits*

- 3.40 Section 10 of the Code provides that the College will engage an independent person to undertake periodic audit checks in relation to compliance with the Code, in particular, in relation to issues relating to informed consent, information provided to potential customers and claims made about procedures and the need for procedures.

3.41 Such audits will include random checks on members. Apparent breaches of the Code will be referred to the Complaints Panel as if they were complaints, and the results of audits are to be provided to the Code Administration Committee.

#### *Enforcement*

3.42 Section eleven of the Code stipulates that the College Council will enforce any orders of the Complaints Panel or Appeals Committee and that where a member refuses to comply with an order of the Complaints Panel or Appeals Committee the Council will either suspend or expel the member as it deems appropriate.

#### *Code Implementation Plan*

3.43 The College also provided a copy of its Code Implementation Plan to be adopted, assuming the Code is authorised, in the first 12 months after the Code is authorised.

3.44 The implementation plan provides timeframes for:

- the College's complaints panel to be appointed
- the Code to be placed on the College's website and disseminated to members
- details about the Code and how it is implemented and copies of the College's information brochure to be sent to members
- the appointment of the Code Administration Committee and Appeals Committee Chairs.

3.45 The implementation plan also provides for:

- the College to undertake ad hoc checks on a sample of College members' websites to gauge compliance with the Code
- an independent compliance auditor to be appointed within six months and complete a compliance audit within 12 months
- a guide to members on the Code and all relevant laws and guidelines to be placed on the College's website within six months
- a progress report to be provided to the ACCC by the College within six months.

## **4. Submissions received by the ACCC**

### **Submissions prior to the draft determination**

- 4.1 The College provided a supporting submission with its application for authorisation and has since provided a submission in response to issues raised by interested parties in their submissions.
- 4.2 The ACCC sought submissions from a range of interested parties, and federal and state government bodies. Prior to issuing the draft determination the ACCC received public submissions from:
- The Australian Society of Plastic Surgeons (ASPS)
  - The Department of Health and Ageing
  - The Department of Human Services – Victoria (DHS)
  - SA Health
  - NSW Health
  - The Cosmetic Physicians Society of Australasia (CPSA)
  - The Australian Medical Council (AMC)
  - The Department of Health and Human Services – Tasmania (DHHS)
  - The Royal Australasian College of Surgeons (RACS).

### **Submissions after the draft determination**

- 4.3 Submissions in response to the draft determination were received from:
- ASPS
  - The Australian Medical Association (AMA)
  - The Consumer Health Forum of Australia (CHF)
  - DHHS
  - The Australian Publishers' Bureau (APB)
  - SA Health
  - RACS
  - The Medical Practitioners Board of Victoria (MPBV)
  - Ms Deidre Nolan

- Ms Marika Castelletti
- Ms Nicole Russell

4.4 A number of submissions were received where the identity of the party providing the submission was excluded from the public register. Some parts of some submissions were also excluded from the public register.

4.5 The views of the College and interested parties, as expressed in submissions and at the pre-decision conference, are outlined in the ACCC's evaluation of the arrangements in Chapter 6 of this determination. Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations Public Registers' links.

## 5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.
- 5.2 The ACCS lodged application for authorisation A91106 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- i. the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
  - ii. this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

### Application of the tests

- 5.4 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.<sup>5</sup>
- 5.5 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>6</sup>
- 5.6 Consequently, given the similarity of wording between section 90(6) and 90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

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<sup>5</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>6</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

## **Definition of public benefit and public detriment**

5.7 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>7</sup>

5.8 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>8</sup>

## **Future with-and-without test**

5.9 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>9</sup>

5.10 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

## **Length of authorisation**

5.11 The ACCC can grant authorisation for a limited period of time.<sup>10</sup>

## **Conditions**

5.12 The Act also allows the ACCC to grant authorisation subject to conditions.<sup>11</sup>

## **Future and other parties**

5.13 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

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<sup>7</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

<sup>8</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>9</sup> Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

<sup>10</sup> Section 91(1).

<sup>11</sup> Section 91(3).

- i persons who become party to the contract, arrangement or understanding at some time in the future<sup>12</sup>
- ii persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>13</sup>

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<sup>12</sup> Section 88(10).

<sup>13</sup> Section 88(6).

## 6. ACCC evaluation

- 6.1 The ACCC's evaluation of the proposed arrangements is in accordance with the net public benefit test outlined in Chapter 5 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed arrangements.
- 6.2 As discussed at paragraphs 3.4 to 3.9 of this determination, on 20 February 2009 the ACCC issued a draft determination proposing to deny authorisation to the College's original application.
- 6.3 Since the release of the draft determination the College has significantly revised its Code and amended its application for authorisation accordingly. The College now seeks authorisation for an agreement between its members in relation to the adoption and putting into effect of the version of the Code submitted to the ACCC on 28 April 2009.
- 6.4 The ACCC's assessment of the proposed arrangements is on the basis of the Code as submitted on 28 April 2009. A copy of the Code as submitted on 28 April 2009 is at appendix A of this determination.

### The market

- 6.5 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

#### *Submissions*

- 6.6 The College submits that the relevant market in which to assess the arrangements is that for cosmetic medical procedures undertaken by registered medical practitioners.
- 6.7 RACS submits that, unless the AMC recognises otherwise, 'cosmetic surgery' is a sub-speciality forming part of 'plastic and reconstructive surgery' which is recognised and accredited by the AMC as a medical specialty.

#### *ACCC view*

- 6.8 The ACCC is not in a position to assess whether, as contended by RACS, 'cosmetic surgery' should, unless or until the AMC recognises otherwise, be considered as a sub-speciality forming part of plastic and reconstructive surgery. However, the ACCC notes that, whether there is for regulatory purposes a sub-specialty of plastic and reconstructive surgery or not, the arrangements for which authorisation is sought are intended to be applied only in respect of College members performing cosmetic procedures.
- 6.9 Accordingly, for the purpose of assessing this application, the ACCC considers the relevant area of competition affected by the proposed conduct is that for the provision of cosmetic procedures.



- 6.10 As noted in *The Cosmetic Surgery Report, Report to the NSW Minister for Health, October 1999* discussed in chapter 2 of this determination:

While cosmetic surgery is difficult to define precisely, it has a number of key characteristics. It involves reshaping normal structures of the body using surgical and non-surgical techniques.

A central characteristic of cosmetic surgery is that it is initiated by the consumer to improve their appearance and self-esteem. Other medical procedures are performed for therapeutic reasons, as a result of medical need. However, delineating procedures performed for therapeutic reasons from those that are performed for cosmetic reasons is difficult. Another important feature is the subjective nature of judgements about improvement in appearance.

Cosmetic surgery covers a wide range of procedures, including surgical procedures, non-surgical procedures and dental procedures. Surgical procedures include breast enlargement, rhinoplasty (nose surgery), surgical face-lifts, abdominoplasty (tummy tuck) and liposuction. Procedures such as chemical peels, collagen injections, laser skin resurfacing, vein removal and laser hair removal are collectively referred to as cosmetic medicine. Cosmetic dentistry is another category of procedures that are regarded as part of cosmetic surgery.<sup>14</sup>

- 6.11 The ACCC notes that such procedures are, depending on the procedure, performed by a range of parties but generally by doctors. With respect to cosmetic surgical procedures, the Cosmetic Surgery Report noted that medical practitioners performing cosmetic surgery include plastic surgeons, cosmetic surgeons, cosmetic physicians, general practitioners, dermatologists, ophthalmologists (eye surgeons), otolaryngologists (ear, nose and throat specialists) and to a lesser extent oral and maxillofacial surgeons.

## The counterfactual

- 6.12 As noted in Chapter 5 of this determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.

### *Submissions*

- 6.13 The College submits that the likely counterfactual if the arrangements are not authorised is that College members will not be clearly guided by ethical rules and the College will not sanction or expel members who are found to have committed misconduct as set out in the Code.
- 6.14 SA Health and NSW Health state that they do not support the application as they do not consider authorisation to be necessary as the College is not the only professional association operating in this field of medicine and loss of College membership would not significantly impede a cosmetic surgeon’s ability to compete. The MPBV also submits that the Code does not require authorisation.
- 6.15 The ASPS submits that it does not consider the application for authorisation to be necessary because the Code does not raise issues in relation to anti-competitive conduct having regard to the limited role and function of the College. The ASPS submits that, given that College membership is not of financial or professional significance, absent authorisation, the College would still be able to implement the Code.

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<sup>14</sup> *The Cosmetic Surgery Report, Report to the NSW Minister for Health, October 1999*, p 4.

- 6.16 In response to the issues raised by SA Health and NSW Health the College submits that the effective implementation of the Code is dependent on the Code being effectively enforced. The College states that while membership is voluntary, once members have joined the College they must adhere to the Code. The College considers that there is a small risk that its arrangements may raise concerns under the Act in that the Code potentially constitutes an anti-competitive agreement and that while the risk of the Code contravening the Act is small, opponents of the College are likely to raise concerns under the Act if the Code is not authorised.

*ACCC view*

- 6.17 The ACCC notes the views expressed by the College that some elements of the Code could raise concerns under the Act. Given that the ACCS has such concerns, the ACCC considers that absent authorisation the College would be less likely to enforce the Code through disciplinary action and complaints handling.

## **Public detriment**

### **Effect on cosmetic surgeons' ability to compete**

*Submissions*

- 6.18 The College submits that College membership is not mandatory for cosmetic surgeons. The College states that the major association with which it competes is the ASPS.
- 6.19 In addition, the College notes that some cosmetic surgeons are members of one or more other industry associations such as the Cosmetic Physicians Society of Australasia, New Zealand College of Appearance Medicine, Australian Skin Cancer Society, Australian College of Phlebology, RACS, Australian College of Dermatologists, Royal Australasian College of General Practitioners (RACGP), or the Royal College of Surgeons.
- 6.20 The College submits that it is unlikely that loss of College membership would significantly impede a cosmetic surgeon's ability to compete. The College states that if it did attempt to expel a significant number of members for anti-competitive reasons these members would be likely to not be a member of any association or to form a new association.
- 6.21 The ASPS considers that the application for authorisation is unlikely to have any adverse effect on competition or any particular public detriment. In particular, the ASPS submits that as the training and accreditation role performed by the College is not currently accredited or recognised by the AMC it does not consider membership of the College as of financial or professional significance.
- 6.22 Similarly, SA Health and NSW Health submit that loss of College membership would not significantly impede a cosmetic surgeon's ability to compete. NSW Health notes that the College is not the only professional association operating in this field of medicine.

### *ACCC view*

- 6.23 Adherence to a recognised code of conduct can constitute an important selling point for a business to attract new customers and may increase the bargaining power of the business when entering into arrangements with other parties.
- 6.24 Membership of a recognised industry association, in itself, can also be an important marketing tool for businesses. In respect of the current application, the ACCC notes that membership of the College will be contingent on the member complying with the Code.
- 6.25 The College and interested parties who commented on this issue all expressed the view that loss of College membership would not significantly affect a cosmetic surgeon's ability to compete. In particular interested parties submitted that:
- cosmetic procedures are performed by a wide range of medical practitioners many of whom are not College members
  - the training and accreditation role undertaken by the College is not currently recognised by the AMC, and
  - the College is not the only professional association available to medical practitioners performing cosmetic surgery.
- 6.26 Given this, 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.
- 6.27 The ACCC does note however that the College currently has an application before the AMC for the area of Cosmetic Medical Practice to be recognised as a specialty. The Department of Health and Ageing has advised that if the application is successful, any body would then be able to apply to the Specialist Education Accreditation Committee of the AMC to be accredited as the provider of standards, training and certification in this proposed specialty.
- 6.28 If Cosmetic Medical Practice was recognised as a specialty, and the College accredited as the provider, or a provider, of standards, training and certification in the specialty, then it would be likely that College membership would significantly assist persons competing to perform many cosmetic procedures. That is, in these circumstance the loss of/or inability to obtain College membership could significantly impede a cosmetic surgeon's ability to compete. In these circumstances the potential anti-competitive detriment generated by the Code would be significantly greater.

### **Impact of granting authorisation on AMC consideration of Cosmetic Medical Practice as a specialty**

#### *Submissions*

- 6.29 The Department of Health and Ageing submits that there is a risk that if authorisation were granted prior to the recognition and accreditation process for the proposed specialty of Cosmetic Medical Practice being completed, this might be construed as a

form of recognition of the College and the proposed specialty, placing undue and inappropriate pressure on the AMC process.

#### *ACCC view*

- 6.30 The ACCC notes the concerns expressed by the Department of Health and Ageing. However, the test the ACCC is required to apply in assessing applications for authorisation is very different from the criteria considered by the AMC in assessing applications for recognition of medical specialities, as is the context in which such assessments are made.
- 6.31 The role of the ACCC, in the authorisation context, is to assess whether the public benefit from potentially anti-competitive conduct for which authorisation is sought, outweighs any public detriment. The ACCC's role in this respect is limited to considering the public benefits and detriments of the conduct for which authorisation is sought. Accordingly, any decision by the ACCC in respect of the current application could not, and should not, be construed as any form of comment on whether recognition of Cosmetic Medical Practice as a specialty is appropriate. As noted, the ACCC is not in a position to comment on this issue.
- 6.32 The AMC has also expressed the view that it is not in a position to comment on the application for authorisation of the College's Code.

#### **ACCC conclusion on public detriments**

- 6.33 The ACCC considers 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.
- 6.34 However, if in the future, Cosmetic Medical Practice was recognised as a speciality and the College accredited as provider, or the provider of standards, training and certification in the speciality and/or the College was successful in promoting itself as the authoritative body in the field of cosmetic surgery, there would be a greater potential for loss of/or inability to obtain College membership to significantly impede a cosmetic surgeon's ability to compete.

#### **Public benefit**

##### *Issues arising out of the draft determination*

- 6.35 In response to the draft determination the College submits that the initial Code submitted for authorisation was underdeveloped (as the ACCC had described it). The College submits that the initial Code was the first, and only, Code submitted for authorisation in the industry and that as a result of the draft determination the College is now aware of the standard to which a code would need to be developed to be authorised.

6.36 The College notes that it has amended the Code in response to the draft determination and contends that the amended Code is exemplary, and exceeds the requirements set out in the draft determination and takes into account the comments of the ACCC and interested parties.

*ACCC view*

6.37 Consumers have a right to accurate and complete information from businesses about their purchases. This is particularly pertinent in relation to health and medical services where often there is a marked disparity in the amount of information available to consumers and service providers. The ACCC has previously considered this issue, in relation to medical and health services, in its publication, *Guide to the Trade Practices Act for the Advertising or promotion of medical and health services*.<sup>15</sup>

6.38 As discussed in this guide, the consequences of the disparity in the amount of information available to consumers and service providers may include:

- the temptation to oversupply services
- the temptation to create unrealistic expectations through promotional activities
- incentives to decrease overall quality where consumers are not able to effectively judge quality differences, and
- the potential for consumers to make incorrect choices which risk their financial, psychological and physical welfare.

6.39 Reducing this information imbalance is essential to improving the protection of consumers.

6.40 To make informed decisions about whether to purchase medical services (and particularly elective services such as cosmetic surgery) consumers need reliable and accurate information about the service or procedure. Practitioners are already obliged by common law and professional practice obligations to provide sufficient information to ensure informed consent by patients. This includes information about:

- risks, side effects, permanency of outcome, and other aspects of the nature of the quality of treatment
- the consequences of not having treatment and alternative treatment options
- post treatment care and complications
- charges (including charges for ancillary and add on services).

6.41 The guide also notes that, in addition to information about the service or procedure, consumers would also benefit from more information about medical and health practitioners, in particular their qualifications and experience.

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<sup>15</sup> Copies of the Guide to the Trade Practices Act for the Advertising or promotion of medical and health services are available from the ACCC's website [www.accc.gov.au](http://www.accc.gov.au).

- 6.42 In this respect, the College's Code is primarily concerned with requirements College members must comply with in advertising their services to consumers, guidelines for informed consent and processes for considering complaints and appeals in respect of breaches of the guidelines.
- 6.43 Any arrangement which promotes the provision of accurate and complete information to consumers, assisting them in making informed choices about cosmetic procedures, is likely to produce a public benefit. Such arrangements also assist in raising practitioners' awareness of their professional and ethical responsibilities and, where backed by effective complaints and sanctions processes, act as a mechanism for ensuring that parties to the arrangements act ethically and professionally.
- 6.44 Accordingly, the key considerations for the ACCC in assessing the public benefits generated by the Code are:
- whether the provisions of the Code foster the provision of accurate and complete information to consumers and encourage College members to act ethically and professionally and if they do,
  - whether the Code is likely to be effectively enforced and adhered to.
- 6.45 The ACCC considers that in respect of many of the provisions of the revised Code, College members complying with these standards would generate a public benefit by assisting consumers in making informed choices about cosmetic procedures. The ACCC also considers that many provisions of the Code will generate a public benefit by assisting in raising practitioners' awareness of their professional and ethical responsibilities.
- 6.46 In particular, the Code contains general provisions regarding the manner in which College members should conduct themselves in their dealings with patients as well as specific guidelines in relation to advertising and informed consent and as processes for dealing with complaints under the Code of Practice. The ACCC considers the amended Code to be a significant improvement on the Code for which authorisation was originally sought.
- 6.47 However, the ACCC has concerns about some provisions of the revised Code. Similarly, interested parties have raised concerns with some provisions of the Code. These concerns are considered below.

## **The Code provisions**

### Use of testimonials

- 6.48 The original Code provided that testimonials should only be used in advertisements if they relate to the advertiser's own patients and must be correct and not create a misleading impression.
- 6.49 In the draft determination the ACCC noted that Section 94(1)(c) of the *Health Professions Registration Act 2005 (Vic)* states that a person must not advertise a regulated health service or a business providing regulated health services in a manner which refers to, uses or quotes from testimonials or purported testimonials.

- 6.50 The ACCC also noted the submission by the College that it does not favour testimonials and would welcome a ban on them.
- 6.51 In the draft determination the ACCC concluded that a restriction on the use of testimonials of the type prescribed in the original Code goes some way towards reducing concerns about the use of testimonials. However, in falling short of the outright ban which Victorian legislation prescribes, and which the College had argued that it would like to see in place in respect of its members, the ACCC considered that the clause as drafted does not address the inconsistency with the Victorian legislation.

*Issues arising out of the draft determination*

- 6.52 In response to the draft determination the College amended the section of the Code regarding the use of testimonials. Clause 2.7 of the amended Code provides that testimonials should not be used in advertising.

*ACCC view*

- 6.53 The ACCC considers that the amendment to the Code addresses the concerns raised in the draft determination.

Use of superlatives in advertising

- 6.54 The original Code required that superlatives should be used with caution and should not suggest that one practitioner is superior to another unless that can be readily proven.
- 6.55 In the draft determination the ACCC expressed concerns that the caveat that superlatives should not be used unless they could be readily proven did not apply, in the original Code, other than in relation to comparing the training and performance of practitioners.

*Issues arising out of the draft determination*

- 6.56 In response to the draft determination the APB submitted with regard to requiring that 'superlatives should be used with caution' that the objective nature of the word superlatives is of concern and that this word should be removed from the Code. The APB submitted that advertising of cosmetic services should be based on accurate information, rather than discretionary claims of success, allowing consumers to make an informed decision about the practitioner and the procedure offered.
- 6.57 In response to the draft determination the College amended the clause of the Code relating to the use of superlatives. Clause 2.3 of the amended Code provides superlatives should not be used in any advertising unless they can be readily proven to be correct and as such are not misleading. By way of guidance the Code states that a claim that a particular procedure carries 'least' risk of a specific complication would be acceptable if true and supported by peer literature, however to claim that a practitioner was the 'best' in any way is not permissible as it involves a value judgement not readily proven.
- 6.58 Subsequent to this amendment the APB submitted that the amendment provides improved guidance on the use of superlatives. The APB submits that the advertising and promotion sections of the Code, as amended, will assist to provide clarity to its

members when accepting and assessing advertisements from those offering cosmetic procedures, in light of the susceptibility and high expectations of consumers when procuring these services.

*ACCC view*

6.59 The ACCC considers that the amendment to the Code addresses the concerns raised in the draft determination and by the APB.

Offers of discounts to undertake procedures

*Issues arising out of the draft determination*

6.60 Clause 2.9 of the amended Code provides that offers of gifts and inducements (for example time sensitive discounts) shall not be used in order to attract potential clients.

6.61 The MPBV states that it does not encourage the use of discounts in any circumstances because it could encourage unnecessary use of medical services.

6.62 The College notes that clause 2.9 provides that time sensitive discounts should not be offered. However, the College states that it does not favour a more general ban on discounts because it does not want to interfere with appropriate price competition.

*ACCC view*

6.63 The ACCC considers that the use of time sensitive discounts could potentially be used to pressure consumers into making decisions about whether to undertake a procedure more quickly than they otherwise would, potentially encouraging such decisions to be made without full consideration having been given to the procedure being contemplated. The ACCC therefore considers that the ban on time sensitive discounts in the Code is in the public interest.

6.64 However, the ACCC would be concerned if a more general ban on price discounting was introduced. As with other service providers, the ACCC considers that decisions about prices to charge should be made independently by each practitioner offering cosmetic procedures. A ban on practitioners offering discounts would likely ultimately result in consumers paying more for these services.

6.65 In addition, such a ban would be difficult to enforce and easily circumvented by practitioners due to ambiguity about what constitutes a 'discounted' price. A price that one practitioner considers to be a discount could be another practitioner's standard price.

Comparative advertising

*Issues arising out of the draft determination*

6.66 Clause 2.5 of the amended Code cautions against the use of comparative advertising, noting that while it can be important in conveying information to consumers it must be correct and readily proven. By way of example, clause 2.5 notes that a claim that one type of treatment is safer than another is acceptable if true and supported by peer review literature.



- 6.67 The MPBV notes that the Code cautions against comparative advertising but then outlines circumstances where comparative advertising is of benefit to consumers by referring to peer reviewed literature. The MPBV states that it would be concerned that such literature should be from a reputable and verifiable source.
- 6.68 The College submits that peer reviewed literature is the accepted standard in the field of medical research and by its nature is reputable and verifiable.
- 6.69 In response, the MPBV submits that the Code does not specifically require peer reviewed literature to be cited, nor does it take account of a potential different purpose of the procedure from that in the literature. The MPBV believes that there remains the danger of the public being misled by clause 2.5 of the Code.

#### *ACCC view*

- 6.70 The ACCC considers that, as a general principal, limiting the use of comparative advertising to matters that can be readily proven would produce a public benefit by striking a balance between providing consumers with accurate information that informs their decisions about procedures and ensuring that consumers are not misled.
- 6.71 However, striking such a balance in practice is not as straight forward as is described in clause 2.5 of the Code, or indeed as could be described in any other generally worded guideline. In this respect, the College has endeavoured to provide additional guidance by reference to the use of peer review literature.
- 6.72 While the ACCC agrees with the MPBV in so far as the existing clause 2.5 does not provide absolute clarity as to the circumstance in which comparative advertising would or would not be acceptable, such an assessment involves a degree of subjectivity such that it is difficult to envisage a set of criteria that would provide absolute clarity. Rather, to an extent, these types of assessments are made on a case by case basis.
- 6.73 The ACCC considers that the existing clause 2.5, while not eliminating the possibility of the public being misled by comparative advertising by College members, provides College members with useful guidance in this regard.

#### Informed consent – disclosure of the number of times a procedure has been performed

- 6.74 Clause 3.7 of the Code provides that if a College member has performed a procedure less than 100 times the member must disclose to the patient at the initial consultation the number of times the procedure has been performed.
- 6.75 In the draft determination the ACCC expressed concerns that the requirement that College members disclose to the patient if he or she has performed the procedure less than 100 times does not adequately inform the patient of the education, training and procedural experience of the doctor.
- 6.76 The ACCC noted that nothing in the Code, beyond a general statement that the doctor disclose to a patient if they are inexperienced in the procedure, required College members to provide patients with information such as their qualifications, credentials and training, their recent experience in performing the procedure and their clinical outcomes and number of adverse effects.

- 6.77 The ACCC considered that informing a patient if the doctor has performed a procedure less than 100 times was likely to be useful to the patient in deciding whether to go ahead with a procedure. However, the ACCC considered that a range of other information regarding the doctor's qualifications, experience and the outcomes when the doctor has undertaken the procedure was likely to be of far greater use to the patient in deciding whether to go ahead with the procedure.
- 6.78 The ACCC noted that the Code does not preclude College members from providing this information, and all members are required by law to provide sufficient information to ensure informed consent by patients. However, the ACCC noted that some College members may adopt the requirements of the Code as the benchmark to which they adhere.
- 6.79 The ACCC considered that to the extent that this did occur there was a risk that in requiring that College members inform a patient if a procedure has been performed less than 100 times, while remaining silent on provision of other information of the type noted above, some members may consider that compliance with this requirement as sufficient to constitute a satisfactory explanation of their experience in performing the procedure.
- 6.80 The ACCC concluded that to the extent that this did occur it was likely that some patients would be receiving less information about the member's experience than they would absent the requirement, as absent adoption of the requirement as a minimum standard the member may be more likely to turn their mind to a more considered explanation of their qualifications and experience.

#### *Issues arising out of the draft determination*

- 6.81 The informed consent provisions of the Code have been substantially revised since the release of the draft determination. Most relevant to consideration of the '100 times' requirement the Code now provides guidelines applicable to all procedures and additional guidelines for invasive procedures. Previously the Code only contained guidelines for invasive procedures.
- 6.82 The amended Code also requires members to make available to patients, before a procedure is agreed to, a College produced brochure about cosmetic procedures that includes information about what the College's qualifications mean and outlines the College's complaints process. In addition, the amended Code requires members to have available for patients a written summary of their own training and experience.

#### *ACCC view*

- 6.83 The concerns expressed by the ACCC in the draft determination were not primarily with the 100 times requirement itself, but rather that requiring provision of this information while remaining silent on College members' other obligations in respect of providing patients with information about the member's qualifications and experience may lead to patients receiving less information than would otherwise be case.
- 6.84 The amended Code requires College members to provide a greater range of information to patients about their qualifications and experience. Requiring the provision of this information in a suitable form would appear to address the concerns raised in the draft determination.

- 6.85 While the ACCC has some concerns about when and how it is proposed that this information will be made available to patients, these concerns are addressed below at paragraphs 6.86 to 6.95.

#### Availability to patients of information about College members' qualifications and experience

##### *Issues arising out of the draft determination*

- 6.86 As noted, in the draft determination the ACCC expressed concerns about the level of information the Code required members to provide patients about their level of qualifications and experience.
- 6.87 Clause 3.2 of the amended Code requires members to make available to patients, before a procedure is agreed to, a College produced brochure about cosmetic procedures that includes information about what the College's qualifications mean and outlines the College's complaints process. In addition, clause 3.3 of the amended Code requires members to have available for patients a written summary of their own training and experience.
- 6.88 RACS raises concerns that simply making qualifications available would not sufficiently ensure that all patients are sufficiently aware of the members' qualifications.
- 6.89 The CHF submits that for information regarding the members' training and experience to be of most benefit it should be made available before the consumer decides on a cosmetic surgeon.
- 6.90 The CHF submits that this information should be made available on a public register or website and be provided by each College member in a consistent, user friendly format.

##### *ACCC view*

- 6.91 As noted at paragraphs 6.37 to 6.41, to make informed decisions about whether to purchase medical services (and particularly elective services such as cosmetic surgery) consumers need reliable and accurate information about the service or procedure. Practitioners are already obliged by common law and professional practice obligations to provide sufficient information to ensure informed consent by patients in relation to issues such as the nature and quality of the treatment, consequences of not having the treatment, post treatment care and cost of treatment. As the ACCC has noted previously, in addition to this information consumers would also benefit from more information about medical and health practitioners, in particular their qualifications and experience.
- 6.92 The ACCC considers that provision of information of the type proposed by the College in the amended Code will assist patients in this regard.
- 6.93 However, the ACCC notes that the Code currently requires only that the brochure be given to patients before a procedure is agreed to and only that the member must 'have available' for patients a written summary of their own training and experience.
- 6.94 The ACCC considers that the benefit in having information about the member's own experience and training would be enhanced if the member was required to provide this

information to consumers rather than simply have it available. Further, the ACCC considers that for the College developed brochure and information about the members' qualifications and experience to be of real assistance to consumers in choosing a medical practitioner this information should be provided at the consumers' first consultation.

- 6.95 The ACCC considers it appropriate to grant authorisation subject to a condition to address this concern.

**C1: Clause 3.2 of the Code must be amended to require members to provide the College developed brochure, defined in clause 3.2, to all persons either at their first consultation or, where the first consultation is by telephone or video, by mail, email or other means prior to their first consultation.**

**Clause 3.3 of the Code must be amended to require members to provide the written summary of their own training and experience to all persons either at their first consultation or, where the first consultation is by telephone or video, by mail, email or other means prior to their first consultation.**

#### Initial consultations conducted by telephone

##### *Submissions*

- 6.96 Clause 3.9 of the Code provides that where it is impractical for patients to meet a member face to face for an initial consultation, as an initial consultation the member may examine photographs of a patient and then consult with them by phone or video.
- 6.97 The DHS submits that such a form of consultation is inappropriate in any circumstances pertaining to cosmetic surgery even if it is considered to be an initial consultation.
- 6.98 The College contends that the use of telemedicine is well established and underutilised and is important in providing equity of access to cosmetic medical opinions to people in country and remote areas.
- 6.99 The College submits that its Code is specifically designed to facilitate such equity and that if telemedicine was unavailable patients in remote areas would be unable to obtain an initial opinion without the expense and inconvenience of travelling a long distance. The College further states that for all patients the Code still requires a face to face consultation prior to the procedure and that in the unlikely event that the findings of the face to face consultation are so different to the initial consultation that the procedure is deemed inappropriate the procedure can be cancelled.

##### *ACCC view*

- 6.100 The ACCC notes the conflicting views regarding the appropriateness of consultation by telephone. In many cases a more considered assessment is likely to be facilitated by a face to face meeting. However, there may also be instances, particularly in respect of routine or straight forward procedures where at least as an initial consultation, a phone conference may provide other benefits, particularly in the form of time and cost saving, to patients in remote locations.

- 6.101 Similarly, for patients in remote locations, the availability of a phone conference for an initial consultation may also allow them to more readily consider the services of a variety of practitioners before deciding whether to undertake a procedure, and if so, who will perform the procedure.
- 6.102 The ACCC is not in a position to reach a concluded view on the circumstances in which a phone consultation may or may not be satisfactory as an initial consultation. Indeed, it would be difficult to imagine a set of criteria that would provide guidance in this respect that would not involve a degree of subjectivity.
- 6.103 However, the ACCC does note that the Code requires, where an initial consultation is by phone, that the patient and doctor supplement this with a face to face meeting before going ahead with the procedure.

#### Cooling off periods

- 6.104 The original Code provided that, generally, there should be a ‘cooling off’ period of at least five days between the initial consultation and the procedure. The Code states that for practical reasons this may not always be possible but that the cooling off period should never be less than one night.
- 6.105 The DHS argued that in order to give patients sufficient time to consider all the information provided at an initial consultation, both about the procedure and any associated risks and the likely cost of the procedure, this clause should be tightened to require a mandatory cooling off period.
- 6.106 In response the College contended that the Code provides for an appropriate cooling off period for the patient to be able to assess this information and encourages second opinions and/or further consultation. The College noted that under the Code it is expected that a five day cooling off period will be provided but states that there are some circumstances where this is inappropriate, particularly in regard to treatment of complications.

#### *Issues arising out of the draft determination*

- 6.107 In the draft determination the ACCC noted that the Code provides considerable scope to avoid the requirement for a cooling off period and that the cooling off period would be very difficult to enforce given the high degree of subjectivity in the cooling off provisions. The ACCC considered that cooling off periods are most effective as a consumer protection mechanism where they apply in all circumstances or with only very limited and clearly specified exceptions.
- 6.108 The ACCC also considered that if, as the College contended, short cooling off periods, such as overnight, could be appropriate in some circumstances the Code would benefit from a mechanism for recording instances in which shorter cooling off periods are employed, including documentation in writing of the reason for a shorter period with clear consent of the consumer. The ACCC noted that this would allow monitoring of whether shorter cooling off periods were only being employed as the exception, where specific circumstances warrant, or being adopted more broadly.

6.109 In response to the draft determination the College amended clause 3.16 of the Code to provide that if the cooling off period is less than five days the reason for this must be properly documented and acknowledged by both the member's and patient's signature.

*ACCC view*

6.110 The ACCC notes that there will be some circumstances where a cooling off period of less than five days will be necessary. However, as discussed in the draft determination, these instances should be the exception rather than the norm.

6.111 Requiring College members to record instances where the cooling off period has been less than five days will, provided that instances where the cooling off period is less than five days are effectively monitored and followed up, assist in determining whether shorter cooling off periods are being used only as an exception, where specific circumstances warrant, or being adopted more broadly.

Advice to patients about fees and charges

6.112 Interested parties expressed concern that the original Code did not provide any instruction about the need to provide patients with comprehensive advice about fees and charges prior to a procedure being undertaken.

*Issues arising out of the draft determination*

6.113 In the draft determination the ACCC stated that any public benefit resulting from adoption of the Code by College members could potentially be enhanced by the Code providing clarification and guidance about providing patients with information about fees and charges prior to a procedure being undertaken.

6.114 Clause 3.4 of the amended Code requires that, before a procedure is agreed to, College members must provide patients with full disclosure of the fees and charges, and likely total cost of the procedure. Clause 3.4 also requires that patients be made aware that further costs could be incurred in the event of complications occurring.

*ACCC view*

6.115 As noted in the draft determination, College members are already obliged by law to provide sufficient information, including information regarding charges, to ensure informed consent by patients.

6.116 However, the ACCC considers that the addition of clause 3.4 to the Code reinforces this requirement and provides guidance in this regard.

Post operative care

6.117 The DHS expresses concerns that the original Code did not set out any expectations as to the surgeon's role in immediate post-operative care. In response the College stated that it would agree to add this to the Code.

### *Issues arising out of the draft determination*

6.118 Clause 4.1 of the amended Code provides that members must:

- provide full and adequate post-operative care for their patients, including provision for emergency after-hours care that is appropriate for the magnitude of the surgery performed and to allow for early detection of and intervention in adverse outcomes
- provide adequate and appropriate on-going care, either by his or her own assessment and treatment, or by appropriate referral.

### *ACCC view*

6.119 The ACCC considers that the amendment to the Code addresses the concerns raised in the draft determination.

### Conducting procedures in regulated settings

6.120 The DHS contends that it would be prudent for the College to encourage, if not mandate, that procedures only be conducted in regulated settings and not in the cosmetic surgeon's rooms. The College contends that this would be appropriate for some procedures such as breast augmentation but not for others such as botox injections or most laser treatments.

### *ACCC view*

6.121 The ACCC notes that many cosmetic procedures are performed in cosmetic surgeons' rooms. As a general observation the ACCC notes that the risk involved in a procedure, and accordingly the appropriate setting in which to perform the procedure, will vary depending on the procedure being undertaken. However, the ACCC is not in a position to form a specific view on technical medical issues such as what, if any types of cosmetic procedures, can or should be conducted in surgeons' rooms.

6.122 The ACCC considers that this is an issue that would be more appropriately addressed by relevant medical authorities in each jurisdiction.

### Consumer complaints and appeals processes

6.123 The Code provides that members of the public can complain to the College, in writing, if they consider that a College member has breached any part of the Code. The Code also sets out processes for dealing with such complaints.

### *Issues arising out of the draft determination*

6.124 In the draft determination the ACCC expressed concerns that the availability of the complaints handling process would not be sufficiently well promoted by the College so as to facilitate easy access to the process for consumers that may have complaints in respect of College members.

6.125 In particular the ACCC was concerned that the only information the College had provided in this regard was that its website was being extensively revamped and that

the revamped website would have prominent information about its complaints procedures.

- 6.126 The ACCC did not consider this sufficient, without also making this information available through other means, to sufficiently ensure that patients were aware of the process.
- 6.127 On the basis of the information provided by the College the ACCC concluded that the apparent lack of promotion of the complaints process for consumers seriously compromised the effectiveness of the complaints process.
- 6.128 As noted at paragraph 6.87 the amended Code requires members to make available to patients, before a procedure is agreed to, a College produced brochure about cosmetic procedures that includes information about what the College's qualifications mean and outlines the College's complaints process.
- 6.129 The College provided the ACCC with a draft of the brochure. It includes a section entitled 'what to do if things go wrong' which includes general guidance about the College's complaints process and provides details of how to get a full copy of the College's complaints process.

#### *ACCC view*

- 6.130 The ACCC considers that, subject to this brochure being made available to all consumers that consult a College member, the information contained in the brochure addresses the concerns outlined in the draft determination.
- 6.131 As discussed at paragraphs 6.86 to 6.95, while the ACCC has some concerns about how widely this brochure will be disseminated, the ACCC has imposed a condition of authorisation that it considers will address this concern.

#### Composition of complaints and appeals panels

##### *Issues arising out of the draft determination*

- 6.132 In the draft determination the ACCC raised concerns that the lack of external review mechanisms had the potential to undermine the effectiveness of the Code.
- 6.133 Clause 5.10 of the amended Code provides for the appointment by the College Council of a Complaints Panel, with a minimum of three members, to consider complaints alleging breaches of the Code. The Code requires the Chair of the Panel to have legal qualifications and be independent of the College and that at least one other member of the Panel be independent of the College. The Code also requires that one member of the Panel must be a College member.
- 6.134 The amended Code also provides for an Appeals Committee to hear appeals against decisions of the Complaints Panel. Clause 5.40 of the Code provides that the Appeals Committee, to be appointed from time to time as needed by the College Council, will be a three member committee including a Chair who must have legal qualifications.



- 6.135 The Chair will recommend the other two members of the Appeals Committee. One member of the Appeals Committee must be a College member with experience in the matter before the Committee.
- 6.136 Clause 5.29 of the Code further provides that where a matter involves a serious risk to public safety or patient welfare it must be referred to the relevant regulatory authorities.
- 6.137 RACS submits that it is unclear whether the Complaints Panel is intended to be independent or have independent representation. For example, RACS notes that if the Committee consists of five members, the majority of panel members could be members of the College.
- 6.138 RACS also submits that, contrary to the College's assertions, it is unclear whether the Appeals Committee is intended to be independent or have independent representation as the Code does not require independent representation of the Appeals Committee notwithstanding that the College has called the Panel an 'External Appeals Committee.'
- 6.139 The CHF submits that the Appeals Committee should be entirely independent and include a consumer representative.
- 6.140 The College submits that the Code requires that the Appeals Committee be primarily external with an independent Chair. The College states that of the two other members of the Committee, to be appointed by the Chair, only one can be a College member.

*ACCC view*

- 6.141 The ACCC considers that the requirement in the amended Code for providing for matters involving a serious risk to public safety or patient welfare to be referred to the relevant regulatory authorities addresses concerns expressed in the draft determination in this regard.
- 6.142 More generally, in relation to external representatives, and external review mechanisms, of College decisions on complaints the ACCC notes that as currently drafted the Code does not provide that either the Complaints Panel or Appeals Committee will consist primarily of members independent of the College.
- 6.143 The ACCC considers that there is benefit in the Complaints Panel consisting of both College members, who potentially have more in depth knowledge of the matter being considered, and persons that are independent of the College, who are likely to instil greater confidence in the complainant and/or the member being complained of regarding the impartiality of the Panel.
- 6.144 While, depending on the number of members appointed to the Complaints Panel, the majority of Panel members could be College members, the ACCC considers that requiring that the Panel have a minimum of two independent representatives, including an independent Chair, would bring sufficient impartiality to the complaints process, particularly if Panel decisions were able to be appealed to an external Appeals Committee.
- 6.145 However, the ACCC notes that, despite the College's assertion to the contrary, the External Appeals Committee provided for in the Code does not in fact require any external representation.

- 6.146 The Code states that the Chair of the Appeals Committee shall be appointed by the College Council. The Chair then appoints the other two members. The Code provides that one member of the Appeals Committee must be a College member. However, the Code is silent on whether the Chair of the Appeals Committee and the third member of the Committee will or will not be College members. Accordingly, as the Code is currently drafted, it would be at the discretion of the College as to whether the Appeals Committee included any external representation.
- 6.147 The ACCC notes that this may have been an unintended drafting oversight on behalf of the College. However, if this is the case, the drafting oversight was not rectified by the College when brought to the College's attention by the ACCC in the course of considering the amended Code.
- 6.148 The ACCC considers that the lack of explicit provision for independent representation on the College Appeals Committee has the potential to undermine the effectiveness of the complaint and appeals process which the College has stated is intended to provide, amongst other things, for a fair hearing and impartiality of decision makers.
- 6.149 The ACCC considers it appropriate to grant authorisation subject to a condition to address this concern. The ACCC notes that the effect of this condition is that the composition of the College's Appeals Committee will reflect the College's stated intention.

**C2: Clause 5.40 of the Code must be amended to provide that the Chair of the External Appeals Committee appointed by the College Council must not be a member of the College. Clause 5.41 of the Code must be amended to provide that one of the other two members of the Appeals Committee must not be a member of the College.**

#### Other issues raised about the complaints and appeals process

##### *Issues arising out of the draft determination – ability of the Complaints Panel and Appeals Committee Chair to dismiss complaints*

- 6.150 Clause 5.6 of the Code outlines a number of circumstances in which the Chair of the Complaints Panel shall not refer a complaint to the Panel including where the complaint does not allege a breach of the Code, if the complaint is more appropriately dealt with by a Court or external body, the complaint is being handled by a medical insurer or the Chair is of the view that the matter is frivolous or vexatious.
- 6.151 Clause 5.7 of the Code also provides that the Chair of the Complaints Panel can exercise his or her discretion not to refer a complaint to the Complaints Panel if they consider the breach to be minor in nature and can be dealt with by advice to the member. However, in these instances the Chair must refer the complaint to the Panel if the complainant is not satisfied with this outcome.
- 6.152 Clause 5.50 of the Code provides that the Chair of the Appeals Committee can dismiss an appeal without the appeal being heard by the Committee if the Chair is of the opinion that the material submitted by the appellant does not support a valid appeal.
- 6.153 The ASPS and RACS raise concerns that the discretion for the Chair of the Appeals Committee to dismiss an appeal without the appeal being considered by the Committee

detracts from the power of the other two members of the Committee and undermines the concept of there being three persons on the Appeals Committee. They submit that this provisions also detracts from natural justice protections.

*ACCC view*

- 6.154 The ACCC notes that the Code provides that the Chairs of the Complaints Panel and Appeals Committee, to be appointed by the College Council, must have legal qualifications. The Chair of the Complaints Panel must be independent of the College. The College has also stated that the Chair of the Appeals Committee will be independent of the College although the Code does not require this. Nor does the Code provide for any oversight of, or reporting of, how the Chairs' discretions to dismiss complaints or appeals are exercised.
- 6.155 The ACCC considers there is benefit in a process for complaints of a minor nature, or that are more appropriately handled by other bodies, to be dealt with without the need for a full hearing before the Complaints Panel. Similarly, the ACCC considers that there is benefit in allowing vexatious or frivolous appeals to be dealt with without the need for a full hearing. However, absent any external oversight of the exercise of this discretion, or any reporting or monitoring of how and when this discretion is exercised, it is not clear that the aims of the complaints and appeals provisions in the Code, including the provision of a fair hearing by an impartial decision maker, will be adequately served by these provisions.
- 6.156 The ACCC considers it appropriate to grant authorisation subject to a condition to address this concern.

**C3: Clauses 5.6, 5.7 and 5.50 of the Code must be amended to provide that details of instances where the Chair of the Complaints Panel does not refer a complaint to the Complaints Panel, or the Chair of the Appeals Committee does not refer an appeal to the Appeals Committee, including details of the reasons why the matter was not referred, must be included in:**

- **the register of determinations made by the Complaints Panel and Appeals Committee maintained by the College pursuant to clause 6.1 of the Code, and**
- **the Annual report of the Complaints Panel and Appeals Committee prepared pursuant to clause 8.1 of the Code.**

**In the case of matters not referred under Clause 5.7, full details of the manner in which the complaint was dealt with must also be included.**

*Issues arising out of the draft determination – publication of Complaints Panel and Appeals Committee decisions*

- 6.157 Clause 5.37 of the Code provides for the College Council, the member complained of and the complainant to be informed of the Complaints Panel's decision, reasons, and their rights of appeal. Where the Panel considers that a matter involves a serious risk to public safety and patient welfare it must be referred to relevant regulatory authorities. Outcomes of appeals must also be advised to parties in writing.

- 6.158 Clause 6.1 of the Code also provides for the College to maintain a register of all determinations made by the Complaints Panel and Appeals Committee and make the register available for inspection by College members and relevant regulatory authorities.
- 6.159 Clause 6.2 of the Code provides the College with the discretion to publicly publish the content of, extracts from, or précis of determinations made by the Complaints Panel or Appeals Committee.
- 6.160 Clause 8.1 through 8.3 of the Code require the Complaints Panel and Appeals Committee to submit an annual report to the College, the ACCC and the College's Code Administration Committee.
- 6.161 Clause 6.4 of the Code requires that all decision to suspend or expel a member be reported to relevant State and Territory Medical Boards.
- 6.162 RACS submits that the public should have access to all complaints and appeal decisions.
- 6.163 RACS also raises concerns that unless decisions to expel members are made public, the public will not know whether a member was expelled rather than resigned. RACS argues that if the College is concerned that publication of cases of expulsion for reasons other than issues concerning public safety would be unfair, this could be addressed by stating reasons for expulsion.
- 6.164 The CHF submits that expulsions should be made public as this will assist in protecting the public interest. The CHF notes that the National Registration and Accreditation Scheme (NRAS) requires mandatory reporting of health professionals that are placing the public at risk.
- 6.165 The College notes that the Code requires that all expulsions be reported to relevant medical authorities. The College submits that these authorities will be able to determine if further statutory action is required to protect the public. The College argues that this is sufficient and the most appropriate course of action.
- 6.166 The College notes that expulsions may be for reasons other than issues of patient safety and argues that publication of such expulsions may constitute double punishment and be unfair.

*ACCC view*

- 6.167 The Code places considerable reporting obligations on the College regarding the operations of its Complaints Panel and Appeals Committee, including regarding decisions made by these bodies. The ACCC considers that these reporting obligations introduce a level of transparency and oversight to the College's complaints and appeals processes that will assist in ensuring natural justice and procedural fairness in Complaints Panel and Appeals Committee decisions.
- 6.168 However, the ACCC notes that none of the information reported by the College will be available publicly. The ACCC considers that the transparency of the College's complaints and appeals process would be enhanced if details about complaints received and the outcome of complaints was publicly available.

- 6.169 While clause 6.2 of the Code provides for the College publicly publishing the content of, extracts from, or précis of determinations made by the Complaints Panel or Appeals Committee, such publication is at the discretion of the College.
- 6.170 It would often not be appropriate to report personal details about complainants and members the subject of complaints. However, the ACCC considers that there would be a public benefit in details of the number of complaints received by the College, the key issues involved in each complaint and how the complaint was resolved, including any sanctions applied, being publicly reported.

**C4: Section 8 of the Code must be amended to include a clause requiring the College to publish annually, including on the College’s website, a report providing details of:**

- **the number of complaints and appeals received by the College in relation to alleged breaches of the Code**
- **the key issues involved in each complaint or appeal**
- **the outcome of each complaint or appeal, including, if the complaint was dismissed by the Chair of the Complaints Panel or Appeals Committee without being referred to the full Panel or Committee, the reasons for this**
- **any sanctions imposed**
- **whether other complaints about the member in question have been received in the past.**

**The details to be provided in this report do not extend to personal details about the complainant or the member complained about, or information that would identify the complainant or member complained about.**

- 6.171 The ACCC considers that issues of public safety are most appropriately dealt with by relevant medical authorities. In this respect, the Code requires the College to report to relevant medical authorities matters that involve a serious risk to public safety of patient welfare.

*Issues arising out of the draft determination – ability of the College to instigate its own complaints*

- 6.172 RACS raises concerns that under the revised Code the College does not appear to have the power to commence its own investigations without a person pursuing a complaint.

*ACCC view*

- 6.173 Section 10 of the Code provides for the College to engage an independent person to undertake periodic audit checks in relation to compliance with the Code. Clause 10.3 of the Code requires that any apparent breaches discovered be referred to the Complaints Panel as if they were complaints.

- 6.174 More generally, while there are no specific provisions in the Code for the College to commence its own investigations into breaches of the Code, nothing in the Code would preclude the College from doing so.

#### Imposition of financial penalties on members

##### *Issues arising out of the draft determination*

- 6.175 Clause 5.28 of the amended Code provides for a variety of sanctions to be imposed by the Complaints Panel for breaches of the Code including payment to the College, to be used as the Panel recommends, of penalties of up to \$10,000 for a first breach of the Code and up to \$20,000 for subsequent breaches of the Code.
- 6.176 The ASPS and RACS question the enforceability of these provisions contending that their enforceability appears to be based on contract law. The ASPS and RACS state that under contract law a term of a contract that 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.
- 6.177 In response the College states that members who do not pay fines or comply with other penalties will be expelled.

##### *ACCC view*

- 6.178 The ACCC notes that there is some question as to the ability of the College to enforce any financial penalties imposed on members in relation to breaches of the Code.
- 6.179 However, as submitted by the College, the ultimate recourse available to it if a member does not comply with a decision of the Complaints Panel or Appeals Committee is expulsion from the College. The ACCC considers that, provided the Code is effectively enforced, this is sufficient to ensure compliance with the Code and with decisions of the Complaints Panel and Appeals Committee and/or otherwise deal with members who do not comply.

#### Provision of services to persons under the age of 18

##### *Issues arising out of the draft determination*

- 6.180 The AMA submits that it has been concerned for some time about the growing problem of unhealthy body image among many young people. The AMA states that there is increasing social pressure for younger people to conform to ideal facial and body types, often under the pervasive influence of media stereotyping. The AMA believes that with this increasing pressure, there is a risk that more adolescents and teenagers will begin to seriously consider cosmetic procedures to enhance their appearance.
- 6.181 The AMA believes that medical procedures to enhance or modify physical appearance should not be provided to people less than 18 years of age unless those procedures are in the medical and/or psychological interest of the patient.
- 6.182 The AMA notes that a parent may consent to their underage child being provided cosmetic procedures but argues that some parents may be captive to the same social

pressures and media influences and may themselves hold unrealistic body images regarding their children.

- 6.183 The AMA submits that the Code should specifically prohibit services that are not medically or psychologically indicated to people less than 18 years of age.

*ACCC view*

- 6.184 The AMA did not provide its submission until 20 May 2009. This is despite first being invited to comment on the Code in November 2008. This left the College, and other interested parties with very little time to consider the issues raised by the AMA.

- 6.185 The ACCC notes the concerns raised by the AMA. However, based on the information before it, and the late stage in the process of considering the application that this issue was raised, the ACCC is not in a position to form a considered view on this issue. Indeed, the ACCC considers that issues such as the minimum legal age for undertaking cosmetic procedures are best considered by relevant medical authorities.

**Adherence to and enforcement of the Code**

- 6.186 As noted at paragraph 6.44, the key considerations for the ACCC in assessing the public benefits generated by the Code are:
- whether the provisions of the Code foster the provision of accurate and complete information to consumers and encourage College members to act ethically and professionally and if they do,
  - whether the Code is likely to be effectively enforced and adhered to.
- 6.187 Paragraphs 6.48 to 6.185 of this determination address the first of these points. This section of the determination discusses whether the Code is likely to be effectively enforced and adhered to.
- 6.188 Clause 18 of the original Code provided for the Code to be reviewed annually by the College Council in consultation with relevant regulatory authorities.
- 6.189 In response to questions about how the College would verify that its members had complied with the Code the College submitted that such verification will be part of the review process under the Code.

*Issues arising out of the draft determination*

- 6.190 In the draft determination the ACCC expressed concerns that the College had provided little information about how the Code would be enforced.
- 6.191 Section 10 of the amended Code provides that the College will engage an independent person to undertake periodic audit checks in relation to compliance with the Code, in particular, issues relating to informed consent, information provided to potential customers and claims made about procedures and the need for procedures.
- 6.192 Clause 10.2 of the amended Code provides that such audit checks will include random checks on Members and clause 10.3 states that apparent breaches of the Code

discovered are to be referred to the Complaints Panel as if they were complaints. Clause 10.4 requires the results of audits to be provided to the Code Administration Committee.

- 6.193 The College advised that it was expected that there will be ‘mystery shopping’ of members and that a statistically significant random sample of members would be audited each year.
- 6.194 The College also provided a copy of a Code Implementation Plan to be adopted if the Code is authorised.
- 6.195 The implementation plan provides timeframes for:
- the College’s complaints panel to be appointed
  - the Code to be placed on the College’s website and disseminated to members
  - details about the Code and how it is implemented and copies of the College’s information brochure to be sent to members
  - the appointment of the Code Administration Committee and Appeals Committee Chairs.
- 6.196 The implementation plan also provides for:
- the College to undertake ad hoc checks on a sample of College members’ websites to gauge compliance with the Code
  - an independent compliance auditor to be appointed within six months and complete a compliance audit within 12 months
  - a guide to members on the Code and all relevant laws and guidelines to be placed on the College’s website within six months (in the conditions section note that this isn’t sufficient to address concerns)
  - a progress report to be provided to the ACCC by the College within six months.
- 6.197 More generally, the revised Code requires a Code Administration Committee, which has access to all matters considered by the Complaints Panel and Appeals Committee, to review the Code every three years. The Code requires that the College adopt recommendations of the Committee unless they give written reasons why a recommendation has not been adopted.
- 6.198 The Code also requires that the Complaints Panel and Appeals Committee submit annual reports to the College and that these reports be provided to the ACCC.
- 6.199 One submission lodged by a consumer argues that College members were not committed to the Code. The consumer lodging the submission stated that they had viewed the website of each NSW and ACT member of the College whose websites are linked to the ACCS membership directory and that 16 of the 35 website included representations that would raise concerns under the Code in relation to:



- use of testimonials
- offers of inducements to attract customers
- offers of finance facilities.

6.200 The submission also raises concerns that some websites provide online treatment booking facilities or online consultations.

6.201 RACS also questions whether complaints handling processes employed by the College to date have been effective.

6.202 One submission raises concerns that their complaint to the College about one of its members appeared to have not been considered in a timely manner despite the College indicating that it would be.

6.203 The College states that since 2004 it has considered fifteen formal complaints, five in relation to advertising, eight in relation to quality and standards of service and two in relation to fees. Of these the College advises that five resulted in expulsion, suspension or resignation, six resulted in other sanctions and four complaints were dismissed. The College states that seven of the complaints originated from patients, four from College members and four from other practitioners or medical authorities.

*ACCC view*

6.204 Ensuring widespread adherence to the Code by College members depends on both effective enforcement of the Code's provisions, and in particular effective processes for applying sanctions in respect of breaches of the Code, but also on the available sanctions being a sufficient deterrent to College members breaching the Code.

6.205 The Code's complaints and appeals processes, if effectively implemented, are likely to assist in assuring compliance with the Code. Similarly, the proposed audit checks and the College's implementation plan will, if effectively implemented, assist in identifying issues of non-compliance with the Code.

6.206 However, the ACCC has some concerns with the extent to which some College members are committed to adopting the behavioural standards of the Code.

6.207 It is likely that many College members will adhere to the Code irrespective of any process requiring compliance, both because many members are likely to consider the Code's provisions to be appropriate, and out of a desire to see the Code successfully implemented in the hope or expectation that successful implementation will enhance the standing of the College and the value of their membership.

6.208 However, as discussed in the ACCC's consideration of the public detriment generated by the proposed arrangements, 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/inability to obtain College membership would significantly impede a cosmetic surgeon's ability to compete. Therefore, the possibility of having sanctions applied against the member is unlikely, in itself, to provide sufficient incentive for some members to comply with the Code.

6.209 In this respect, it is relevant to note the submission provided by one consumer that 16 of 35 NSW and ACT College member websites linked to the College's own webpage included representations that would raise concerns under the Code. The ACCC conducted its own enquires about these websites and found that, on 22 May 2009:

- three promoted or offered finance for cosmetic procedures
- two provided patient testimonials and one had a section with testimonials promoted as coming soon
- two had online booking services
- five offered inducements to undertake procedures in the form of time sensitive discounts
- four offered other types of inducements such as:
  - a rewards programs based on procedures undertaken and referral of other patients
  - gift vouchers
  - discounts for 'bringing a friend.'

6.210 The College has noted that the Code is not yet in force and that concerns such as these highlight the need for the Code. However, while the Code is not yet in force it was, at the time that the ACCC conducted its review of College members' websites, prominently displayed on the College's website with no disclaimer to the effect that it is a draft Code and/or was not currently being adopted by members. Indeed, in the ACCC's view, any person viewing the Code on the College's website at that time, would have reasonably assumed that the Code had been implemented and that College members were, at that time, required to abide by it.

6.211 It would be expected that the vast majority of College members that were genuinely committed to the Code's behavioural standards would be adopting them irrespective of the existence of a Code requiring them to do so.

6.212 The number of College members identified as not currently complying with the standards that the Code will require of them if it is implemented raises questions about both the extent to which some College members are committed to these standards, and how effectively the College will be able to enforce the Code to change some members' behaviour if the Code is adopted.

6.213 To the extent that such concerns do arise, this calls into question the extent to which the benefits that may otherwise result from the behavioural standards of the Code being adopted will be realised.

6.214 The ACCC considers that the Code Implementation Plan developed by the College, if effectively implemented, assists in identifying issues of non-compliance with the Code.

6.215 The Code Implementation Plan developed by the College envisages that immediately upon authorisation being granted the Code will be put on the College's website as

official College policy. The Implementation Plan also provides for the Code to be emailed to each College member, along with details of how it is to be implemented within two weeks of authorisation being granted.

- 6.216 The Code Implementation Plan provides for the College to immediately begin checking College members' websites to gauge compliance with the Code and for the College to provide a report to the ACCC on its findings within three months.
- 6.217 Given the concerns expressed above, the ACCC considers that details of the Code and how it is to be implemented should be provided to members, and the College's check of its members' websites for compliance with the Code should take place, as soon as practical. The ACCC considers that the timetable proposed by the College facilitates this.
- 6.218 To ensure that this occurs the ACCC considers it appropriate to grant authorisation subject to a condition to provide certainty that the Code implementation plan is implemented in the manner proposed.

**C5: The College must implement the Code Implementation Plan at appendix B of this determination in the manner outlined in the plan, including implementing all proposed measures within the timeframes provided in the plan.**

- 6.219 The Code Implementation Plan also provides for the independent compliance auditor, to be appointed pursuant to clause 10.1 of the Code, to be appointed within six months of authorisation coming into effect and for the auditor to undertake annual compliance audits, the results of which are to be provided to the ACCC.
- 6.220 Given the ACCC's concerns regarding compliance with and enforcement of the Code the ACCC considers that this requirement should be incorporated into section 10 of the Code.

**C6: Section 10 of the Code must be amended to require that the independent auditor engaged by the College shall report the findings of periodic audit checks annually, on or before the anniversary of the date of authorisation coming into effect, to the Code Administration Committee and the ACCC.**

## **The Code and AMC accreditation**

### *Submissions*

- 6.221 The Department of Health and Ageing submits that the likely public benefits of the proposed arrangements would only accrue if recognition of the proposed speciality of Cosmetic Medical Practice and of the College as the provider of standards, training and certification was confirmed. In response the College submits that realisation of the public benefits of the Code is not contingent on Cosmetic Medical Practice being recognised as a speciality as the Code will protect consumers.

### *ACCC view*

- 6.222 The ACCC considers that to the extent that the Code does generate public benefits, these public benefits would be likely to result even if Cosmetic Medical Practice is not recognised as a speciality by the AMC.

6.223 Irrespective of whether the proposed specialty is recognised College members will continue to perform cosmetic procedures. Accordingly, any benefits which would result from implementation of the Code would continue to be realised.

### **The Codes standards and relevant state legislation**

6.224 The amended Code's preamble states that whilst all medical practitioners must adhere to relevant laws and guidelines, which vary from state to state, the Code highlights these responsibilities and sets additional and higher standards for members of the College.

6.225 In submissions about the amended Code, RACS and the MPBV contend that the Code does not set additional, higher, standards to those required by legislation and that, in some respect, sets lower standards. In particular, RACS and the MPBV submit that some clauses in the Code are inconsistent with, and/or set lower standards than *Victorian Advertising Guidelines for Registered Medical Practitioners* (the Victorian Advertising Guidelines) that have been developed by the MPBV to advise medical practitioners about the provisions of the *Health Professions Registrations Act 2005 (Vic)* (the HPR Act) and how the MPBV interprets these provisions.

6.226 The College submits that the MPBV is wrong in this assertion. The College states that under the Code members must adhere to all standards under all relevant laws, and that, in addition, the Code requires additional and higher standards.

6.227 The College submits that any discrepancies between its Code and Victorian laws are irrelevant because where such a discrepancy exists the Code requires that Victorian members follow Victorian laws.

6.228 The College further submits that the Victorian Advertising Guidelines are guidelines with a focus on medical services that are considered necessary. The College argues that cosmetic medical procedures do not fit within this model as they are not concerned with pathological conditions and are performed with the sole intent of changing a person's appearance at their request. The College submits that patients recognise that their desire for a cosmetic procedure is discretionary and not necessary.

6.229 In response the MPBV submits that notwithstanding that where there are discrepancies between its Code and Victorian laws the Code requires that Victorian members follow Victorian laws, the existence of inconsistent guidelines for medical practitioners would create a public detriment.

6.230 Two specific examples of inconsistencies between the Victorian Advertising Guidelines and the College's Code noted by the MPBV are in relation to:

- the use of before and after photos in advertising
- the use of the College's logos and post nominals.

#### *Use of before and after photos in advertising*

6.231 Clause 2.6 of the amended Code provides guidelines for the use of before and after photos in advertising.

- 6.232 In response to the first series of amendments to the Code, RACS and the MPBV submitted that clause 2.6 was inconsistent with the Victorian Advertising Guidelines. In particular, the MPBV noted that the Guidelines require that if before and after photos are used they acknowledge that the procedure being referred to is the only change that has occurred to the person being photographed.
- 6.233 In response to these concerns the College added to clause 2.6 a requirement that if the patient in the before and after photographs has had any treatments other than the procedure being advertised, this must be clearly stated.
- 6.234 The MPBV notes this amendment but states that clause 2.6 is still inconsistent with the Guidelines. The MPBV states that while the distinction is subtle, members of the public may be unqualified, or otherwise unable, to discern the impact that each procedure had on the appearance.

*College logos and post nominals*

- 6.235 Clause 2.13 of the Code states that the College logo or relevant Certification logo may only be used by doctors who are currently accredited Fellows, or Fellows of the Faculty of Medicine of the College. Clause 2.13 also states that the Certification logo can only be used if the doctor is currently compliant with the College CME programme, as evidenced by the CME certificate.
- 6.236 Clause 2.14 of the Code provides that if any doctor who holds a Fellow of the Australasian College of Cosmetic Surgery (FACCS) or Fellow of the Faculty of Medicine of the Australasian College of Cosmetic Surgery (FFMACCS) wishes to perform any invasive surgical procedure for which he or she is not accredited by the College, then that doctor shall not be entitled to use their College post nominals, nor mention the College in any way which might be seen or heard by a patient considering undertaking such a procedure.
- 6.237 The MPBV notes that the Victorian Advertising Guidelines state that consumers are best protected when practitioners advertise only qualifications that have been awarded by institutions accredited by the AMC.
- 6.238 The MPBV also notes that the Guidelines clearly state that it is an offence under section 80 of the HPR Act for an unregistered person to hold himself out, either explicitly or implicitly, to be a specialist unless his registration is endorsed under section 27 of the HPR Act.
- 6.239 The MPBV goes on to state that as the qualifications awarded by the College have not been accredited by the AMC the MPBV would not consider that the College logo or post nominals should be used in advertising and that the use of them risks an implication that the advertiser is a specialist whose registration is endorsed under section 27 of the HPR Act.
- 6.240 The MPBV states that use of the College logo and post nominals is a clear contradiction of the Guidelines.
- 6.241 The MPBV concludes that reliance by members of the public upon qualifications which are awarded by institutions not accredited by the AMC may cause public detriment by

exposing those members of the public to medical treatment of a standard and expertise which is unable to be verified and regulated.

- 6.242 RACS also raises concerns that the College's post-nominals suggest specialist or medical qualifications when they are not specialist qualifications approved by the Minister for Health and Ageing, are not relevant qualifications for the purposes of section 3D of the *Health Insurance Act 1973 (Cth)* and not otherwise recognised by the AMC.
- 6.243 The College argues that the AMC has not recognised, to date, any qualification in cosmetic surgery or cosmetic procedures. The College argues that if the MPBV position was followed, a doctor could inform a patient about a specialist qualification without informing them that that qualification has never been assessed for any cosmetic medical service but at the same time prevent doctors from explaining what their College cosmetic medicine or surgery qualification means.
- 6.244 RACS submits that, unless the AMC recognises otherwise, 'cosmetic surgery' is a sub-speciality forming part of 'plastic and reconstructive surgery' which is recognised and accredited by the AMC as a medical specialty.
- 6.245 RACS argues that only specialist qualifications approved by relevant Ministers and relevant legislation should be acceptable advertising. Alternatively, RACS submits, specialist qualifications should only be stated where they are accredited or recognised by the AMC.

*ACCC view*

- 6.246 Under section 95 of the HPR Act the MPBV has the power to formulate guidelines about the advertising of medical services. According to the definition of unprofessional conduct contained in section 3(1) of the HPR Act a contravention of the Guidelines may constitute unprofessional conduct and be investigated by the Board as a breach of professional standards.
- 6.247 The College's Code is designed to apply to members in all states and, in the College's opinion, sets higher standards than required by relevant laws and guidelines.
- 6.248 In respect of any discrepancy between the Code and, in particular, Victorian Advertising Guidelines, the College argues that because the Code requires relevant laws and guidelines to be followed, that if any discrepancy does arise, at a minimum, members will comply with relevant laws and guidelines.
- 6.249 However, this assumes that members adopting, and otherwise complying with the Code would be aware of, or take the time to examine the Code to establish if and where any discrepancies between the Code and relevant laws and guidelines arise.
- 6.250 The ACCC notes that under the College's proposed Code Implementation Plan it intends to develop a guide to the Code and all relevant laws and guidelines, to be placed on the College's website within six months of any authorisation coming into effect. While such a guide would presumably provide some guidance to College members, absent an explicit acknowledgement in the Code of each instance where discrepancies between the Code and relevant laws and guidelines exist it is likely that some members would, quite reasonably, assume that the Code is fully consistent with

relevant laws and guidelines, particularly as the College is promoting the Code as setting additional and higher standards than required by relevant laws and guidelines.

- 6.251 Indeed, nowhere does the Code draw any attention, even in a general way, to the fact there may be discrepancies between the Victorian Advertising Guidelines and the Code, and that where discrepancies do arise Victorian members must comply with relevant laws and guidelines. Rather, the Code simply states that members must act in accordance with all applicable laws and guidelines.
- 6.252 While it is ultimately the responsibility of each individual to ensure that they comply with all relevant laws, members of a professional association are entitled to assume that any Code of Practice their association requires them to follow is fully consistent with all relevant laws and guidelines. Any inconsistencies between the Code and Victorian Advertising Guidelines risks some College members practising in Victoria adopting the Code unaware that in doing so they may be adopting some standards that fall short of these Guidelines.
- 6.253 In making this assessment the ACCC is not forming a view on the relative merits of applicable laws in each state or territory. However, as a general principal, the ACCC does not consider that authorising arrangements that are inconsistent with, or promote behaviour that is inconsistent with, relevant laws and guidelines to be in the public interest.
- 6.254 In relation to the inconsistencies between the Victorian Advertising Guidelines and clause 2.6 of the College's Code dealing with the use of before and after photos, the College amended clause 2.6 when concerns about inconsistencies were raised. However, inconsistencies between the Code and the Guidelines remain. That being the case, it is not clear to the ACCC why the College, in seeking to address this inconsistency, did not simply adopt the requirements of the Guidelines.
- 6.255 As discussed above, the ACCC considers that inconsistencies between the Code and relevant laws and guidelines may encourage the adoption by College members of standards that fall short of these guidelines, possibly with the member being potentially unaware that they are doing so. To the extent that this does occur the ACCC considers that clause 2.6 of the Code, at least in so far as it is adopted by members of the College practicing in Victoria, will not generate a public benefit and may result in a public detriment.
- 6.256 The ACCC proposes to impose a condition of authorisation to address this concern.

**C7: Clause 2.6 of the Code must be amended to provide that where before and after photographs are used the procedure being referred to must be the only change that has occurred to the person being photographed. Clause 2.6 must also be amended to require that a clear statement that the procedure being referred to is the only change that has occurred to the person being photographed be included when photographs are used in advertising.**

- 6.257 In relation to the use of the College's logos and post nominals, the College has not sought authorisation for its logos or post nominals. However, the Code does include clauses addressing how and when these post nominals are used and in that sense, the Code promotes their use by College members in what, the College considers to be,

appropriate circumstances. Therefore the ACCC considers that the manner in which the College's qualifications are represented, in the Code, and in the associated information brochure to be developed and distributed by the College pursuant to clause 3.2 of the Code, is relevant to consideration of the current application.

6.258 Use of College logos and post nominals is clearly inconsistent with Victorian Advertising Guidelines that state that consumers are best protected when practitioners advertise only qualifications that have been awarded by institutions accredited by the AMC.

6.259 The ACCC proposes to impose a condition of authorisation to address this concern.

**C8: An additional clause (clause 2.15) must be added to the Code. This clause must read as follows.**

**“College members are required to comply with all relevant laws and guidelines in jurisdictions where they practice. Where an inconsistency between this Code and relevant laws or guidelines arises, College members must adhere to the relevant laws or guidelines.**

**In particular, College members practising in Victoria should be aware that Victorian Advertising Guidelines for Registered Medical Practitioners, developed by the Medical Practitioners Board of Victoria (MPBV) to advise medical practitioners about the provisions of the *Health Professions Registrations Act 2005 (Vic)* (the HPR Act) and how the MPBV interprets these provisions, state that:**

- **It is an offence under section 80 of the HPR Act for a medical practitioner to hold him – or herself out to be a specialist, either explicitly or by implication, or attempt to convey that perception to the public unless his or her registration has been endorsed under section 27 of the HPR Act.**
- **The Board considers that consumers are best protected when practitioners advertise only qualifications that have been awarded by institutions accredited by the Australian Medical Council.”**

6.260 As noted, pursuant to clause 3.2 of the Code the College will develop a brochure about cosmetic procedures that includes information about what the College's qualifications mean. In addition, pursuant to clause 3.3. of the Code, each College member will produce a written summary of their own training and experience. This brochure and written summary are discussed in greater detail at paragraphs 6.86 to 6.95.

6.261 The ACCC expects that the College will ensure that any information contained in the brochure and written summaries of members' qualifications and experience also complies with all relevant legislation and guidelines. For the reasons discussed above, the ACCC would have serious concerns if the manner in which information about College members qualifications and experience was represented was inconsistent with applicable laws and guidelines. If this was to occur this would call into question the public benefits that may otherwise result from adoption of the Code.



## **ACCC conclusion on public benefits**

- 6.262 The ACCC considers that arrangements that promote the provisions of accurate and complete information to consumers, assisting them in making informed choices about cosmetic procedures, are likely to produce a public benefit. Such arrangements also assist in raising practitioners' awareness of their professional and ethical responsibilities and, where backed by effective complaints and sanctions processes, act as a mechanism for ensuring that parties to the arrangements act ethically and professionally.
- 6.263 The ACCC considers that in respect of many of the provisions of the revised Code, College members complying with these standards would generate a public benefit by assisting consumers in making informed choices about cosmetic procedures and by assisting in raising practitioners' awareness of their professional and ethical responsibilities. The ACCC considers the amended Code to be a significant improvement on the Code for which authorisation was originally sought.
- 6.264 However, the ACCC remains concerned that some provisions of the Code are not effective in this regard. In particular the ACCC is concerned about the effectiveness of the Code's complaints and appeals processes.
- 6.265 The ACCC also has concerns about how widely information required to be provided by College members to consumers under the Code will be disseminated, how widely the Code will be adopted by College members and ensuring that the Code will be effectively enforced.
- 6.266 Most significantly, the ACCC notes the inconsistencies between the Code and the Victorian Advertising Guidelines developed pursuant to the HPR Act.
- 6.267 The ACCC has imposed conditions of authorisation to address these concerns.

## **Balance of public benefit and detriment**

- 6.268 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit that will outweigh any public detriment.
- 6.269 In the context of applying the net public benefit test at section 90(8)<sup>16</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>17</sup>
- 6.270 The ACCC considers 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

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<sup>16</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>17</sup> Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

considers it unlikely that, in the present environment, the loss of/or inability to obtain College membership would significantly impede a cosmetic surgeons ability to compete.

- 6.271 The ACCC considers that adoption of the revised Code, subject to the conditions outlined above, will generate a public benefit by assisting consumers in making informed choices about cosmetic procedures and by assisting in raising practitioners' awareness of their professional and ethical responsibilities.
- 6.272 Accordingly, the ACCC **grants** authorisation, subject to conditions, for an agreement between College members to adopt and give effect to the College's Code of Practice.

### **Conditions**

- 6.273 The Act allows the ACCC to grant authorisation subject to conditions.<sup>18</sup> Generally, the ACCC may impose conditions to ensure that the net public benefit test is met or continues to be met over the period of authorisation.
- 6.274 To ensure that the proposed arrangements will deliver a net public benefit over the period of authorisation the ACCC considers it appropriate to impose a number of conditions as outlined above.
- 6.275 A number of these conditions relate to processes for enforcing the Code and monitoring compliance with the Code. These conditions are imposed in addition to, not as a replacement for, the other activities the College has indicated it intends to engage in, for example in relation to implementing the Code and conducting audits of compliance with the Code.

### *Other proposed amendments to the Code*

- 6.276 The ACCC notes that a number of interested parties expressed concerns with the Code and recommended improvements and/or additions to the Code. The ACCC has granted authorisation subject to conditions addressing some of these concerns.
- 6.277 However, while the ACCC notes the additional concerns expressed by interested parties with other aspects of the Code, it is the role of the ACCC in assessing applications for authorisation to consider the arrangements before it.
- 6.278 While the ACCC is able to grant authorisation subject to conditions, it is not able to use this power in order to redraft an applicant's code. In the context of section 91(3) of the Act allowing the ACCC to grant authorisations subject to conditions, the Tribunal commented that:

it is not for the ACCC or the [t]ribunal to use the conditioning power and its discretion in order to construct and impose its ideal or preferred system of self-regulation. The imposition of a condition designed to enhance or increase the likelihood of benefits said to flow from a voluntary code is a far cry from redrafting the [c]ode.<sup>19</sup>

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<sup>18</sup> Section 91(3)

<sup>19</sup> Application by Medicines Australia Inc [2007] ACompT 4, p. 49.

6.279 Accordingly, it is not the role of the ACCC through the authorisation process to craft an ‘ideal’ code.

### **Length of authorisation**

6.280 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in light of any changed circumstances.

6.281 In this instance the College seeks authorisation for five years. The College did not elaborate on why it seeks authorisation for this period of time.

6.282 As noted, the ACCC considers that the extent of the public benefit that will actually result from the Code is somewhat uncertain. The ACCC has imposed a number of conditions to address this concern.

6.283 Given these concerns the ACCC considers that an early review of the extent to which a public benefit results from implementation of the Code is warranted. Accordingly the ACCC grants authorisation to the Code, subject to the conditions outlined above, for three years.

6.284 It is open to the College to reapply for authorisation at the expiration of this authorisation and, if at that time the College considers that the manner in which the Code has operated over the initial three years of implementation demonstrates that an authorisation of longer duration is warranted, to seek re-authorisation for such longer period as the College considers appropriate.

6.285 In the event that an application for reauthorisation is received by the ACCC, whether re-authorisation should be granted would be considered based on the circumstances at the time. In this regard, the reporting requirements contained in the Code, and those required by the ACCC as conditions of authorisation, will assist in making this assessment.

### **Authorisation is not endorsement**

6.286 As noted, the authorisation process is set out in the Act and only indicates that a code passes a certain legal test. In this case the ACCC is satisfied that, subject to a number of conditions being complied with, this legal test is satisfied.

6.287 Authorisation, with or without conditions, does not indicate that a code is best practice, and this conditional authorisation can in no way be held out as an endorsement or approval by the ACCC of the College’s Code of Practice.

## 7. Determination

### The application

- 7.1 On 6 November 2008, the Australian College of Cosmetic Surgery (the College) lodged application for authorisation A91106 with the Australian Competition and Consumer Commission (the ACCC). The College amended its application for authorisation on 16 March 2009 and 28 April 2009.
- 7.2 Application A91106 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 7.3 In particular, the College seeks authorisation for a contract, arrangement or understanding amongst its members in relation to the adoption of and giving effect to the College's Code of Practice.

### The net public benefit test

- 7.4 For the reasons outlined in Chapter 6 of this determination, and subject to the conditions below, the ACCC considers that in all the circumstances the contract, arrangement or understanding amongst College members in relation to the adoption of and giving effect to the College's Code of Practice 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.
- 7.5 The ACCC therefore **grants** authorisation to application A91106.

### Conduct for which the ACCC grants authorisation

- 7.6 The ACCC grants authorisation for a contract, arrangement or understanding amongst current and future members of the College in relation to the adoption of and putting into effect of the College's Code of Practice.
- 7.7 Authorisation is granted in relation to the adoption of and putting into effect of the College's Code of Practice, subject to the conditions outlined below, as it stands at the time authorisation is granted. Adopting and putting into effect any changes to the Code, other than those changes necessary to comply with the conditions of authorisation below, would not be covered by the authorisation.
- 7.8 The ACCC grants authorisation for a period of three years.
- 7.9 This authorisation is subject to the conditions outlined below.
- 7.10 This determination is made on 18 June 2009.

## Conditions

**C1: Clause 3.2 of the Code must be amended to require members to provide the College developed brochure, defined in clause 3.2, to all persons either at their first consultation or, where the first consultation is by telephone or video, by mail, email or other means prior to their first consultation.**

**Clause 3.3 of the Code must be amended to require members to provide the written summary of their own training and experience to all persons either at their first consultation or, where the first consultation is by telephone or video, by mail, email or other means prior to their first consultation.**

**C2: Clause 5.40 of the Code must be amended to provide that the Chair of the External Appeals Committee appointed by the College Council must not be a member of the College. Clause 5.41 of the Code must be amended to provided that one of the other two members of the Appeals Committee must not be a member of the College.**

**C3: Clauses 5.6, 5.7 and 5.50 of the Code must be amended to provide that full details of instances where the Chair of the Complaints Panel does not refer a complaint to the Complaints Panel, or the Chair of the Appeals Committee does not refer an appeal to the Appeals Committee, including details of the reasons why the matter was not referred, must be included in:**

- **the register of determinations made by the Complaints Panel and Appeals Committee maintained by the College pursuant to clause 6.1 of the Code, and**
- **the Annual report of the Complaints Panel and Appeals Committee prepared pursuant to clause 8.1 of the Code.**

**In the case of matters not referred under Clause 5.7, full details of the manner in which the complaint was dealt with must also be included.**

**C4: Section 8 of the Code must be amended to include a clause requiring the College to publish annually, including on the College's website, a report providing details of:**

- **the number of complaints and appeals received by the College in relation to alleged breaches of the Code**
- **the key issues involved in each complaint or appeal**
- **the outcome of each complaint or appeal, including, if the complaint was dismissed by the Chair of the Complaints Panel or Appeals Committee without being referred to the full Panel or Committee, the reasons for this**
- **any sanctions imposed**
- **whether other complaints about the member in question have been received in the past.**

**The details to be provided in this report do not extend to personal details about the complainant or the member complained about, or information that would identify the complainant or member complained about.**

**C5: The College must implement the Code Implementation Plan at appendix B of this determination in the manner outlined in the plan, including implementing all proposed measures within the timeframes provided in the plan.**

**C6: Section 10 of the Code must be amended to require that the independent auditor engaged by the College shall report the findings of periodic audit checks annually, on or before the anniversary of the date of authorisation coming into effect, to the Code Administration Committee and the ACCC.**

**C7: Clause 2.6 of the Code must be amended to provide that where before and after photographs are used the procedure being referred to must be the only change that has occurred to the person being photographed. Clause 2.6 must also be amended to require that a clear statement that the procedure being referred to is the only change that has occurred to the person being photographed be included when photographs are used in advertising.**

**C8: An additional clause (clause 2.15) must be added to the Code. This clause must read as follows.**

**“College members are required to comply with all relevant laws and guidelines in jurisdictions where they practice. Where an inconsistencies between this Code and relevant laws or guidelines arises, College members must adhere to the relevant laws or guidelines.**

**In particular, College members practising in Victoria should be aware that Victorian *Advertising Guidelines for Registered Medical Practitioners*, developed by the Medical Practitioners Board of Victoria (MPBV) to advise medical practitioners about the provisions of the *Health Professions Registrations Act 2005 (Vic)* (the HPR Act) and how the MPBV interprets these provisions, state that:**

- It is an offence under section 80 of the HPR Act for a medical practitioner to hold him – or herself out to be a specialist, either explicitly or by implication, or attempt to convey that perception to the public unless his or her registration has been endorsed under section 27 of the HPR Act.**
- The Board considers that consumers are best protected when practitioners advertise only qualifications that have been awarded by institutions accredited by the Australian Medical Council.”**

## **Conduct not authorised**

- 7.11 The authorisation does not extend to any conduct engaged in by College members in relation to the enforcement of the Code of Practice that would or may constitute an exclusionary provision.

## **Date authorisation comes into effect**

- 7.12 This determination is made on 18 June 2009. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 9 July 2009.

## Appendix A – ACCS Code of Practice



*The Australasian College of Cosmetic Surgery*

Raising Standards, Protecting Patients

[www.accs.org.au](http://www.accs.org.au)

### CONSUMER/PATIENT CODE OF PRACTICE

#### **A. Introduction**

Membership of the Australasian College of Cosmetic Surgery (ACCS) provides patients with an assurance that ACCS Members meet the highest standards. The aim of this Code is to protect the public by making these standards transparent and ensuring that they are met. The Code also establishes transparent complaints and external adjudication processes.

The ACCS promotes and endorses truthful, ethical and informative advertising, and the provision of appropriate information to patients and potential patients. It also requires a face to face consultation with the Member offering a procedure before any procedure is undertaken. These processes are designed to ensure patients are provided with comprehensive advice allowing them to make fully informed decisions before consenting to undergo a cosmetic procedure.

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.



To assist in compliance with laws and guidelines, the ACCS will provide Members with a guide of their overall responsibilities to consumers and to each other.

## **B. Interpretation**

“**Advertising**” applies to all promotional material and is to be interpreted broadly. It includes websites and all electronic media. It also includes any advertising carried out on behalf of a Member and conduct by a Member’s employees or agents or representatives. Those representatives include any third parties acting on behalf of members.

“**Cosmetic Medical Practice**” is defined by the College as operations, procedures and treatments that revise or change the appearance, colour, texture, structure or position of normal bodily features with the sole intention of improving the patient’s appearance or self-esteem.<sup>20</sup> It includes non-surgical cosmetic medical procedures and cosmetic surgical procedures.

“**FACCS**” means a Fellow of the Australasian College of Cosmetic Surgery.

“**FFMACCS**” means a Fellow of the Faculty of Medicine of the Australasian College of Cosmetic Surgery.

## **C. Code Administration Committee**

There will be a Code Administration Committee, comprised of at least 3 members. There is to be an independent Chair, being someone with experience of developing codes. Another member is to be a consumer representative nominated by an organisation such as the Australian Consumers Association. Further there is to be at least one member representing the College.

The Committee will review the Code tri-annually and report to the College on its review. It is able to make recommendations to the ACCS about the Code and its administration.

In its review the Committee shall consult with relevant regulatory bodies.

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<sup>20</sup> Adapted from definition adopted by the UK Department of Health. *Expert group on the regulation of cosmetic surgery: report to the Chief Medical Officer*, January 2005, p. 3. And see e.g. *Provision of cosmetic surgery in England: Report to the Chief Medical Officer Sir Liam Donaldson*, 2004.

In its review the Committee will have access to matters considered by the Complaints Panel and the Appeals Committee.

The College will adopt the recommendations of the Committee unless it gives written reasons why a recommendation is not accepted.

The review and the ACCS response will be placed on the ACCS Website and will be submitted to the ACCC.

The ACCS must collect and keep data that will assist the Code Administration Committee in its reviews.

## **The Code**

### **1. General Considerations**

Australasian College of Cosmetic Surgery Members have a duty to the public and to each other. That duty is not a duty to legal minima, but one that seeks to constantly improve standards and consumer welfare.

Members must:

- 1.1 practice with integrity and honour, in the best interests of their patients, with the patient's safety and quality of care being paramount;
- 1.2 conduct their professional affairs in accordance with all applicable laws, relevant professional guidelines and ethics, and in a manner that upholds the good reputation of the medical profession;
- 1.3 strive for the advancement of the speciality of cosmetic medical practice through research and development, ensure the maintenance of the highest standards through continued medical education and training, keep themselves up to date on legislative and ethical requirements relevant to being a medical practitioner and specialising in cosmetic procedures and
- 1.4 adhere to the College Constitution, By Laws and Codes.

In addition ACCS members must comply with the following guidelines:

## **2. Advertising and promotion**

- 2.1 Advertising must not contain false, misleading or deceptive statements, or create misleading impressions about the doctor or clinic or the services offered. It should provide balanced information on the procedures or products advertised and should not suggest these are risk free. Critical omissions can also be misleading.
- 2.2 Members must not mislead consumers about the need for any procedure.
- 2.3 Superlatives should not be used in any advertising unless they can be readily proven to be correct and as such are not misleading. For example, to claim that a particular breast implant has the “least” risk of a specific complication would be acceptable if true and supported by the peer reviewed literature. Such information is of value to consumers. To claim a practitioner is the “best” in any way is not permissible as it is a value judgement, not readily proven, which could mislead consumers.
- 2.4 Members must be able to substantiate any claims made in their advertising at the time the claims are made.
- 2.5 Comparative advertising should be used with caution. It can be valuable in conveying information to consumers but it must be correct and readily proven. For example, to claim a type of treatment is safer than another type of treatment is acceptable if true and supported by the peer reviewed literature. Again such information is of benefit to consumers.
- 2.6 Photographs may be used to display the results of treatment and or complications. ‘Before and after’ photographs should be presented with similar pose, presentation, lighting and exposure. Any uncomplicated results shown should be typical and be likely to be reproduced in a similar patient. Photographs must not be altered in any way other than to protect a patient’s identity. ‘Before and after’ photographs must be of the advertising doctor or clinic’s own patients and contain accurate and informative captions. If the patient in the before and

after photographs has had any treatments other than the procedure being advertised, this must be clearly stated.

- 2.7 Testimonials should not be used in advertisements.
- 2.8 Medical or surgical procedures should not be offered as inducements or prizes in competitions or contests, or as a way of generating business.
- 2.9 Offers of gifts or other inducements (for example time sensitive discount periods) shall not be used in order to attract potential clients.
- 2.10 Discounts for early payment should not be used as an inducement to commit to a procedure.
- 2.11 No Member will offer finance facilities as part of the services provided, except a credit card facility. In no circumstances should a Member accept any commission from a credit provider.
- 2.12 The College notes that in Victoria advertisements of a surgical (invasive) procedure shall include in a prominent place and in a visible fashion the following statement:

*“Any surgical or invasive procedure carries risks. Before proceeding, you should seek a second medical opinion”.*

Whilst this is not mandatory in other States and Territories, Members advertising in other States and Territories are encouraged to use such a statement.

### **College and Certification logo and post nominals**

- 2.13 The College logo or relevant Certification logo may only be used by doctors who are currently accredited Fellows, or Fellows of the Faculty of Medicine of the College. Additionally, the Certification logo can only be used if the doctor is currently compliant with the College CME programme, as evidenced by the CME certificate.
- 2.14 If any doctor who holds an FACCS or FFMACCS wishes to perform any invasive surgical procedure for which he or she is not accredited by the College, then that

doctor shall not be entitled to use their College post nominals, nor mention the College in any way which might be seen or heard by a patient considering undertaking such a procedure.

### **3. Guidelines for informed consent - applicable to all procedures**

- 3.1 Informed consent is a process, not simply the signing of a consent form. Members should give information about the risks of any intervention, especially those that are likely to influence the patient's decisions. Known risks should be disclosed when an adverse outcome is common even though the detriment is slight, or when an adverse outcome is severe even though its occurrence is rare.
- 3.2 All Members must make available to patients, before any procedure is agreed to, a College produced information brochure about cosmetic procedures. This must include information about what College qualifications mean and also outline the College's complaints process. The brochure must inform patients how to obtain a full copy of this Code of Conduct. To the extent possible the same information is to be on the College's website and on Members' websites, either directly or via a link to the College's website. The brochure will contain information about other routes for patients to make a complaint; for example Medical Boards and statutory health care complaint bodies. The brochure will also advise patients that a second opinion is advisable before making any decision to have a procedure.
- 3.3 Additionally all Members must have available for patients a written summary (for example in the form of a resume) of their own training and experience.
- 3.4 All Members must, before any procedure is agreed to, provide the patient with full disclosure of the fees and charges, and likely total cost of the procedure. Patients should be made aware that further costs could be incurred in the event of complications occurring.
- 3.5 Members must, before any procedure is agreed to, provide patients with information about:
  - how and where the procedure is performed;
  - who will be assisting in the procedure;

- possible complications and side-effects, their frequency and severity;
- any anticipated post operative scarring;
- whether the patient be required to go to a hospital;
- whether the patient will need to take time off work;
- the post-operative course and expected recovery time;
- possible alternative treatments where appropriate including the option of no treatment at all;
- the expected realistic outcome.

3.6 No procedure should take place unless the Member has consulted with the patient beforehand and has fully explained to the patient the procedure and any associated risks. Patients should be encouraged to ask questions at this consultation.

3.7 If a Member offers an invasive procedure to a patient which that Member has performed less than 100 times previously, then the Member must disclose to the patient, at the initial consultation, how many times the Member has performed the procedure before.

**Guidelines for informed consent for more invasive procedures with a significant risk of an adverse long term outcome**

3.8 The guidelines described in this section are in addition to the rules concerning Members' conduct described above. These guidelines refer to invasive procedures which have a significant risk of an adverse long term outcome. They are not relevant to temporary fillers or botulinum toxin treatment for example, to which all statutory requirements and the additional requirements for ACCS members as detailed above apply. They would apply, for example, to laser resurfacing, chemical peels with the potential to affect the dermis and to permanent fillers.

3.9 The patient must have at least one consultation, with the Member performing the procedure before the day of surgery.

3.10 For geographical reasons it is sometimes impractical for patients to meet the doctor face to face for their initial consultation. In these circumstances it is

acceptable for the patient to send photographs to the doctor and then for the doctor to have a telephone or video consultation with the patient. This can be considered to be the initial consultation with the doctor performing the procedure. If the patient elects to proceed, the doctor must see the patient face to face before the procedure, preferably at least one day before. It is accepted that there may be instances where, for logistical reasons, this face-to-face meeting can only occur on the day of surgery, but this should not be considered the norm. If the face-to-face meeting, being the exception, does not occur at least a day before the procedure, the reason for this must be properly documented.

- 3.11 It must be clearly stated to the patient that, if either the doctor or the patient decides at that meeting not go ahead for any reason, then a full refund of any monies paid will be provided. If a cancellation fee from the anaesthetist and/or the hospital might be incurred, the patient must be advised of this prior to paying any monies.
- 3.12 If there is a consultation with someone other than the Member performing the procedure, this is not an acceptable substitute for the process described in 3.8, 3.9 and 3.10 above, which must still occur.
- 3.13 If the doctor is inexperienced in the specific procedure contemplated, either because the doctor is new to the procedure or because the procedure itself is new, this should be disclosed to the patient at the first consultation, as per the 100 case rule indicated above.
- 3.14 At the end of the initial consultation the patient should be provided with a procedure-specific consent form to consider at home.
- 3.15 The patient should be told, and it should be stated on the consent form, to contact the doctor, by telephone or at another consultation, if they have any questions or need clarification of the consent form.
- 3.16 If there is doubt about which procedure would be most appropriate for a patient, or if the patient is unsure about having the procedure, the desirability of a

second opinion should be emphasised, reinforcing the advice in this respect contained in the information brochure.

- 3.17 Generally there should be a 'cooling off' period of at least five days between the initial consultation with the doctor performing the procedure and the procedure itself. It is accepted that there may be circumstances where, for practical reasons, this period may need to be shorter but it should never be less than one night. If the 'cooling off' period is less than 5 days the reasons for this must be properly documented and acknowledged by both the Member's and patient's signature.

#### **4. Post-Operative Care**

4.1 Each Member must:

- provide full and adequate post-operative care for their patients, including provision for emergency after-hours care. The post-operative surveillance should be appropriate for the magnitude of the surgery performed and to allow for early detection of and intervention in adverse outcomes; and
- provide adequate and appropriate on-going care, either by his or her own assessment and treatment, or by appropriate referral.

#### **5. Complaints Processes**

##### **5.1 Preamble**

The Rules dealing with the Complaints regime and disciplinary process adopt the concepts of natural justice. In this context ***natural justice***, also known as procedural fairness, has three main principles:

1. The Member complained of is provided with:

- a fair hearing;
- all information within a reasonable timeframe required to answer the allegations made against him/her; and
- an opportunity to respond to all allegations or decisions affecting him/her and;
- their response is genuinely considered.



2. The decision maker is impartial; and
3. The Complainant must be kept properly informed at all times.

### **Complaints**

- 5.2 All complaints must be in writing.
- 5.3 If a complaint is made to the College in writing that a Member has allegedly breached any part of the Code of Practice, the complaint will be handled in accordance with the procedures set out in the Code.
- 5.4 Upon the receipt of a written complaint the College will refer the complaint to the Chairman of the Complaints Panel.
- 5.5 On receipt of a written complaint, the College shall advise the Complainant and the Member involved in writing within 7 days that the matter has been referred to the Chairman of the Complaints Panel
- 5.6 The Chairman of the Complaints Panel shall not refer the matter to the Panel if:
  - (a) the Complainant does not agree, in writing, that their identity can be revealed to the Member complained of, unless that their identity is not necessary for the Panel to investigate the matter;
  - (b) the information provided by the Complainant does not allege nor disclose a breach of the Code;
  - (c) it is more appropriate that the complaint be dealt with by a Court or an external complaints, disciplinary, conciliation, or arbitration body or procedure;
  - (d) the Complainant is seeking compensation or reimbursement only and is not alleging that a Member has been in breach;
  - (e) the act or omission giving rise to the complaint occurred before the date of commencement of the relevant ACCS Rules;

- (f) the subject matter of the particular complaint was comprised in a same complaint by the same person (or any one or more of them) previously considered by the Complaints Panel and finalised;
  - (g) the complaint is against a non ACCS Member;
  - (h) the matter is being handled by a medical insurer; or
  - (l) the Chair of the Panel is of the view that the matter is frivolous or vexatious.
- 5.7 If, in the view of the Chair of the Panel, the breach is of minor nature and can be dealt with by advice to the Member the complaint will not be referred to the Panel. The Chair will inform the Complainant in writing of this decision and advise the Complainant that if he or she is not satisfied with this outcome the Complainant can insist the complaint be referred to the Complaints Panel and this then must occur.
- 5.8 Any complaints resolved under the process described in 5.7 above are to be included by the Chairman of the Complaints Panel in the annual report described in Section 8 below.

### **Complaints Panel**

- 5.9 The College Council will appoint a Complaints Panel. The role of the Panel is to consider complaints against an ACCS member alleging breaches of the ACCS Code.
- 5.10 The Panel shall have a minimum of three members at least one of whom shall have legal qualifications and at least two of whom shall not be a Member of the ACCS. The Chair of the Panel will be independent of the ACCS and shall have legal qualifications. At least one of the members shall be an ACCS Member.
- 5.11 No Member who is in any way concerned with the matter in question, or who is connected in any business entity, firm, corporation, or department with the Member accused or the party who originated the complaint, shall be a member of the Panel.
- 5.12 Panel processes must be conducted in private.

- 5.13 The Member complained of may be legally represented before the Panel, provided that:
- (a) the Panel is advised not less than 5 days prior to the date set down for any hearing of the intention of the particular party to have legal representation, and the name and contact details of each such legal representative, and
  - (b) the Panel may, if it is satisfied that legal representation has served or may continue to serve to delay the hearing of the matter, terminate the right of the party to have legal representation in which event the legal representative or representatives must depart the hearing and take no further part in it and the hearing must proceed in the absence of that legal representation.
- 5.14 No party may be compelled to appear at a hearing of the Panel, but any party to a hearing may provide written submissions and evidence to the Chair of the Panel at least 3 days before the hearing.
- 5.15 The Panel may make such procedural arrangements as it thinks fit, including directions for the provision of written submissions and evidence.
- 5.16 The Panel may conduct hearings as it considers fit, having regard to the necessity that adequate consideration be given to matters before it. However the Panel shall hold a hearing if the Member complained of asks that there be a hearing.
- 5.17 The laws and rules of evidence do not apply to proceedings before the Panel.
- 5.18 The Panel may obtain legal advice and have legal advisers in attendance at a hearing.
- 5.19 The Panel may conduct hearings or other meetings of the Panel in person or by other means, provided that all members of the Panel are able to hear and speak to each other.
- 5.20 All determinations and decisions of the Panel are to be made by a majority of the members of the Panel.

5.21 The Member complained of in any matter shall be informed, at least 14 days prior to any hearing, of:

- (a) the name of the Panel Chair and members of the Panel;
- (b) the exact nature of the complaint and the disciplinary charge that the Member will be required to address;
- (c) the time, date and place for the hearing;
- (d) the right of the Member concerned to be heard in regard to the allegations;
- (e) whether or not the person instigating the complaint may be called to give evidence and/or provide a written submission in statutory declaration form;
- (f) whether or not other witnesses may be called to give evidence and/or provide a written submission in statutory declaration form;
- (g) what material the Member should bring to the hearing.

5.22 The Complainant shall, at least 7 days prior to any hearing, be informed of the time, date and place of the hearing and whether or not they will be required to give evidence at the hearing.

### **Admission of Evidence**

5.23 No documents will be admitted into evidence that have not been made available to the Member complained of within a reasonable time prior to the hearing. This timeframe will be at the discretion of the Chair of the Panel. If any party wishes to introduce additional documentary evidence, the Chair may, if necessary, adjourn the hearing to allow the other party sufficient time to consider the evidence.

## **Hearing Procedure**

- 5.24 The procedures for the hearing shall be at the discretion of the Chair of the Panel.
- 5.25 A transcript of a hearing is to be kept and a copy given to the Member complained of and the person who instigated the complaint, if that person was asked by the Panel to be involved in the hearing. A fee may be charged by the College for the transcript.

## **Panel's Decision**

- 5.26 The Chair of the Panel shall furnish in writing to the ACCS Council, the Panel's decision, the reasons for the decision and details of any sanction to be imposed.

## **Sanctions**

- 5.27 Where the Panel determines that a Member has not been involved in a breach, the Panel shall make a determination to dismiss the matter.
- 5.28 Where the Panel determines that a Member has been involved in a breach, the Panel shall make a determination of breach against the Member complained of, and may impose one or more of the following sanctions:
- (a) reprimand the Member;
  - (b) admonish the Member publicly;
  - (c) counsel the Member;
  - (d) suspend the Member from membership of the ACCS, for such period and on such terms or conditions as the Panel thinks fit;
  - (e) where the Member is already the subject of an order for suspension, continue that suspension for such period and on such terms or conditions as the Panel thinks fit;
  - (f) require the Member to take such steps as the Panel may determine to correct the effects of any breach found to have been engaged in;

- (g) require a payment to the ACCS to be used as the Panel recommends, such penalty to be no more than \$10,000.00 for the first instance and no more than \$20,000.00 for any subsequent breach;
  - (h) require the Member to undertake such education or compliance program as the Panel thinks fit, provided that the purpose of such program is to reduce the likelihood of future breaches by the Member;
  - (i) expel the Member from membership of the College;
  - (j) adjourn the proceeding subject to compliance with such conditions as to sanctions as the Panel may otherwise impose in accordance with the ACCS Rules;
  - (l) order the Member to reimburse a patient; or
  - (m) impose any other Order that the Panel thinks fit.
- 5.29 Where the Panel considers the matter to involve a serious risk to public safety and patient welfare it must refer the matter to the relevant regulatory authorities in the relevant State or Territory.
- 5.30 Where the Panel is of the view that a Member has unreasonably failed or refused to co operate with the Panel then that non-cooperation can be held to be a breach of the Code and the Panel can impose an appropriate sanction until such time as the Member cooperates.
- 5.31 The Panel can award reasonable costs at its discretion against an ACCS Member involved in the matter before it.
- 5.32 The Panel shall have a pre-sentence process, to relay likely sanctions to the Member complained of, and give that Member an opportunity to state any objections to likely sanctions.
- 5.33 When determining any sanction, the Panel may take into consideration any penalty imposed on the Member as a result of external legal proceedings brought against that Member in relation to the same matter.
- 5.34 A suspended Member must comply with the ACCS CME requirements and provide a return for each year as normally required.

- 5.35 If a suspended Member breaches the conditions of suspension, then the penalty shall be expulsion from Membership.
- 5.36 The Panel shall have the power to stay any sanction pending an appeal. The member involved in an appeal must apply to the Panel for a stay and provide reasons for a stay or partial stay.

### **Notification of Decision**

- 5.37 The Member complained of and the party who instigated the complaint shall be informed in writing of the Panel's decision, the reasons for the decision, and any rights of appeal against the decision.
- 5.38 The Panel will issue a written determination within 30 days of its decision.
- 5.39 The Member concerned shall be provided with a copy of the Panel's written determination.

### **External Appeals Committee**

- 5.40 The External Appeals Committee, shall be a three-member appeal body, including the Chair, appointed from time to time by ACCS Council. The Chair, who must possess legal qualifications, shall be appointed by Council. The Committee is not to be a standing Committee, but established when there is an appeal.
- 5.41 The Chair will recommend the other two members to the Council. The Council will accept the recommendations unless any appointments raise issues of conflict of interest. One member recommended by the Chair shall be an ACCS member with relevant experience in the matter before the Committee.

### **Appeal Process**

- 5.42 The Member complained of may, within 21 days of being notified of the Panel's decision, appeal against that decision by notice in writing to the Chair of the Appeals Committee.

- 5.43 The College can also appeal a Panel decision and must do so within 21 days of the decision.
- 5.44 The Chair of the Appeals Committee shall notify the Chair of the Complaints Panel when an appeal has been lodged and shall request copies of the relevant correspondence and records of proceedings held by that Panel. This documentation may include:
- (a) the original complaint;
  - (b) the charge formulated from this complaint;
  - (c) all correspondence and written evidence in relation to the matter and;
  - (d) the record of the Panel's hearing, if any.
- 5.45 This material will be provided to the Appellant.
- 5.46 The Chair of the Committee will also advise the original Complainant of an appeal being lodged.
- 5.47 The Appellant is to notify in writing the basis of the appeal including all documentation within 21 days of lodging the appeal. If the Appellant considers more time is necessary to prepare the appeal, the Appellant may submit a request in writing to the Chair of the Appeals Committee for an extension of time.
- 5.48 Parties to the appeal, other than the Appellant, shall provide written responses to the Appellant's submission within timeframes determined by the Chair of the Appeals Committee.
- 5.49 If the Appellant does not comply with the timeframe determined by the Appeals Committee Chair and an approval for extension of time has not been granted by the Chair of the Appeals Committee, the appeal shall be deemed to be abandoned and the parties informed accordingly in writing.
- 5.50 Where the Chair of the Appeals Committee is of the view that the material submitted by the Appellant does not support a valid appeal, the Chair can dismiss the appeal and inform the parties in writing,



### **Withdrawal of Appeal**

- 5.51 An Appellant may withdraw an appeal by giving notice in writing to the Chair of the Appeals Committee.
- 5.52 A withdrawal must be received no later than seven days before the day scheduled for any hearing. After this time the Appellant will be responsible for any costs incurred by the Appeals Committee.

### **Conduct of Appeal Hearing**

- 5.53 The procedure and conduct of the appeal hearing will be at the discretion of the Chair of the Appeals Committee, including the involvement of the original Complainant.
- 5.54 The Appeals Committee will not, except where the Committee requests additional material, accept any additional material once the hearing has commenced.
- 5.55 Appellants may be represented by legal counsel or other person on terms and conditions set by the Appeals Committee.

### **Consequences of Appeal**

- 5.56 The Appeals Committee may uphold the appeal, dismiss the appeal or may vary the sanction imposed by the Panel.
- 5.57 The Appeals Committee must give written reasons for its decision.
- 5.58 The ACCS Council must be informed of the Appeals Committee's decision.

### **Action by Council**

- 5.59 The ACCS Council cannot overrule or vary the decision of the Appeals Committee.

### **Costs Awarded by the Appeals Committee**

5.60 Reasonable costs of the appeal may be awarded by the Appeals Committee, either in favour of the Appellants or against the Appellants;

### **Notification to Parties**

5.61 The Chair of the Committee shall advise the parties of the Appeals Committee's decision in writing. The original Complainant is also to be advised of the outcome of any appeal.

### **Quorums**

5.62 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 two Members, including the Chair of that Committee.

### **Keeping Complainants informed**

5.63 The College may keep a person instigating a complaint informed of progress in handling the complaint, provided always that the College must not provide any information to a Complainant in relation to the progress of the complaint where:

(a) to do so may expose the College or the Complaints Panel or Appeals Committee to liability for civil damages;

(b) to do so would or could prejudice, impede or in any other manner adversely affect the investigation of the complaint or;

(c) to do so would deny procedural fairness to the Member, the subject of the complaint.

## **6. Publication of decisions**

6.1 The College must maintain a Register of all determinations made by the Complaints Panel and the Appeals Committee and make the Register available

for inspection by Members and relevant regulatory authorities. otherwise make available

- 6.2 The College may, publish to Members, any other persons or the public generally the content of, or an extract from, or précis of, any determinations by the Complaints Panel and the Appeals Committee and the register maintained by the College.
- 6.3 The College shall publish regular information about the outcome of disciplinary matters including an annual overview of the operation of the Colleges disciplinary regime.
- 6.4 Where a Member has been suspended or expelled the College shall advise relevant State and Territory Medical Boards.

## **7. Indemnities**

- 7.1 The College will indemnify each member of the Panel and Appeal Committee against any claim, action or proceeding brought against that person by any other person arising out of or in connection with, a proceeding before the Panel or Committee, or any order, determination or decision made by the Panel or Committee, and this indemnity will extend to the conduct of the defence of any proceedings and the payment of any costs thereof.
- 7.2 The indemnity does not extend to actions brought by the College against any person.

## **8. Annual Report**

- 8.1 The Complaints Panel and Appeals Committee shall submit an Annual Report to the ACCS.
- 8.2 Those Annual Reports will also be submitted to the ACCC.
- 8.3 Those Reports will be provided to the Code Administration Committee.

## **9. Assistance to the Complaints Panel and Committees**

- 9.1 The College will provide appropriate resources to the Complaints Panel and Appeals and Code Administration Committees in order for them to undertake their tasks.

## **10. Compliance Audits**

- 10.1 The College will engage an independent person to undertake periodic audit checks in relation to compliance with the Code, in particular, issues relating to informed consent, information provided to potential customers and claims made about procedures and need for procedures.
- 10.2 Such audit checks will include random checks on Members.
- 10.3 Apparent breaches of the Code so discovered are to be referred to the Complaints Panel as if they were complaints.
- 10.4 The results of such audits are to be provided to the Code Administration Committee.

## **11. Enforcement**

- 11.1 The College Council will enforce any Orders of either the Panel or the Appeals Committee.
- 11.2 Where a Member fails or refuses to comply with an Order of the Panel or the Appeals Committee, the Council will either suspend or expel the Member, as the Council deems appropriate.

# **Appendix B – ACCS Code Implementation Plan**

## **ACCS INDICATIVE CODE IMPLEMENTATION PLAN**

The programme starts as from when ACCC authorisation determination is made. It is understood that there is a 21 day appeal period and if there is an appeal any steps may need to be deferred.

- **Chair of Complaints Panel is to be appointed immediately and the rest of the Panel to be appointed at the same time or within 1 week.**
- **Code to be immediately put on ACCS website as official ACCS policy (it is currently on website as a draft).**
- **ACCS to commence ad hoc checks on a sample of member's websites to gauge compliance with the code. ACCS to report to ACCC within three months on the results of such checks.**
- **Within 2 weeks the College is to email to each member with details of the final code and how it is to be implemented and attention is to be drawn to particular issues of concern and action by members.**
- **Within 2 months the proposed Information brochures are to be sent to each member with instruction on their use. In the meantime the brochure will be on the ACCS Website.**
- **Within 1 month Code Administration Committee Chair is to be appointed and asked to make recommendation to the College on other members.**
- **Within 1 month Chair of External Appeals Committee is to be appointed and be asked to make recommendation to the College re other members.**
- **Within 6 months the independent compliance auditor to be appointed and compliance audits to be done within 12 months of the authorisation becoming effective. Such audits to be done within each 12 month period and any report to the ACCS by the auditor to be sent to the ACCC.**
- **Within 6 months, a comprehensive Guide to members on the Code and all relevant laws and guidelines to be placed on ACCS website.**
- **Within 6 months ACCS to report to ACCC re progress.**

**ACCS**

**JUNE 2009**