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Mr Gavin Jones
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

Dear Mr Jones

Australasian College of Cosmetic Surgery ("ACCS") application for authorisation A91106 – final determination

The Royal Australasian College of Surgeons ("**RACS**") is in receipt of your correspondence dated 18 June 2009 in which you enclosed the ACCC's determination in the above application.

The RACS acknowledges that the ACCC appears to give careful consideration to the concerns that have been raised, and has sought not to intrude on the merits of medical regulation where the ACCC acknowledged it was not in a position to assess those merits. The RACS also notes the stringent conditions imposed on the ACCS which require additional changes to the ACCS Code of Conduct ("**ACCS Code**").

However, the RACS wishes to express its strong disagreement with the ACCC's views and the conclusions ultimately reached by the ACCC. The RACS also wishes to record its dissatisfaction with the practical outcomes of the determination that will be detrimental to the public interest as further detailed below.

1 Outcome of determination does not address concerns

From our reading of the submissions from six professional bodies (including the RACS), two regulatory bodies (medical boards), five Health Departments and three consumers, the ACCC has failed to adequately address the concerns that have been raised, and in some cases has misinterpreted or played down the significance of the submissions made by those bodies.

Most bodies would acknowledge that the "cosmetic surgery industry" is one that requires more stringent regulation and appropriate oversight. That was indeed the thrust of *The Cosmetic Surgery Report, Report to the NSW Minister for Health, October 1999* ("**Cosmetic Surgery Report**"). The ongoing problems with advertising guidelines prompted the Medical Practitioners Board of Victoria ("**MPBV**") to revise its advertising code. The MPBV made submissions that the ACCS Code is weaker than the requirements in Victoria and indeed will confuse the public due to the use of post-nominals that are not allowed in Victoria. The RACS does not believe it was appropriate to deal with such systemic issues occurring throughout Australia by simply including a condition on authorisation specific to Victoria. A more substantive consideration of the public detriment occurring in this area was needed.

The ACCS will now be encouraged to retain and perpetuate the ACCS Code in a way which will confuse the public. The RACS would be saddened, but not surprised, if others were to develop codes of conduct based on the ACCS Code (because it was authorised by the ACCC) and then unwittingly adopt the substantial shortcomings in the ACCS Code which were identified but remain unaddressed.

2 Public confusion as to the difference between "authorisation" and "endorsement or approval"

The second dominant theme of the submissions was that the processes required under the *Trade Practices Act 1974* (Cth) for authorisation are not appropriate for a code of conduct as it applies to a professional group providing health services. The RACS is not aware of any other professional group that has believed it requires authorisation by the ACCC to be protected from competition laws under the *Trade Practices Act* in order to improve standards.

Whilst the ACCC is obliged to apply the test of net public benefit to the ACCS application, it unfortunately has not taken any perspective of the confusion that this will generate in the mind of the public. This issue was raised in several submissions but addressed in only a limited way the statement at paragraphs 6.286 and 6.287 that:

> ... the authorisation process is set out in the [Trade Practices] 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, 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.

The RACS acknowledges that the ACCC has pointed out that "authorisation" is not "endorsement or approval". However, the practical reality is that the public is not aware of this distinction and looks to the ACCC as a public authority that protects consumers. The fact that the ACCC is only applying a legal test under the *Trade Practices Act* is unappreciated by the public at large. Unfortunately, this means that the public will reasonably assume that the ACCC, alongside other bodies:

- is a regulator of medical codes of conduct;
- has investigated best practice;
- has independently determined best practice; and
- on the approval of the ACCS Code, endorses the detail within the ACCS Code.

This particularly arises from the ACCC's willingness to engage in a clause by clause analysis of the ACCS Code and the imposition of conditions to modify specific provisions.

It is in this application of public detriment that the ACCC has failed to take into account advice from other professional bodies and also Medical Boards and various Health Departments. These other groups understand best practice and patient behaviour, and have given advice that it is too soon or not appropriate to endorse the ACCS Code.

The RACS notes that this public detriment is already occurring. Despite the ACCC stating that authorisation is not "endorsement or approval", the RACS wishes to draw the ACCC's attention to an article by Ben Packham, "Cosmetic cowboys lassoed", *Herald Sun*, 20 June 2009 (a copy of that article is annexed). It incorrectly states that:

> The competition watchdog has ***approved the code***, drawn up by the Australian College of Cosmetic Surgery, after rejecting an earlier version. ...
>
> Australian Competition and Consumer Commission acting chairman Peter Kell said the code was ***approved*** after improvements were made. (*Emphasis added*)

It appears from the above extract that not only has Commissioner Kell been misquoted, but that the author appears to have misunderstood the distinction which the ACCC has unsuccessfully emphasised. Given the lack of resolve by the ACCC, the community will then see the ACCS as broadly representing that they are "authorised by the ACCC".

The RACS considers it is not appropriate to allow the ACCS to represent the ACCS Code as "authorised by the ACCC". Whilst such statements may be strictly true, they will obviously mislead the average consumer. Even the presentation of such statements such as those at paragraphs 6.286 and 6.287 of the determination, would be lost on the consumer, and would ultimately be misleading to the community at large.

The RACS highlights that only the withdrawal of authorisation will prevent this ongoing mischaracterisation of the authorisation process under the *Trade Practices Act*. Indeed, by not withdrawing the determination, the ACCC would be seen to be deliberately perpetuating this misconception.

3 Future development of the industry

In the determination, the ACCC recognised that it is not in a position to:

- assess whether, as contended by RACS, "cosmetic surgery" should be considered as a sub-specialty forming part of plastic and reconstructive surgery (paragraph 6.8); and
- comment on the ACCS' application to the Australian Medical Council ("**AMC**") for the area of "cosmetic medical practice" to be recognised as a specialty (paragraph 6.31).

Despite these remarks, the RACS notes with dissatisfaction that the ACCC implicitly endorsed the use of the phrase "cosmetic surgery" as defined in the Cosmetic Surgery Report and recognised a market for "cosmetic procedures performed by a range of medical practitioners" for the purposes of the legal test under the *Trade Practices Act*. The RACS regrets the ACCC's inconsistent and interchangeable use of "cosmetic surgery", "cosmetic procedures" and "cosmetic medical practice" in the determination.

The AMC refused to contribute to the above issues. They clearly stated that Cosmetic Medical Practice was yet to be a recognised medical specialty and that the ACCS was yet to be recognised as an organisation able to provide guidance on standards, training or ongoing professional development. This issue is still actively being evaluated. From the public's perspective, it is confusing that the ACCC can weigh the public benefit and public detriment of a medical code, yet on the other hand does not believe it has the expertise to make judgements about clinical practice. It is also surprising that the ACCC is making parallel decisions on the assumption of certain outcomes. This degrades the good faith efforts of organisations like the RACS in contributing to policy outcomes, and calls into question the role of the AMC and the Australian Health Ministers in recognising medical specialties.

Ideally, the ACCS Code could have been put to one side until the AMC completes their evaluation of the proposed specialty. Indeed if the issues highlighted by the ACCS have such significance then they should be incorporated into the National Code of Conduct ("**National Code**") that the AMC is finalising on behalf of all medical practice, as discussed below.

4 Development of a National Code of Conduct

The next major reservation is that although there are some measures within the ACCS Code that should be developed further into robust measures, this needs to be undertaken by a group with authority and appropriate expertise spanning both medical and legal regulation.

The RACS understands that the AMC is finalising their own code of conduct that is being prepared at the request of the Australian Health Ministers. The AMC is currently undertaking this work and if the ACCC felt these issues should have been addressed the ACCS Code should have been referred to them for appropriate review and inclusion in the National Code being developed. This will be presented to the Australian Health Ministers at some stage in the near future. If the AMC was not the appropriate body then at least a group that had some

formal recognition should carry this forward. In the medical college arena, the current formal recognition is provided by the AMC when an area becomes a recognised specialty. The ACCS has an application in front of the AMC at the moment but the decision making process will appear to have been pre-empted by the ACCC.

The AMC reporting to the Australian Health Ministers is the most appropriate forum for this work, as the Ministers will be able to ensure that their state or territory's legislation and policies are made consistent with that National Code. It can be expected that this will become the best practice and recognised standard for all medical practitioners. This can be contrasted with ad hoc development of the ACCS Code, and the ACCC's resort to imposing conditions in response to ad hoc concerns raised by stakeholders. The RACS queries whether the ACCC was reliant on stakeholders raising regulatory and policy issues that affect whether there is public benefit in authorising the ACCS Code.

5 Problems with the implementation of the ACCS Code

Even within the ACCS Code as modified by the stringent ACCC conditions there are issues of substantial regional variation and concerns that have prompted strong conditions in implementation. In the days of internet based health information access, practitioners may be violating requirements in Victoria whilst practising in Southern New South Wales or beyond.

The MPBV has highlighted the inconsistencies between what is in the ACCS Code developed "on the run" and what is provided under the provisions of the *Health Professions Registration Act 2005*. In particular MPBV has highlighted how use of the post-nominals applying to the ACCS is not appropriate as they are not recognised under the appropriate legislation. Victoria has approximately twenty five percent of the population of Australia where key components of the ACCS Code are not applicable or membership of the ACCS will not be able to be demonstrated easily. Equally internet access to web-sites where this type of information will be readily available and will immediately violate cross border sensitivities.

The ACCC appears to avoid any conclusion about the volume measure put forward by the ACCS by relying on the provision of other information. The RACS and Australian Society of Plastic Surgeons have highlighted previously how doing 100 procedures does not guarantee success or quality. Volume measures do not indicate quality. Unfortunately at times they can indicate the absolute opposite. The appropriate use of surgical techniques and the careful selection of patients are keys to the least number of adverse events. The RACS is astounded that the ACCC believes that the provision of other information regarding skills and experience will be sufficient to balance the deficiencies in the "volume measure". It is plainly an unacceptable outcome and in addition will serve to encourage other medical practitioners to use deficient volume measures in their advertising.

6 Capacity of the ACCS to comply with their implementation plan

RACS has raised on a number of occasions the very inappropriate nature of the development of this code over multiple revisions. The ACCC has acknowledged this but also allowed the authorisation process to be extended and continued. This calls into question proper policy development principles in this case. From the initial and totally inadequate document that was presented in 2008, there is no doubt a more robust ACCS Code at the end of this process. However the rapid progression would have been lost on the ACCS who as a membership based organisation need to provide some broader imprimatur to what is now becoming the ACCS Code. The ACCC recognised that it was unclear whether the ACCS Code had in fact been adopted by the ACCS.

This substantial issue has been highlighted in the assessment of web-sites as undertaken by the writer of one submission and the ACCC's determination. There appears to be a substantial disconnect between what is accepted behaviour by the broader membership of the ACCS and development of the ACCS Code. The ACCC acknowledges this by placing heavy expectations on the implementation plan and reporting methodologies that underscore a disbelief in the capacity of the ACCS in undertaking a monitoring role.

Conclusions

With due respect, the ACCC has come to conclusions with which the RACS cannot agree. While the RACS acknowledges that the ACCC is required by the *Trade Practices Act* to conduct the authorisation process, it has allowed the application of tests for authorisation to be applied out of context, to issues that require different measures, being advocated by groups for which there has been no formal assessment of capacity and according to a time line that is making assumptions about formal applications in other domains. It has requested the opinions of key stakeholders and progressively ignored their collective advice. It has done this on the narrow interpretation of legalistic tests that the public will not understand. The authorisation process under the *Trade Practices Act* is not intended to be applied in this manner, and certainly should never give cause for consumers to be misled.

In particular, the RACS is disappointed that the practical outcome of the ACCC determination is a regrettable contribution to:

- public confusion as to the ACCC's role in "authorising" but not "endorsing or approving" the ACCS Code;
- further recognition of a "cosmetic industry" despite the active consideration by the AMC of whether there is a discrete and recognised medical specialty; and
- a negative impact on the work by the AMC to establish and implement a National Code for all medical practitioners, which would ultimately be of greatest benefit to consumers and medical practitioners alike.

The RACS strongly disagrees with and regrets the outcome which has been reached by the ACCC in this matter. We appeal to the ACCC to reconsider.

Yours sincerely

Professor Ian Gough
President

ANNEXURE

Ben Packham, "Cosmetic cowboys lassoed", *Herald Sun*, 20 June 2009, http://www.news.com.au/heraldsun/story/0,21985,25661497-662,00.html, accessed 26 June 2009.

Cosmetic cowboys lassoed

BREAST enhancements, tummy tucks and botox injections will come with detailed warnings in a new code to bring cosmetic cowboys into line.

Before and after photos will also have to be shot in similar poses, with similar lighting; and operations must not be offered as raffle prizes.

The competition watchdog has approved the code, drawn up by the Australian College of Cosmetic Surgery, after rejecting an earlier version.

Members of the college will have to prove they have done proper training before being accredited.

The code will require college members to fully explain the risks of procedures before giving patients their new look.

"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," it says.

The code requires cosmetic surgery advertising to be balanced and "should not suggest these are risk-free".

"Advertising must not contain false, misleading or deceptive statements, or create misleading impressions about the doctor or clinic or the services offered," it says.

"Before and after photographs should be presented with similar pose, presentation, lighting and exposure."

It calls for cooling off periods of five days, but this could be shortened to as little as one night in some cases.

"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," the code says.

The college has been fighting for years for recognition of the specialty amid stiff resistance from the Australian Society of Plastic Surgeons.

Australian Competition and Consumer Commission acting chairman Peter Kell said the code was approved after improvements were made.

"For the code to offer benefits to consumers it is important that it is complied with and effectively enforced," he said.