

Our Ref: 280204
Your Ref: A91360



15 August 2013

BY EMAIL: David.Hatfield@accc.gov.au

Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

ATTENTION: Mr David Hatfield

Dear Sir

Australian Society of Ophthalmologists Inc Application for Authorisation - A91360

We refer to the pre-decision conference convened in connection with the abovementioned Application on 5 August 2013.

We are instructed that the ACCC has sought a further summary of our client's position in connection with the Application. The summary sought is set out below.

The Nature and Scope of the Proposed Conduct

1. The Proposed Conduct is described in paragraph 17 of the Application, as follows: *"The authorisation relates to the discussion of and, if relevant, the making of or giving effect to contracts, arrangements or understandings between two or more ophthalmologists who are members of the ASO and practice in a shared practice as to the fees to be charged for ophthalmology services provided in the practice."*
2. The Proposed Conduct only applies *within* a shared practice and not *between* shared practices. Accordingly, the scope of the Proposed Conduct is very narrow. If authorised, it will facilitate common fee arrangements within practices which (at their largest) constitute less than one percent of the market.¹ The scope of the Proposed Conduct is therefore minute and far narrower than comparable conduct previously authorised by the ACCC.²
3. The Proposed Conduct is voluntary.
4. Furthermore, the ASO has also indicated that it is prepared to the imposition of a geographic restriction on the Proposed Conduct, such that it is only authorised in the

¹ The average size of a shared practice is three practitioners – refer paragraph 15 of the Application. If there are 810 ophthalmologists in Australia, then such shared practice would amount to 0.37% of practitioners. If shared practices grow to 6-8 practitioners, then the Proposed Conduct could relate to up to 0.74 to 0.98% of practitioners, per paragraph 21.2 of the ASO's submission of 25 July 2013.

² In the Vision Group Application, for instance.

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event that the relevant shared practice faces competition from another/other ophthalmologists within a 10 km radius.

Public Benefits of the Proposed Conduct

5. The ASO has identified the following public benefits which arise from the Proposed Conduct:

- 5.1 Facilitating continuity of service and making patient services more readily and widely available. This is particularly important for urgent conditions and conditions which require ongoing treatment. The ASO has made it quite clear that both such conditions comprise a significant and important part of the practice of ophthalmology.³ The Proposed Conduct seeks to break down barriers to cross-referral and make emergency treatment process simpler and more efficient.
- 5.2 Providing certainty and predictability in price of ophthalmic care. Informed financial consent (**IFC**) occurs on two levels – at the referral stage and at the shared practice itself.⁴ The Proposed Conduct seeks to simplify the IFC process, remove uncertainty and facilitate efficiency. This will reduce patient anxiety and confusion about the treatment process, as well as fees.
- 5.3 Increasing the range of ophthalmological services available to meet demand.
- 5.4 Increasing the level of efficiency with which ophthalmological services are provided. The Proposed Conduct will achieve this by simplifying the IFC process, creating operational efficiencies and reducing the extent of fee-related enquiries which are necessary.
- 5.5 Cost benefits. It is expected that administrative and operational efficiencies will place downward pressure on prices and lead to cost savings for patients. Furthermore, the ASO believes that the Proposed Conduct will **not** lead to increased prices because:
 - 5.5.1 It will not affect inter-practice competition, which will continue to be strong.
 - 5.5.2 Competition on price within shared practices is not material in any event (it is noted that the ACCC acknowledged this to be the case in the Vision Group Authorisation).
 - 5.5.3 The pre-existing restraints on price will continue to apply.
 - 5.5.4 Competition in the form of substitute services (eg optometrists) will remain unaffected.

The ASO believes that these restraints are stronger than the restraints identified in the comparable authorisations granted to dentists, the Vision Group and GPs.

³ Refer, for example to paragraphs 1-6 of the ASO's submission of 25 July 2013.

⁴ Refer paragraph 4 of the ASO's submission dated 3 June 2013.

- 5.6 Improved quality of ophthalmology services. Patients will be more likely to obtain treatment faster and for a lower price if the Proposed Conduct is authorised. The prevailing restraints on price will, in our submission, prevent the common fees being set at a high benchmark rate. Thus, it is expected that patients will be able to choose to receive treatment from a wider range of practitioners for a relatively lower price if the Proposed Conduct is authorised. Promoting teamwork and operational efficiencies will reduce patient delays and increase morale. It will also reduce the level of distractions and interruptions and therefore improve communication and service levels.

Competition

6. It is not expected that the Proposed Conduct will result in an increase in price for the following reasons.
7. Inter-practice competition is strong. The scope of the Proposed Conduct will not affect inter-practice competition at all.
8. Other restraints on price exist, which will not be affected, including:
 - 8.1 Public hospitals which provide ophthalmological services.
 - 8.2 Optometrists, who are able to offer an increasingly broad range of services which have historically been the exclusive domain of ophthalmologists.
 - 8.3 Discounts to pensioners, veterans and other special interest groups.
 - 8.4 The trend towards "no-gap" and "known-gap" surgery, which restrains the prices charged in a real and substantial way, notwithstanding the fact that levels of demand remain high.
 - 8.5 Preferred provider arrangements with private health funds.
 - 8.6 Particular arrangements entered into with large clients, such as government clients.
 - 8.7 Other informal arrangements, such as discounts provided based on financial hardship.
9. The ASO submits that ACCC's perception that the supply and demand dynamics of ophthalmology differs materially from those applicable to dentists and general medical practitioners is misguided. Those medical professions service a vastly greater pool of patients. The existence of a substantially larger number of dentists and GPs simply reflects this.

New Technology

10. New technology has been developed which facilitates the provision of ophthalmological treatment via telephonic/digital means. This technology is expected to become more refined and sophisticated in the years ahead and more readily available. It offers great potential as a means of providing the specialist eye care to people living in remote parts of Australia. The economic viability of such technology relies upon an understanding of

cost and fees between the service provider and patient. Adding further complexity to the process of treatment via such technology will lead to patient confusion and anxiety and undermine the success of the technology.

Other Authorisations

11. The ACCC has authorised the same common fee arrangements in respect of other medical practitioners previously – for instance, in the GP Authorisation, the Dentist Authorisation and the Vision Group Authorisation. The ASO submits that there is no legitimate basis for the ACCC to adopt a different approach to its Application. Not only would that be, in our submission, inconsistent, it would place ASO members who practice in shared practice in a position of unfair competitive disadvantage to the members of the Vision Group, who are able to pass on the benefits we have identified to their patients and benefit from the administrative and operational efficiencies which are realised.

We are not instructed to seek the exclusion of this correspondence from the public register.

Yours faithfully
KELLY & CO.

per:



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