

LAW REPORT

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ACCC SUCCESSFULLY SUES SURGICAL CONSULTANTS

Doctors and the medical colleges received a recent reminder of the important effect of the *Trade Practices Act*, and the powers of the ACCC. The Federal Court in South Australia determined that two consultant surgeons had breached the Act by engaging in anti-competitive conduct.

The allegations were that:

- the consultant surgeons had made an arrangement that they would prevent a newly qualified surgeon from entering the market, before he had undertaken further surgical training, notwithstanding that he was already qualified to practice independently;
- the consultant surgeons gave effect to a non-compete arrangement, to identify particular hospitals at which the surgeons would operate.

The Court accepted that the consultant surgeons operated within a “market” for the purposes of the *Trade Practices Act*, and therefore the anti-competitive provisions of the Act would apply.

It was suggested that the conduct of the consultant surgeons sought to prevent a newly qualified junior surgeon from commencing independent practice within their hospital area. The junior surgeon had completed advanced surgical training, with positive references. The consultant surgeons had partly supervised the advanced training, and gave positive assessments. Although it was intended that the junior surgeon would undertake some time overseas, he changed his mind and indicated that he would be commencing practice in that hospital area immediately. It was then alleged that the consultant surgeons undertook action to prevent the junior surgeon “entering the market”. The surgeons attempted to prevent the junior surgeon becoming credentialed. It was apparently suggested that the junior surgeon was not equipped to perform surgery without supervision and guidance, and was not competent to take on private practice.

The second allegation involved the consultant surgeons entering into arrangements with others so as not to compete at each other’s hospitals. Some of the arrangement was set out in relevant correspondence. Although designed to better arrange and define surgical services within the Adelaide area, the effect of the arrangement, as concluded by the Court, would have prevented particular surgeons from supplying cardiothoracic surgical services in competition with each other at particular hospitals.

As a consequence, the Court found several breaches of the *Trade Practices Act*. Penalties of \$50,000 each were applied to the surgeons. In addition, the surgeons agreed to undertake trade practices compliance seminars.

In this case, records of the Royal Australasian College of Surgeons were subpoenaed, to support evidence in relation to the handling of the junior surgeon through the College Advanced Training Program. No allegation was made against the Royal Australasian College of Surgeons.

This case therefore provides a timely reminder that:

- doctors cannot enter into arrangements with each other, which are anti-competitive, by which they agree to cover particular areas, and not compete in other areas;

- doctors (and hospitals) cannot artificially or unreasonably prevent the entry of new doctors into their hospitals or area (the market);
- medical colleges should ensure that assessments of trainees remain objective and transparent and that no unreasonable decisions or artificial barriers apply within their training program to prevent or delay properly competent trainees ultimately achieving Fellowship and becoming independent consultants.

The medical colleges will be aware that the ACCC has previously alleged that the RACS potentially infringes the *Trade Practices Act* because it limits the number of surgeons to be trained, and therefore restricts the number of consultant surgeons that can emerge. No adverse finding on this basis has ever been made against the College. The College maintains that the limitation on training numbers arises from the places made available by the jurisdictions (state governments, hospitals, etc) and by the need to maintain standards of training (In other words, only those who are fully competent, emerge as consultants, following objective assessment.).

However, the medical colleges should be alert to ensure that all of their processes, including the assessment of international medical graduates, remain objective, apply the appropriate standards (comparability, competence, etc) and do not have any artificial requirements which would otherwise prevent or delay Fellowship or entry to the “market”.