

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/08/2019 11:53:29 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD1255/2019
File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v HEALTHENGINE PTY LTD ACN 138 767 021
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 7/08/2019 4:10:23 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form NCF1

**Concise Statement (Public Version)**

No. NSD of 2019

Federal Court of Australia

District Registry: New South Wales

Division: General

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

**HEALTHENGINE PTY LTD (ACN 138 767 021)**

Respondent

**A THE IMPORTANT FACTS GIVING RISE TO THE CLAIM**

- 1 The Respondent (**HealthEngine**) operates Australia's largest online health marketplace. It conducts a business, in trade or commerce, of hosting an **online directory** listing over 70,000 health practices and practitioners across Australia (**Health Practices**), and facilitating bookings by consumers (**Patients**) for services provided by those Health Practices, including by publishing reviews (at the time of the relevant conduct) and ratings to enable Patients to identify a Health Practice suitable for their needs.
- 2 This claim concerns HealthEngine's conduct in manipulating the feedback it received from Patients who had attended a consultation at a Health Practice which they had booked through HealthEngine's website at [www.healthengine.com.au](http://www.healthengine.com.au) or mobile phone app (together, the **Platforms**). From 31 March 2015 to 1 March 2018 (the **Review and Ratings Conduct Period**), HealthEngine had a practice of not publishing negative Patient feedback, editing Patient feedback before it was published as a review, and misrepresenting the reasons why it did not publish a rating for some Health Practices. This claim also concerns HealthEngine's conduct, during the period 30 April 2014 to 30 June 2018 (the **Referral Conduct Period**), of providing personal information supplied to it by Patients to third party private health insurance brokers (in return for a fee) without adequately disclosing that this would occur.

---

Filed on behalf of	Australian Competition and Consumer Commission, Applicant		
	Claire Schneider and Simon White SC of Counsel and Frances Williams of Corrs Chambers Westgarth		
Prepared by	<b>Corrs Chambers Westgarth</b>		
Law firm			
Tel	(07) 3228 9332	Fax	(07) 3228 9444
Email	frances.williams@corrs.com.au		
<b>Address for service</b>	Level 43, 111 Eagle Street, Brisbane, Queensland, 4000		

- 3 The **Platforms** include the online directory, an online booking system (**OBS**) that allows Patients to book consultations with Health Practices, and reviews and ratings for some Health Practices. Patients can also access the OBS using a booking '**widget**' embedded on the website of some Health Practices. On average, over a million Patients use the Platforms each month to locate and make bookings with Health Practices using the OBS. Patients do not pay a fee for using the Platforms or the OBS. Instead, HealthEngine receives fees from Health Practices for facilitating bookings through the OBS, which includes a fee for each new patient that books through the Platforms, and fees from some Health Practices for particular listings on the Platforms.

### **The Review and Ratings Conduct**

- 4 From 1 March 2015, HealthEngine sent a follow-up **survey** to Patients who attended a consultation with a Health Practice that had been booked through the OBS on the Platforms. The survey included a question inviting Patients to provide feedback about their experience with the Health Practice (for example, "*Do you have any general feedback or comments about the practice you visited?*"). The survey also included a **Ratings Question** designed to ascertain whether the Patient would recommend the Health Practice to others (for example, "*Would you recommend others to this practice?*" with a 'yes' or 'no' answer available). Throughout the Review and Ratings Conduct Period, HealthEngine received approximately 128,000 responses to the survey (the **Patient Reviews**). HealthEngine selectively published approximately 50,000 of those Patient Reviews on the Platforms under the heading "Reviews". In determining which Patient Reviews it would publish, HealthEngine implemented, relevantly, two practices: a practice of not publishing any negative Patient Reviews it received in relation to services provided by Health Practices; and a practice of editing some Patient Reviews before they were published to remove negative comments and/or suggestions for improvement, or to embellish them so that they appeared more positive. In implementing these two practices, HealthEngine immediately disregarded the approximately 17,000 Patient Reviews from Patients who answered 'no' to the Ratings Question and edited approximately 3,000 Patient Reviews before they were published. **Annexure A** contains examples of some Patient Reviews that were not published. **Annexure B** contains examples of Patient Reviews as received by HealthEngine and as published on the Platforms after they were edited. The **Review Conduct** concerns HealthEngine implementing the two practices without disclosing to the public that it would do so.
- 5 HealthEngine used Patients' responses to the Ratings Question to calculate a practice rating for particular Health Practices (the **Rated Health Practices**). During the Review and Ratings Conduct Period, if 80% or more of Patients answered 'yes' to the Ratings Question for a Rated Health Practice, HealthEngine published the practice rating for that Health Practice (either as a percentage or, after 1 March 2017, by using a number and an image of

a star: e.g. “4.9★”) on the Platforms. If less than 80% of Patients answered ‘yes’ to the Ratings Question for a Rated Health Practice, HealthEngine did not publish a practice rating for that Health Practice and instead published on the Platforms a notation indicating there was no rating, for example, “--”. For Rated Health Practices that had a no-rating notation, HealthEngine attached on its website, a hover link to the no-rating notation which, when activated, displayed the phrase “*There is currently insufficient data to calculate a patient satisfaction level*”. In the app, instead of a hover link, HealthEngine published the statement “*This practice does not have a customer satisfaction score*”. The **Ratings Conduct** concerns HealthEngine engaging in the conduct described in this paragraph without disclosing to the public that it would do so.

- 6 By publishing the Patient Reviews on the Platforms in the circumstances described in paragraph 4, HealthEngine represented that the Patient Reviews published on the Platforms in connection with Health Practices were an accurate reflection of the Patient Reviews HealthEngine received from Patients about the Health Practices (the **genuine reviews representation**), when they were not.
- 7 By publishing the no-rating notation in combination with the hover link phrase on its website or the statement in the app, HealthEngine represented that it had not received sufficient feedback (either positive or negative) from Patients to enable HealthEngine to calculate and publish on the Platforms a practice rating for the relevant Rated Health Practices (the **insufficient feedback representation**), when in fact HealthEngine had received sufficient feedback and was able to publish a practice rating, but chose not to.
- 8 Furthermore, by engaging in either the Review Conduct or the Ratings Conduct, Health Engine engaged in conduct that was liable or likely to create a more positive or favourable impression on consumers who used the Platforms to find a suitable Health Practice of:
  - (a) the standard, quality or suitability of the Platforms as a means of finding or booking suitable health care services (the **suitability of Platforms conduct**); and/or
  - (b) the standard, quality or suitability of health care services provided by Health Practices (the **suitability of Health Practices conduct**).

### **Referral Conduct**

- 9 During the Referral Conduct Period, HealthEngine had arrangements with (at various times) nine different private health **Insurance Brokers** pursuant to which HealthEngine received from the Insurance Brokers a fee for referring Patients to them. As part of these arrangements, HealthEngine provided the Insurance Brokers with Patients’ personal information, including some or all of the following: the Patient’s name, phone number, email address, date or year of birth, appointment time, type of health care practice the Patient had made a booking with (e.g. GP, chiropractic or dentistry), and/or whether or not the Patient had private health insurance (and if so, the provider). HealthEngine collected this personal

information each time a Patient booked an appointment with a Health Practice using the Platforms or the widget.

- 10 During the online booking process, HealthEngine had a practice of asking Patients whether they had private health insurance. Regardless of whether the Patient answered 'yes' or 'no' to the question, they were asked a further question as to whether, in effect, they wished to receive a call about health insurance comparison services, or to assist the Patient to assess their private health insurance needs (the **Health Insurance-Related Services**). If the Patient answered 'yes' to this further question and then booked an appointment with a Health Practice, HealthEngine provided their personal information to an Insurance Broker. HealthEngine used language in this question that indicated HealthEngine would provide the Health Insurance-Related Services (when it did not) and did not adequately disclose that if the Patient answered 'yes', their personal information would be sent to one of the Insurance Brokers, or that HealthEngine would receive a payment for doing so. **Annexure C** contains examples of the questions asked by HealthEngine about the Health Insurance-Related Services. HealthEngine provided personal information for approximately 135,000 Patients to the Insurance Brokers and received almost \$ [REDACTED] in revenue from those Insurance Brokers.

- 11 The conduct described in paragraph 10 above (the **Referral Conduct**) was liable or likely to cause Patients to believe that HealthEngine provided the Health Insurance-Related Services (when it did not) and would use their personal information for that purpose, rather than providing it to a third party.

## **B THE RELIEF SOUGHT FROM THE COURT**

- 12 The ACCC seeks the relief set out in the accompanying Originating Application.

## **C THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

- 13 HealthEngine's employees implemented the Review, Ratings and Referral Conduct within the scope of their actual or apparent authority and, by reason of s139B(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the employees' conduct was also engaged in by HealthEngine.
- 14 By making the genuine reviews representation and, further or alternatively, the insufficient feedback representation, HealthEngine engaged in conduct that was misleading or deceptive or likely to mislead or deceive, and/or made false or misleading representations that the services provided by HealthEngine on the Platforms were of a particular standard, quality, value or grade, thereby contravening ss 18 and 29(1)(b) of the Australian Consumer Law (**ACL**) in Schedule 2 to the CCA.
- 15 On each occasion, by publishing edited Patient Reviews, HealthEngine engaged in conduct that was misleading or deceptive or likely to mislead or deceive, and/or made a false or



misleading representation that purported to be a testimonial by Patients relating to services provided by Health Practices, thereby contravening ss 18 and 29(1)(e) of the ACL.

- 16 By engaging in the suitability of Platforms conduct, HealthEngine engaged in conduct that was misleading or deceptive, or liable or likely to mislead or deceive the public as to the nature, characteristics and/or suitability for their purpose of services provided by HealthEngine, thereby contravening ss 18 and 34 of the ACL.
- 17 By engaging in the suitability of Health Practices conduct, HealthEngine engaged in conduct that was misleading or deceptive, or liable or likely to mislead or deceive the public as to the nature, characteristics and/or suitability for their purpose of services provided by Health Practices, thereby contravening ss 18 and 34 of the ACL.
- 18 By engaging in the Referral Conduct, HealthEngine engaged in conduct that was misleading or deceptive, or liable or likely to mislead or deceive the public as to the nature and/or characteristics of services provided by HealthEngine, in contravention of ss 18 and 34 of the ACL.

#### **D THE ALLEGED HARM SUFFERED**

- 19 HealthEngine's conduct had the effect of manipulating important health care decisions made by consumers. By engaging in both the Review Conduct and the Ratings Conduct, HealthEngine failed to disclose important information about the quality of the services other Patients had reported experiencing with Health Practices listed on the Platforms, which meant that consumers may have chosen a health care provider they would otherwise not have chosen. In addition, such conduct influenced Patients to use the Platforms to select a health care provider because it created a false impression about the quality of the Health Practices that could be accessed through the Platforms. HealthEngine benefited from this conduct as it received a fee from Health Practices for each new Patient that booked through the Platforms.
- 20 By engaging in the Referral Conduct, HealthEngine deprived Patients of the opportunity to control the transfer of their personal information to the Insurance Brokers. Patients were not informed of the arrangements HealthEngine had with the Insurance Brokers, and therefore unable to make an informed choice regarding the use of their personal information in this way. HealthEngine benefited from this conduct as it received fees from the Insurance Brokers for referring Patients to the Insurance Brokers.

Date: 7 August 2019

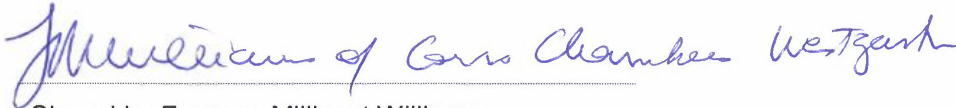


Signed by Frances Millicent Williams,  
Lawyer for the Applicant

**Certificate of lawyer**

I, Frances Millicent Williams, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation set out in the pleading.

Date: 7 August 2019



Signed by Frances Millicent Williams

Lawyer for the Applicant

This concise statement was settled by Simon White SC and Claire Schneider of Counsel.

**Annexure A – examples of unpublished reviews**

Date Received	Original Feedback
3/04/2015	Accessibility! A family clinic with stairs to the entrance, parents with prams face a mighty struggle
18/06/2015	We were treated badly Unprofessional Made to feel unwanted Not important
31/08/2015	This practice frequently cancels appointments with no warning.
27/04/2016	Felt like a number not a patient, poor interaction and wouldn't go back
30/03/2017	<ul style="list-style-type: none"> <li>- waiting room over crowded</li> <li>- practice was over booked</li> <li>- not enough seats</li> </ul>
14/09/2017	Waiting area is so dirty, chairs probably need replaces so they are plastic rather than fabric. I'm not looking to return again and would not recommend this practice to anyone.
27/11/2017	I found the reception staff very unfriendly and it reflected so poorly on the entire practice that I am unlikely to return.
24/02/2018	They bulk bill but charge \$10 registration fee. Clinic is dirty and messy.
26/02/2018	I am sick of constantly waiting for an hour or more , having booked a double appointment only to be pushed out after 15 mins coz the dr is running late and makes me come back for another appointment yet still collects the cash for a double apt when I only really had a single apt
28/02/2018	I waited for over an hour and was not apologised to. This happens every time. If it keeps up, I'm going to find a new Doctor.



### Annexure B – examples of edited reviews


Date Received	Original Feedback	Published Feedback
31/03/2015	Both times I have attended the practice the gp has been running over 40minutes late. I appreciate that the gp is thorough and takes their time with each patient however, maybe longer bookings should be made so patients are not waiting for so long. 45 mins is too long to wait with a toddler when you are feeling sick. However, overall I was happy with the service provided.	Overall I was happy with the service provided.
21/06/2015	Happy with experience although reception needs thorough clean. Old chairs need thorough cleaning/scrubbing. I kept thinking how unsanitary they looked	Happy with experience
28/06/2015	As my children have always been bulk billed here in the past, I thought this was standard practice at this practice. We saw a different doctor today who did not bulk bill and I was unprepared to pay \$70. She didn't even take a temperature or write a script or anything - just looked at my son and said she didn't know what it was and to wait the virus out. I'm not against paying extra for healthcare but I like to see a bit of extra effort if I have to pay extra. Our usual doctors at this practice are excellent and are kind enough to bulk bill our sons. I'll be sticking to them in future and only seeing other doctors in an absolute emergency.	Our usual doctors at this practice are excellent and are kind enough to bulk bill our sons.
2/07/2015	<ol style="list-style-type: none"> <li>1. Open practice 10 minutes before the first appointment.</li> <li>2. Understand that if someone is banging on the door 5 minutes before opening it is usually going to mean something urgent is happening (my 3 year old was crying as he was about lose his bowels in the middle of the street)</li> <li>3. Don't look down upon and chastise the customer at 805am that doors don't open till 8am because</li> </ol>	The doctor as always was perfect.


Date Received	Original Feedback	Published Feedback
	<p>they are too busy. (My appointment was at 8am).</p> <p>4. The doctor as always was perfect, although since the doors did not open till 805am I was not seen till about 815. ( Not a bad thing this time as I had to duck into the bathroom to clean up my little boy)</p> <p>Very disappointed in how I was spoken too and how the staff made me feel rude and impatient all because I knocked waited a minute then knocked loudly again on the door in order to get my crying 3 year old boy to a toilet.</p>	
22/07/2015	The doctors are very good. However the delay at times is not satisfactory. Last visit I waiting 2.5hrs!	The doctors are very good.
22/09/2015	The practice is good just disappointed with health engine. I will call the clinic next time instead of booking online.	The practice is good.
10/11/2015	<p>We were punctual to our appointments, according to our HealthEngine confirmation bookings and reminders which we have retained. However, on arrival, the practice had us booked in earlier so it appeared we were late. This was not the case and it wasn't a nice experience to be told, in a public setting, that we were late. We explained that we had confirmations but this explanation was dismissed.</p> <p>Apart from that, we've always had a good experience with HealthEngine and the practice.</p>	We've always had a good experience with HealthEngine and the practice.
3/04/2016	<p>I love the practice and have never had a bad experience with any of the doctors but this one made me rip the Fixomull Stretch bandage off my own infected sore, told me to go home and wash it and bandage it again with something different. She was very uncaring.</p> <p>It wasn't hurting much before that but it is now!</p>	I love the practice and have never had a bad experience with any of the doctors.

Date Received	Original Feedback	Published Feedback
20/04/2016	I have been attending this practice for years. Every doctor there is great. I saw a new doctor this time and halfway through the appointment he took a personal call on his mobile and was talking about paying his rent and water bill and got out all his credit cards asking what details they needed etc. this went on for about 4mins. Very rude and I felt like I was not a priority. Will not be seeing this dr again!!! Not sure of his name, but he was a small Indian man around 50-60yrs old.	I have been attending this practice for years. Every doctor there is great.
11/05/2016	The doctor was great, seemed very caring and made me feel comfortable. The admin officer at the front desk however had very poor customer service skills. I didn't get a hello, she was flustered and everyone could hear her sigh loudly. She may be over worked but she wasn't a very pleasant first point of contact with the service.	The doctor was great, seemed very caring and made me feel comfortable.
26/08/2016	The last 2 times I have had to wait over 30 minutes past my scheduled appointment. The first day my appointment was at 11:15am and it was midday by the time I was called in, the second appointment was at 10:15am and almost 12pm when I got called in. Not nice when you're feeling really unwell and just want to go home and rest. But I love this practice and my GP.	I love this practice and my GP.
30/10/2016	The staff at reception were excellent.  The doctor was very off hand, appeared uninterested, I was very uncomfortable. He rang reception for me to go to his rooms, he did not come to get me from the waiting room and did not introduce himself when I entered.	The staff at reception were excellent.
10/01/2017	I have been seeing my doctor for the past 10 years & am happy with his service. I do think it is a bit expensive to have to pay the full price of a visit when	I have been seeing my doctor for the past 10 years & am happy with the service.

Date Received	Original Feedback	Published Feedback
	it is related or ongoing from the previous visit, maybe they could be charged at the Medicare rate.41	
23/03/2017	Great doctor, very pleased with the quality of the service	Great doctors. Very pleased with the quality of the service.
16/07/2017	Have been cared by this Doctor for some eight years and level of of care make me feel very important	Incredible doctor and practice staff, I have been at this practice for over 8 years and the level of care always makes me feel very important.
22/08/2017	Good first impression. Well run unit.	Good first impression. Well run practice!
16/09/2017	Doctor listen and watch symptoms of sickness carefully and give suggestions as well.	The doctor listens and gives thorough and individualised treatment. very happy!
8/11/2017	Warm friendly, welcome smiles	Warm & friendly, welcome smiles!

## Annexure C – examples of health insurance related questions


Logout →
Menu



ubi Smilemakers Dentist

Wed, 11th Oct  
at 10:50am

[Change appointment](#)

About this Practice

Appointment Type

Personal Details

Additional Health Services

Do you have private health insurance?

Yes

No

Returning for treatment? One simple 10 minute conversation could save you hundreds.

We can find you suitable extras cover from as low as \$3.81 per fortnight.

Would you like free expert advice on private health insurance?

Yes

No

☒ Better healthcare in just one click? Join our mailing list to receive the latest healthcare news, special offers and more.

By continuing with your booking, you agree to our [Terms of Use](#), [Privacy Policy](#) and [Collection Notice](#).

[Book Appointment](#) ✓

1-34 Returning (YES TO PMU)

Do you have private health insurance?

Yes

No

Name of health fund

We can find you suitable extras cover starting from \$3.81 per fortnight and hospital cover starting from \$24.27 a fortnight.

A lot of the time we can find you a policy that will make your treatment more affordable and you won't have to re-serve waiting periods that you've already served.

Would you like a free call from our private health insurance experts to ensure you're not paying more than you should be?

Yes

No