



# Online Directories and Appointment Booking Platforms – Reminders from the ACCC and the Federal Court

There is a growing number of online directories and booking systems on the market for dentists and other health professionals. Uptake of these platforms appears to be increasing amongst both practitioners and patients. They can be a compelling way of promoting a practice; and of acquiring, managing and retaining patients. They can also be an attractive way for a digitally savvy public to book their dental appointments

## ACCC AND HEALTHENGINE IN THE FEDERAL COURT

Readers will no doubt be familiar with HealthEngine. Describing themselves as Australia's largest online health marketplace, HealthEngine hosts an online booking system and directory listing thousands of health practices and practitioners across Australia. In the past (until mid 2018) consumers could also access reviews and ratings from patients about the quality and services of health practitioners.

The model is not dissimilar to those seen in other industries, such as the travel industry.

HealthEngine has been a great success story. Established in WA, HealthEngine's investors include subsidiaries of Telstra and Seven West Media. It is one of Australia's fastest growing technology companies, and the company's market share speaks for itself.

In August 2019, however, the Australian Competition and Consumer Commission (ACCC) commenced proceedings against HealthEngine in the Federal Court of Australia. Notice of filing is available on the ACCC's website, at: <https://www.accc.gov.au/media-release/healthengine-in-court-for-allegedly-misusing-patient-data-and-manipulating-reviews>

According to the statement filed with the Court, the ACCC alleges that HealthEngine engaged in misleading and deceptive conduct. In summary, the ACCC says:

1. "... 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 conduct had the effect of "manipulating important health care decisions made by consumers".
2. HealthEngine also provided "... 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". This deprived Patients of the opportunity to control the transfer of their personal information.

The proceedings are ongoing; and as such it must be stressed that *at the time of writing, the Court has made no findings against HealthEngine*. Further, HealthEngine's chief executive and founder is on record as saying that they had made changes to the platform before HealthEngine received any formal notice of an ACCC investigation. He has also stated that HealthEngine's rapid growth over the years "has sometimes outpaced our systems and processes and we sincerely apologise if that has meant we have not always met the high expectations of us": <https://www.businessnews.com.au/article/ACCC-takes-HealthEngine-to-court>

For now, the Federal Court proceedings serve as a springboard for a discussion about some broader issues.

## LEGAL CONSIDERATIONS: PATIENT PRIVACY AND MISLEADING OR DECEPTIVE CONDUCT

The ACCC cites one of their top current priorities as being issues of transparency and adequate disclosure when digital platforms collect and use consumer data. According to the ACCC's Chair: "Businesses who are not upfront with how they will use consumer data may risk breaching the Australian Consumer Law and face action from the ACCC." See: <https://www.accc.gov.au/media-release/healthengine-in-court-for-allegedly-misusing-patient-data-and-manipulating-reviews>

In July 2019, the ACCC published the Final Report of its Digital Platforms Inquiry, which focussed on three categories of digital platforms: online search engines, social media platforms and other digital content aggregation platforms. Amongst other things, the Final Report recommends strengthened consent and notification requirements under the Privacy Act, and "pro-consumer" responses to existing concerns. It is recommended that consents for the purposes of data collection, use and disclosure should not be bundled into a single consent. The report is available here: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

The Federal Court proceedings are tangible evidence of the interest that the ACCC is taking in the use and disclosure of consumer data on digital platforms. But the ACCC is, of course, not the only regulator that would concern itself with matters of patient privacy, and misleading or deceptive conduct in a health setting:

### *Patient privacy*

- The Office of the Australian Information Commissioner is responsible for privacy functions that are conferred by the Privacy Act – whether in a health setting or otherwise.
- AHPRA and the Dental Board will also supervise Practitioners' ethical and legal obligations to protect the privacy of people requiring and receiving care, as provided for in the Code of Conduct for Registered Health Practitioners.

### *Misleading or deceptive conduct*

- Australian Consumer Law (ACL) regulators (ACCC and its state and territory counterparts) will investigate complaints about potential breaches of the ACL and take enforcement action where necessary. This includes the general ban on misleading or deceptive conduct in trade or commerce found at section 18 of the ACL.
- Section 133 of the Health Practitioner Regulation National Law also expressly prohibits advertising of a regulated health service or business in a way that "is false, misleading or deceptive or is likely to be misleading or deceptive". This is developed further in the Guidelines for Advertising Regulated Health Services jointly developed by the National Boards under section 39 of the National Law.

## MESSAGE FOR DENTAL PRACTICES

Based on the issues and themes discussed, we consider it timely to remind dental practices that you should:

- Educate yourself on how the third parties with whom you do business will handle and protect your patients' personal information.
- If you are disclosing patient information to a third party (whether an online service provider or anyone else) be aware of your own privacy obligations.
- Monitor how third-party websites are advertising and promoting your business – whether through reviews, ratings or service descriptions.
- Ensure that your own advertising and media activity does not mislead or deceive.
- Take stock of how your practice is approaching patient privacy generally: Do you have a Privacy Policy, and are you providing and collecting appropriate disclosures and consents in relation to the management of your patients' personal information?
- Have a response plan in case of a data breach – whether that breach is encountered at your practice, or it happens to a third party who holds your patient data. In the event of a breach will you merely comply with mandatory data breach notification laws to the minimum extent required? Or will you take a more proactive approach and contact patients wherever there might be potential for them to be concerned? Ideally, the first your patient hears about a data breach will not be something they find in the media.

David McMullen, Special Counsel  
**PANETTA MCGRATH**  
 LAWYERS



**Please contact us if you wish to know more about privacy obligations, or any consumer protection issues, affecting you or your patients.**