

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/07/2021 12:03:57 PM 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: VID375/2021
File Title: AUSTRALIAN COMPETITION & CONSUMER COMMISSION v
SMILEDIRECTCLUB & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 12/07/2021 12:51:33 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

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.



Concise Statement

No. VID of 2021

Federal Court of Australia
District Registry: Victoria
Division: General
Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

SMILEDIRECTCLUB LLC and another named in the schedule

Respondents

1. In this proceeding, the Australian Competition and Consumer Commission (**ACCC**) alleges that, between May 2019 and October 2020 (**Relevant Period**), SmileDirectClub LLC (**SDC LLC**) and SmileDirectClub Aus Pty Ltd (**SDC AU**) (together, **SDC**) made representations that were false, misleading or deceptive in relation to Australian consumers' eligibility for reimbursement from private health insurers in respect of plastic teeth aligners promoted and supplied by SDC (**SDC Aligners**) and/or associated treatment (**Aligner Treatment**).

IMPORTANT FACTS GIVING RISE TO THE CLAIM

The Respondents and their business

2. SDC LLC is a US corporation, based in Nashville, Tennessee, which uses a direct-to-consumer model of providing consumers with SDC Aligners which are claimed to gradually straighten mild to moderately malaligned teeth over the course of months. Its subsidiary SDC AU commenced trading in Australia in around April 2019. From May 2019, SDC have in trade or commerce promoted and supplied SDC Aligners to Australian consumers, including through the SmileCheck portal (**SmileCheck Portal**). SDC Aligners cost approximately \$2,825 if paid upfront or \$3,155 if paid by instalments over 24 months.
3. SDC AU's website at www.smiledirectclub.com.au/en-au/ (**SDC Website**) was launched on 9 April 2019. SDC LLC is and was the registrant for the SDC Website and was responsible for its operation, and the operation of the SmileCheck Portal, throughout the Relevant Period, including the development and approval of content published on the SDC Website.
4. SDC describe the SmileCheck Portal as a web-based teledentistry platform, which can connect dentists or orthodontists to consumers. However, during the Relevant Period there was no real time consultation by voice or video between dentists or orthodontists and consumers using the platform. Any information provided through the platform was by images and text. Consumers did not choose a dentist or orthodontist, rather SDC allocated the dentist from a small group affiliated with SDC AU (**Affiliated Dentists**), as detailed below. The Affiliated Dentists did not conduct any face to face consultation or examination with the consumer in relation to the SDC Aligners or Aligner Treatment.

Filed on behalf of (name & role of party)	Australian Competition and Consumer Commission (applicant)		
Prepared by (name of person/lawyer)	James Love, lawyer for the applicant		
Law firm (if applicable)	Johnson Winter & Slattery		
Tel	+61 3 8611 1339	Fax	+61 3 8611 1300
Email	james.love@jws.com.au		
Address for service	Johnson Winter & Slattery, Level 34, 55 Collins St, Melbourne, VIC 3000		

5. During the Relevant Period, prior to receiving the SDC Aligners, consumers either completed a “Smile Assessment” form on the SDC Website and ordered a dental impression kit and “smile stretcher” through the SDC Website, which the consumer used to take a dental impression and photographs of their own teeth and gums and sent them to SDC AU, or had photographs and 3D imaging of their teeth and gums taken by a sales representative at a SmileShop (being a physical retail location operated by SDC AU). Based upon that information, employees or contractors of SmileDirectClub Sociedad Anonima (**SDC CR**), a related entity of SDC based in Costa Rica, used software to create a draft treatment plan for the consumer. An Affiliated Dentist assigned by SDC would then review, and either approve, modify or reject the plan.
6. Consumers could select a “Fast Track” option to automatically proceed with the SDC Aligners and Aligner Treatment once the Affiliated Dentist approved a treatment plan for the consumer. Otherwise, consumers could confirm that they wished to proceed based on the approved treatment plan once it was made available on the SmileCheck Portal. SDC LLC then supplied the SDC Aligners to SDC AU, which packaged and delivered the SDC Aligners, usually directly to the consumers by mail.

SDC Website

7. From at least 24 May 2019 to 28 September 2019, SDC LLC published, or caused to be published a page on the SDC Website which stated:

“Are you eligible? Check first! Your private health fund provider or insurer may reimburse certain costs of SmileDirectClub clear aligner treatment. Please check your eligibility and scope of coverage so you know what costs your private health fund provider or insurer will cover.

In the meantime, you can get started with us by making a 3D image of your smile with an at-home impression kit or SmileShop visit.

*At up to 60% less** than traditional metal braces, SmileDirectClub aligners are already more affordable, but check with your health fund provider to see how much you can claim.”*
8. That webpage contained a link entitled “*Find Your Savings*” which opened an “insurance inquiry form”. The insurance inquiry form contained the following statement: “*Let’s get some information before we get started. In order to get this going, we just need some basic contact information from you. We’ll use it to contact you about the details of your coverage*” and requested the consumer’s policyholder identifying details, health fund, policy number, and the consumer’s health fund’s telephone number.
9. After they had completed and submitted an insurance inquiry form, a number of consumers were contacted by email and text message, as set out at paragraphs 13 to 15 below.
10. SDC LLC also published, or caused to be published, the following statements on the SDC Website:
 - a. on the “Pricing” page, from at least 29 June 2019 to about March 2020: “*If your private health insurance includes extras, you may benefit from your insurance company after purchasing your aligners. SmileDirectClub doesn’t accept direct payment from insurance companies. We can get you the forms you need to file your claim for reimbursement.*”
 - b. on the “Frequently Asked Questions” page, from at least 20 January 2020 to about February 2020: “*Can I use insurance to pay for SmileDirectClub clear aligners?*
Depending on your private health insurance provider and policy, you may be eligible for reimbursement for part of the cost of SmileDirectClub clear aligner

treatment through your private health fund. We can assist you with making a claim by providing any required treatment plan documents and itemised invoices. For tips on checking your insurance coverage, please visit our Insurance Page."

11. Subsequently, SDC LLC published, or caused to be published, the following statements on the SDC Website:
 - a. on the "Pricing" page, from about March 2020 to about August 2020: *"Your private health insurer may cover teledentistry. Since SmileDirectClub does not accept direct payment from insurance companies, we can't help you get information regarding possible reimbursement. We're still here to help. Below we have provided you with the dental item numbers so you can check into it yourself:

825 – each aligner set. Enter this number twice: once for the upper and once for lower

811 – retainers. Enter this number twice: once for the upper and once for lower"*
 - b. on the "Frequently Asked Questions" page, from about February 2020 to 8 October 2020: *"Can I use insurance to pay for SmileDirectClub clear aligners?

Your private health insurer may cover teledentistry. Since SmileDirectClub does not accept direct payment from insurance companies, we can't help you get information regarding possible reimbursement. We're still here to help. Here are the dental item numbers so you can check into it yourself: 825 – each aligner set. Enter this number twice: once for the upper and once for lower; 811 – retainers. Enter this number twice: once for the upper and once for lower."*
12. The conduct set out in each of paragraphs 7, 8, 10 and 11 was engaged in by SDC LLC on behalf of SDC AU.

Emails and text messages

13. Between 28 May 2019 and 28 September 2019, employees or contractors of SDC CR sent emails to 648 consumers who completed the insurance inquiry form referred to in paragraph 8 above with the subject *"Good news about your private health fund"*. Each of those emails contained the content set out in Annexure A.
14. Between at least 26 July 2019 and 1 October 2019, employees or contractors of SDC CR also sent text messages to 124 of those 648 email recipients, which stated: *"Good news [name], we've contacted your private health fund provider and it looks like with your Orthodontia coverage that you are eligible for up to \$925 in potential reimbursement savings"*.
15. During the Relevant Period (on dates that are otherwise not currently known to the ACCC), employees or contractors of SDC CR sent emails to further consumers (the number of which is not currently known to the ACCC) who completed the insurance inquiry form referred to in paragraph 8 above. Each of those emails contained statements to the effect of those set out in Annexure B.
16. The conduct set out in each of paragraphs 13 to 15 above was engaged in by SDC CR on behalf of SDC AU.

SmileShop insurance information cards

17. From about 20 June 2019 to 20 December 2019, SDC AU distributed to consumers in its SmileShops a printed card which stated: *"Private Health Insurance? Find out how much*

you may be reimbursed. Submit these dental item numbers to your provider” and then specified item numbers including 811 and 825 (private health insurance cards).

RELIEF SOUGHT FROM THE COURT

18. The ACCC seeks declarations, pecuniary penalties, compliance orders, publication orders, consumer redress orders and costs as specified in the Originating Application.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

19. By the conduct set out above, the following representations were made to consumers (together, the **Representations**):
- a. some Australian private health insurers provide insurance cover for SDC Aligners and/or Aligner Treatment (**Coverage Representation**);
 - b. after purchasing SDC Aligners, consumers may be eligible under their private health insurance for reimbursement of part of the cost of SDC Aligners and/or Aligner Treatment (**Future Eligibility Representation**);
 - c. consumers whose private health insurance covered items 811 and/or 825 are entitled to reimbursement from their private health insurers of part of the cost of SDC Aligners and/or Aligner Treatment (**Item 811/825 Representation**);
 - d. SDC AU had contacted the consumer’s private health insurer to find out if that particular consumer’s health insurance covered SDC Aligners and/or Aligner Treatment (**Individual Contact Representation**); and
 - e. the particular consumer’s health insurance covered SDC Aligners and/or Aligner Treatment (**Individual Cover Representation**).
20. The Coverage Representation and Future Eligibility Representation were conveyed by:
- a. SDC LLC, by making the statements on the SDC Website referred to in paragraphs 7, 10a and b (separately and/or together), and 11a and b (separately and/or together);
 - b. SDC CR, by making the statements in the emails and text messages referred to in paragraphs 13 to 15 (separately and/or together); and
 - c. SDC AU, by providing to consumers the private health insurance cards referred to in paragraph 17.
21. The Item 811/825 Representation was conveyed by:
- a. SDC LLC, by making the statements on the SDC Website referred to in paragraphs 11a and b (separately and/or together);
 - b. SDC CR, by making the statements in the emails referred to in paragraph 15; and
 - c. SDC AU, by providing to consumers the private health insurance cards referred to in paragraph 17.
22. The Individual Contact Representation and Individual Cover Representation were conveyed by SDC CR making the statements in the emails and text messages in paragraphs 13 and 14 above (separately and/or together).
23. The conduct of SDC LLC and SDC CR in each case was undertaken as agent on behalf of SDC AU and was within their actual or apparent authority. Pursuant to s 139B(2) of the CCA, that conduct is taken to have been engaged in also by SDC AU.

24. The Representations were false, misleading or deceptive because:
- a. In the Relevant Period there were about 37 Australian private health insurers, and those insurers, or alternatively most of them, did not provide insurance coverage for SDC Aligners or Aligner Treatment, or items 811 or 825 where they had not been supplied by a dentist or orthodontist having a face-to-face consultation with the consumer.
 - b. A provider needed to be recognised by the applicable Australian private health insurer as someone whose services were eligible for the payment of health insurance benefits, in order for the consumer to be eligible for those benefits. The Affiliated Dentists did not all have that recognition throughout the Relevant Period (either in respect of any services, particular locations, or items 811 and/or 825 specifically).
 - c. In relation to the Individual Contact Representation and Individual Cover Representation, SDC AU and SDC CR did not contact particular consumers' private health insurers to check that their health insurance covered SDC Aligners and Aligner Treatment supplied by SDC AU. Instead, what was checked (if anything) was whether the consumer's coverage included coverage for orthodontics or for items 811 or 825.
25. By making the Representations, SDC AU and, in respect of the Coverage Representation, Future Eligibility Representation and Item 811/825 Representation, SDC LLC contravened:
- a. s 18 of the Australian Consumer Law (**ACL**), being Schedule 2 to the CCA, by engaging in conduct that was misleading or deceptive, or likely to mislead or deceive;
 - b. s 29(1)(g) of the ACL, by making false or misleading representations that the goods or services had approval or benefits; and
 - c. s 29(1)(m) of the ACL, by making false or misleading representations concerning the existence, exclusion or effect of a condition or right.
26. To the extent that the Future Eligibility Representation was a representation as to a future matter, the ACCC relies on s 4 of the ACL and alleges that SDC did not have reasonable grounds for making it.

ALLEGED HARM SUFFERED BY CONSUMERS

27. The Representations were made to consumers about reimbursements under their private health insurance. Consumers were not in a position to receive those reimbursements until after they had made payment and requested and received documentation from SDC in order to lodge a claim. At least 26,300 consumers ordered SDC Aligners and commenced the Aligner Treatment in the Relevant Period, paying thousands of dollars each, in circumstances where those with private health insurance may not have done so if they had known that they were not entitled to reimbursement from their private health insurer.

Dated: 12 July 2021

This concise statement was prepared by James Love of Johnson Winter & Slattery and settled by Naomi Sharp SC and Clare Cunliffe of counsel.

Annexure A

Email with subject "Good news about your private health fund."

Your private health fund provides up to \$600 in savings.*
Buy a kit



SMILE AND SAVE

Your private health fund savings are waiting. Go get 'em.

Hey [Name], per your request, we contacted **your private health fund provider** to find out if they will cover part of the cost of your invisible aligners. Good news – our private health fund team confirmed you have orthodontia coverage and are eligible for up to \$600 in potential savings.* Plus, our aligners are already **60% less than braces** — that's a lot of savings.

Save on your smile.

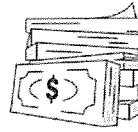
BUY A KIT

What happens now that my coverage is confirmed?



Get reimbursed

It works like a **mail-in rebate**. After you purchase your aligners and have paid in full, you submit a claim form to your private health fund provider.**



Two ways to pay

You can buy your aligners with a single payment of \$1895 or choose SmilePay™ for a **\$250 down payment and \$85 a month for 24 months.****

@SmileDirectClub



1800 515 198 | [contact us](#) | [view in browser](#) | [unsubscribe](#)

This email was sent to

*SmileDirectClub cannot guarantee reimbursement from your private health fund provider. The coverage amount listed is based on the private health fund information provided to SmileDirectClub by [Name]. We have confirmed your private health fund plan with your private health fund provider has coverage for one or more of the following orthodontia CDT codes: D8090, D8080, D8040.

**You cannot submit a claim to your private health fund provider until you've completed all your SmilePay payments and paid in full.

Annexure B

"Dear Future Grinner,

We were not able to check the eligibility on your dental insurance plan; unfortunately, your insurance company does not release benefit information to our network or otherwise non-contracted providers. We encourage you to contact your insurance provider directly.

Here are the questions you'll want to ask your insurance company to find out if your policy will reimburse you for your SmileDirectClub Invisible Aligner purchase:

- *1. Does my plan include orthodontic benefits?*
- *2. Are there any age restrictions on my orthodontic benefits?*
- *3. Does my plan cover invisible aligners? If you are asked for an Item number for these services, refer to 825 as the Item number to describe our product.*
- *4. Are there any out of the pocket charges that I will be responsible for?*
- *5. What is the process for me to file a claim for reimbursement from my plan?*
- *6. Is there a lifetime Maximum on my policy?*
- *7. If you ask for the Dr. Name is (Doctor's Name) Lai and the provider number is (Provider #)*

Neither SmileDirectClub nor the doctor prescribing the treatment will be filing a claim, so it will be important to understand what your insurance company will require from you so that you can be reimbursed accurately and directly to you.

When you purchase your aligner treatment plan, we will provide you with the information most insurance companies require for filing a claim so that you can be reimbursed by your plan. If you have any questions, comments or concerns just call a SmileExpert (a real, live human) at 1(800) 515 198."

Schedule

No. VID of 2021

Federal Court of Australia
District Registry: Victoria
Division: General
Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

Respondents

Second Respondent: SmileDirectClub Aus Pty Ltd (ACN 632 280 310)

Date: 12 July 2021

Certificate of lawyer

I, James Love, 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 in the document.

Dated: 12 July 2021

A handwritten signature in black ink, appearing to read 'James Love', is written above a horizontal line.

Signed by James Love
Lawyer for the Applicant