



## Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

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### **1. Executive summary**

- Independent contractors that use the Mable platform are not by any rational definition “employee like”, nor is Mable part of the “gig” economy or in any way similar to platforms in ride share and food delivery.
- The care and support sector is facing significant, long term challenges which marketplace platforms like Mable help address by leveraging digital technology, data and direct community connections, leading to increased productivity, workforce participation and innovation.
- Mable has called for marketplace platforms – where providers determine the services they offer, who they provide services to and the rates and terms of the service – to be excluded from the “employee like” legislation.
- Mable is supportive in principle of the concept of legislated workable minimum standards for independent contractors but does not support the proposed “employee like” model as it introduces unnecessary uncertainty, complexity and cost.
- Mable provides a strong value proposition to both sides of its marketplace: people who need support and independent contractors offering diverse services. Each side of Mable's marketplace has a choice regarding how to engage with each other.
- Mable already provides minimum standards to the independent contractors who choose to use its platform including a minimum contractual rate and comprehensive insurances.
- A recent survey by YouGov demonstrated that 87 per cent of independent contractors on Mable prefer to be self-employed; have higher levels of satisfaction of their mode of employment when compared to employees of traditional providers; and are already planning for their costs of running a small business.
- Mable support providers earn more on average than individuals working under comparable award arrangements, demonstrating that support providers are setting appropriate rates, even as clients pay less for their services due to Mable's low fee structure.
- These reforms could result in less flexibility for independent contractors and their clients in reaching mutually agreeable terms tailored to their unique individual preferences and need. This might include prohibitions on working in certain ways (such as for less than two hours in a shift) and added complexity from having to navigate award-like standards (when support providers are already able to set their own rates and terms, negating the needs for such an intervention).
- These reforms will adversely impact the choice and control of older persons and

### **Mable Technologies Pty Ltd**

1300 73 65 73 | Suite 12.03, Level 12, 255 Pitt St Sydney, 2000, NSW  
info@mable.com.au | ABN: 80 162 8 90 379



people with disabilities.

- The cost of minimum standards and the costs platforms will incur in monitoring and enforcing minimum standards across diverse services and tailored contracts will be borne by platform users, both consumers and independent contractors.

## **2. About Mable**

Mable is a two-sided, health tech marketplace that offers a complementary approach to traditional aged care at home and disability support models. Mable gives older Australians and people with disability more choice, control and flexibility to shape the care and support they receive in their own homes and community. This choice is made possible by over 15,000 independent contractors providing valuable and necessary care and support services via the platform. Founded in 2014, Mable now operates at some scale with support providers on the platform providing care and support services to over 20,000 people with disability and older Australians.

Digital marketplace platforms such as Mable are uniquely placed to unlock productivity gains in the care and support sector by (i) using technology and data to better and more efficiently match the unique individual needs and preferences of consumers who are located in communities around Australia with the needs and preferences of people in their community who can support them, delivering cost savings and higher utility and (ii) providing technology-enabled administrative efficiencies, transparency and safeguards. Digital platforms and independent contractors are also well placed to lead the innovation in support needed for the long-term effectiveness and sustainability of the NDIS, particularly support that builds participants' capacity to achieve their social and economic inclusion goals.

Mable's customers include both sides of its marketplace: people who need support and independent contractors offering diverse services. Each side of Mable's marketplace has a choice regarding how to engage with each other. Without Mable having a strong value proposition for both sides, they will each choose to engage elsewhere. Part of Mable's value proposition to independent contractors who choose to use its platform is minimum standards, including a minimum contractual rate and comprehensive insurances.

Mable's low fees cover access to the online systems and tools for clients and support providers in its tech-enabled platform. In return for these fees, users receive access to a safeguarding and compliance system (including provider screening, contextual information, insurances and incidents and complaints handling), record keeping and invoicing/payments system, data security and privacy system (ISO 27001 certified), training opportunities through the Mable Learning Hub and partnerships with RTOs, and the "matching" system including search and job post functionality. Mable employs nearly 300 Australians at its head office, including an operations and support team that helps clients and contractors use the platform. Mable is a profit-for-purpose business. Notably, 13 per cent of head office staff identify as having a disability, and 29 per cent have close family members who live with disability. Mable is investing in long-term tech, data and operations solutions needed to support a two-sided, safeguarded marketplace platform and is yet to make a profit.

## **3. Mable's position on the Closing the Loopholes Bill**



Mable's position remains unchanged: independent contractors that utilise its platform are not by any rational definition "employee like", nor is Mable part of the gig economy. Mable's platform operates entirely differently from vertical 'gig' platforms in rideshare and food delivery. Mable also operates in an entirely different sector of the Australian economy to rideshare and food delivery, one that has unique characteristics and is experiencing significant challenges for individuals, families, communities and Government.

Notably, in the past twelve months 64.62 per cent of relationships between support providers on the platform were 3 months or older while 50.72 per cent of relationships were 6 months or older. This demonstrates that the dominant mode of service delivery on the Mable platform is now long-term collaborative relationships between client and support provider. This is not "gig work".

**Mable has consistently called for marketplace or horizontal platforms – such as Mable, Airtasker and Expert 360 – to be excluded from the "employee like" legislation.** A marketplace platform is one in which providers determine the services they offer, who they provide them to, and the rates and terms for providing those services. The parties contract directly with each other. **Even so, Mable is supportive in principle of the concept of workable minimum standards for independent contractors.** However, the model that the Government has proposed for independent contractors working on horizontal platforms creates unnecessary uncertainty, complexity and cost. In addition, the Bill introduces inconsistent treatment of independent contractors who adopt digital platform technology in their business differently than those who do not.

In Mable's view, the solution is simple: **the Government should put forward a bill that gives certainty by establishing straightforward standards for independent contractors through legislation.** These same standards should apply to all independent contractors regardless of whether they utilise a digital platform.

The notion that the existence of independent contractors in the care economy is reliant on platforms is specious and denies agency to participants, both independent contractors and clients. In reality, independent contracting has emerged in response to individualised funding arrangements (in-home care packages and the NDIS), consumer choice and care workers choosing self-employment. The emergence of technology platforms such as Mable – providing a safeguarded marketplace facilitating connection and transparency, business tools to small businesses looking to enter the care economy and safeguarding and protections to both parties – is a natural outgrowth of reforms and decision-making by others.

This is one of the fundamental differences between the care economy and rideshare and food delivery: independent contractors can and do operate off-platform. There is no dependency on the Mable platform. There are, for example, multiple active Facebook pages enabling tens of thousands of people to engage services from independent contractors.<sup>1</sup> People also find and engage local independent contractors via Gumtree, word of mouth or supermarket notice boards. However, given the transparency, compliance, safeguarding (including the provision of insurance) and trust & safety functions of platforms, it is not in the Government's interest to inadvertently encourage more off-platform engagement.

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<sup>1</sup> NB - A single Facebook page for this purpose has nearly 40,000 members and there are dozens of such pages. See [here](#).



#### 4. Outcome of YouGov survey

Mable commissioned respected polling company YouGov to undertake a study of the users of its platform as well as users of traditional providers and an online provider that uses an employment model. YouGov conducted the study online between 17 April and 5 May 2023. Responses were received from 1,549 Australians working in care and support, 894 from people who have a home care package or are assisting someone with a home care package and 631 from people who are NDIS participants or assisting someone with an NDIS package. The individuals working in care included people employed or self-employed who offer services via online platforms, self-employed people who provide services independent of platforms and people who are employed directly by clients or traditional and registered providers.

People providing support showed clear preferences with regard to employment or self-employment, with 87 per cent of independent contractors on Mable preferring to be self-employed and only 13 per cent preferring to be employed. Similarly, 88 per cent of people employed by traditional providers prefer to be employed, with 12 per cent preferring to be self-employed. There are distinct motivators for these different preferences. The main reasons for people preferring to be self-employed on Mable were “I have more independence to work however suits me” (48 per cent) and “I enjoy scheduling my time seeing the same clients each week” (32 per cent), while the main reasons for people preferring to be employed, were “My employer pays my wage, tax, superannuation and workers compensation” (34 per cent) and “I have job security” (25 per cent).

Mable support providers are more likely to be very satisfied with their mode of employment, with 72 per cent rating it as ‘very good’, compared to support providers in all other modes of employment; employed directly by clients (59 per cent) and directly employed by a traditional provider (29 per cent). Further, 91 per cent of digital platform service providers rated their experience as ‘very good’ or ‘good’. This compares favourably to only 62 per cent of those directly employed by a traditional service provider. Support providers on Mable rate their overall experience, satisfaction with hourly rate and whether they feel trusted, significantly higher than support workers employed by traditional providers. Mable support providers were more likely to experience job satisfaction than those directly employed by traditional providers (72 per cent compared to 51 per cent), be confident (70 per cent compared to 48 per cent), and happy at work (71 per cent compared to 41 per cent). Both report similar levels of job security and reliability of working hours, although in both cases, levels are marginally higher for self-employed people on Mable. This indicates that people who choose to offer services via Mable are finding that their needs or preferences in relation to job security and reliability of working hours are being satisfied.

The survey also demonstrates that support providers on the platform understand the nature of their engagement and are making the kinds of choices necessary for small businesses across Australia. Notably, 59 per cent of support providers on Mable report putting aside money for superannuation (with those that don't overwhelmingly having reasons for not doing so such as being retired), 45 per cent are putting aside funds for their leave and 81 per cent are putting aside money for taxation purposes. Mable is investing in tools, currently in pilot, to make it easier for sole traders on its platform to make voluntary superannuation contributions and make tax payments and continues to improve education about the



importance of planning for superannuation, taxation and leave.

The YouGov survey demonstrates that people working in the care sector hold clear preferences between being employed or self-employed and are engaging in the form of work that most suits them. **Independent contractors are a complementary rather than competing workforce and increase workforce participation in the care and support sector.**

## 5. Implications of these reforms for support providers

Mable's primary concern in relation to support providers (who are independent contractors) is that they might lose the ability to set their own rates and terms in relation to the services they choose to provide when they use a digital platform to connect with clients. Currently, support providers can determine their own earnings in negotiation with clients. Mable's only intervention is to set a minimum contractual rate. The minimum contractual rate is determined annually based on the National Minimum Wage and includes allowance for platform fees, superannuation and 25 per cent casual loading. This is currently set at \$36 per hour, which ensures that support providers receive a minimum of \$32.40 per hour after platform fees. The vast majority of services on the Mable platform are, of course, contracted well above this minimum. Where relevant, the system also provides education to support providers to ensure their prices fall within government guidelines, for example, the NDIS Price Limits.

Minister for Employment and Workplace Relations the Hon Tony Burke MP has indicated that he believes that support providers on Mable should be paid based on awards.<sup>2</sup> This is despite the significant evidence provided to the Government that support providers on Mable, in setting their own rates, earn, on average, more than individuals working in the care economy as employees under award (*see analysis in the appendix*). There are two potential interpretations of the Minister's remarks. The first interpretation might be that a minimum contractual rate is establish per broad service category, based on a reasonable interpretation of a relevant award. Under this model, if the rights of independent contractors to flexibly determine their own services and set rates above that amount is retained then Mable is open to this proposal.

**Mable's concern is that the Fair Work Commission might instead force compliance to the Social, Community, Home Care and Disability Services Industry Award (SCHADS) and the Nurses Award, which would risk making the platform unworkably complex and increase platform fees.** Across the 15,000<sup>3</sup> active support providers and 54,000 diverse service relationships<sup>4</sup>, there are more than 100 different categories under the award that may apply.<sup>5</sup> There may also be services which won't necessarily fit under a disability or aged care award. Attempting to force independent contractors to comply with employment awards will invariably undermine independent contracting and service innovation in the care

<sup>2</sup> Hon Tony Burke MP, "Q&A National Press Club Speech, Closing Loopholes Bill", 31 August 2023, [link](#).

<sup>3</sup> Active on average on a monthly basis.

<sup>4</sup> Active in the calendar year 2023 so far.

<sup>5</sup> Under the SCHADS Award, Social and community services (SACS) subdivision which covers most disability support work there are 28 separate base pay points. Under SCHADS Home Care Disability there are 9 pay points, under SCHADS Home Care Aged Care there are 9 pay points. For nurses there are 27 pay points that would apply to Registered Nurses working with aged care clients and a further 27 pay points for nurses that work with people with disabilities. This count does not include miscellaneous services which might be difficult to capture under an award or allied health professionals.





economy. Notably, given the very different pay for individuals working in the NDIS and home care, it would also make it difficult for independent contractors to provide support to both people with disabilities and older persons – something 45.39 per cent of independent contractors on the Mable platform chose to do in the 2022-23 financial year.

Support providers on Mable have other concerns where the Fair Work Commission might seek to prohibit them from making choices currently granted to any small business in Australia. For example, having to comply with a two-hour minimum service period (notably, 33.2 per cent of independent contractors on Mable choose to provide a less than two hour service in response to their client's life needs at a price they determine), a creation of a maximum number of hours of work or a requirement for support providers to pay into a portable leave entitlement scheme. The reality is that support providers on the Mable platform are – like every small business in Australia – making their own decisions about work hours, accounting for business costs and breaks and putting aside funds for superannuation, taxation and leave. This is demonstrated by the YouGov Survey results outlined in section 4.

## 6. Implications of these reforms for clients

Older persons and people with disabilities have not been consulted on the implications of this legislation on their choice, control and flexibility, innovation on workforce participation and their ability to access support.<sup>6</sup> In Mable's experience, people with disabilities and older persons want support workers, including independent contractors, to feel valued and be well remunerated. This is demonstrated time and again, including by those people with disabilities and older persons who use the Mable platform to form relationships and who agree to pay independent contractors appropriately. However, the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* creates a whole new jurisdiction at the Fair Work Commission, which will have the ability to intervene in the tailored and personal support arrangements of people with disabilities and older people.

In setting minimum standards for “employee like” independent contractors in the care and support economy, the Fair Work Commission will have to consider a number of things, including the needs of workers and the economic needs of businesses. But, the Bill does not require the Commission **to consider what impact a minimum standard might have on people with disabilities and older persons.**<sup>7</sup> If the Government's intention is to capture the care and support economy, including those using horizontal or marketplace platforms, then it seems reasonable that the Government require the Fair Work Commission to consider the needs of people who use platforms to engage independent contractors in its decision making.

There are relatively few limits on standards to be imposed by the Fair Work Commission, which creates uncertainty for platform operators, independent contractors and consumers.<sup>8</sup> This means that **arrangements mutually agreed upon by clients and independent**

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<sup>6</sup> Transcript, Education and Employment Legislation Committee (Senate Estimates), 30 May 2023, [link](#).

<sup>7</sup> Schedule 1, Part 16, Item “536JX The minimum standards objective”, [link](#).

<sup>8</sup> Schedule 1, Part 16, Item “536KM Terms that must not be included in a minimum standards 12 order”, [link](#).



**contractors, such as support for less than two hours, might be prohibited** or subject to equivalent restrictions as they exist under the award.<sup>9</sup>

In relation to the issue of “deactivation”, **independent contractors are only ever removed from the Mable platform for reasons of participant safety or compliance with regulated codes of conduct or other regulations.** These individuals, of course, represent a tiny minority of support providers, and only a handful are removed in any given year. Exclusion from the Mable platform only occurs in relation to serious matters, such as allegations of abuse, neglect or exploitation of people with disabilities or older persons, a change to the support providers' screening check, being added to a banned worker list, or non-compliance with the Aged Care Code of Conduct or the NDIS Code of Conduct. Mable will also act to remove clients who put support providers at risk or where their needs are better met elsewhere. Mable has a strong commitment to natural justice, and all such instances of removal of a person from the platform, whether a client or a support provider, are reviewed by its Trust & Safety committee.

The Government has modelled the bill's deactivation approach on unfair dismissal legislation, even while acknowledging that work on platforms such as Mable fundamentally differs from work in an employed setting.<sup>10</sup> Individuals on the Mable platform are independent contractors, and Mable's ability to direct a reinstated individual is far more limited than an employer. It is also Mable's understanding that unfair dismissal has resulted in a situation in which traditional providers have been unable to exclude individuals they believe pose a threat to the safety and wellbeing of their clients. The Government claims its summary dismissal equivalency will be sufficient to protect people with disabilities and older persons, but the Fair Work Commission has reinstated many individuals despite behaviour that might cause concern for people with disabilities and older persons.<sup>11</sup> Even more troubling, in instances where an independent contractor is reinstated to a platform, the Fair Work Commission could make an ‘order to restore lost pay’.<sup>12</sup> It is unclear which party will wear the liability for such an order: the platform or the client.

Further, it is worth acknowledging that the “deactivation” provisions have been written far more broadly than to only cover instances where independent contractors are removed from a platform. The draft legislation states that deactivation includes instances where an independent contractor is:

*...no longer able to perform work under an existing or prospective services contract or the ability of the person to do so is so significantly altered that, in effect, the person is no longer able to perform such work.*<sup>13</sup>

This could be interpreted to include systems such as star ratings, which consumers use to provide feedback about the quality of care and support received.

**It is likely that Mable's platform fees will have to increase as a result of this legislation,**

<sup>9</sup> Since July 2022, the SCHADS award has prohibited working for less than two hours, even where both parties might agree to such arrangements. See “Changes to the Social, Community, Home Care and Disability Services (SCHADS) Industry Award from 1 July 2022” by NDIA, 20 September 2022, [link](#).

<sup>10</sup> *Schedule 1, Part 16, Item “Part 3A-3—Unfair deactivation or unfair termination of regulated workers”*, [link](#).

<sup>11</sup> Paulinet Tamaray, “FWC finds procedural unfairness with worker's dismissal”, *Human Resources Director*, 15 August 2023, [link](#).

<sup>12</sup> *Schedule 1, Part 16, Item “536LQ Remedy—reactivation etc.”*, [link](#).

<sup>13</sup> *Schedule 1, Part 16, Item “536LG Meaning of deactivated”*, [link](#).



impacting both clients and support providers. The Mable platform is **not** operationally similar to ride-share and food delivery platforms. There is not a single service offered via the platform, and Mable does not control the rates and terms for providing the service. As such, the legislation will require monitoring and enforcing minimum standards in relation to diverse services where the rates and terms for these services are agreed between two third parties, not Mable. This will likely necessitate extensive platform and operational changes.

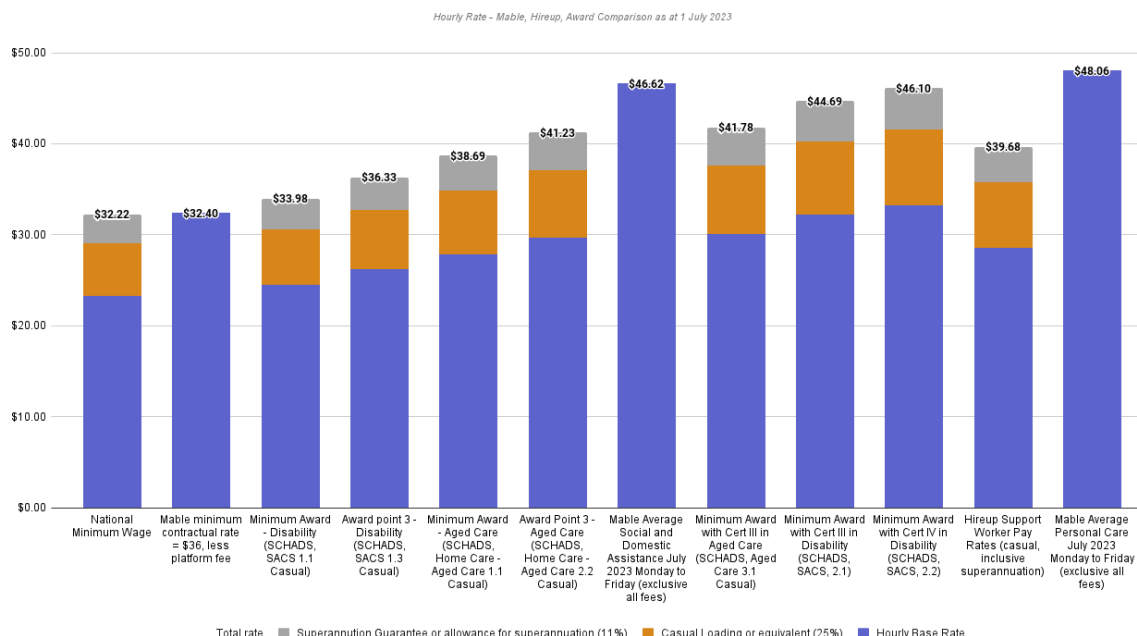
Since its founding, Mable has kept its fee structure low by investing in efficient technology and data solutions (including minimum standards) designed to meet the needs of both sides of its platform. This ongoing investment by Mable and the accompanying low-fee structure enables clients to pay less on average while support providers are paid more on average. On Mable, only 16.6 cents in every dollar returns to its business in platform fees. This compares favourably to Mable's competition, Hireup, with a margin of 33.8 per cent and traditional providers whose margins range from 40 to 50 per cent of what the consumer pays. However, requiring Mable to monitor and enforce standards, for which its customers are not asking, will inevitably result in higher fees to meet increased costs. Some parties claim that any increase would be at the expense of Mable's profits. This ignores the fact that **Mable has never made a profit but has operated at a loss for its entire existence.**





## 7. Appendix - Support Provider Earnings

*How Mable average rates in the two lowest paid categories compare to the Award*



*Average rates across the four categories of services in the Mable marketplace*

| Service category                       | Average rates July 2023 after platform fees |
|--|---|
| Allied health care <sup>14</sup>       | \$119 per hour (M-F is \$119)               |
| Nursing                                | \$60 per hour (M-F is \$57)                 |
| Social support and domestic assistance | \$49 per hour (M-F is \$47)                 |
| Personal Care                          | \$51 per hour (M-F is \$48)                 |

<sup>14</sup> Includes speech therapists, psychologists, physiotherapists and occupational therapists.