

SELECT SENATE COMMITTEE ON JOB SECURITY

ANSWERS TO QUESTIONS ON NOTICE

Safe Work Australia

Senator Sheldon asked the following question on 10 June 2021:

CHAIR: *There are carers providing home care services through Mable at NDIS participants' houses as we speak, and if there is a workers health and safety incident Safe Work doesn't know if they might be legally liable. I appreciate that these are uncharted waters. I asked the NDIA last week, and they didn't know either. It seems to be a ticking time bomb for some of the most vulnerable people in our community. Are you in a position to give further definition particularly about the Mable circumstances? Are you able to take that on notice?*

Mrs Costelloe: *We could certainly provide some general advice on how we think it could potentially apply. Again, we're not a regulator, so it wouldn't be definitive or legal advice or anything like that. But we could certainly look at the situation.*

The response to the honourable senator's question is as follows:

Safe Work Australia is not a WHS regulator and therefore cannot provide specific advice on how WHS laws apply to platforms such as Mable. However, Safe Work Australia can provide general information on the duties in the model WHS laws and how they could apply in a gig arrangement, as set out below.

Under the model WHS laws, a person undertaking a business or undertaking (PCBU) has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers while they are at work in the business or undertaking (s19(1)).

A worker also has a duty to take reasonable care for their own health and safety and the health and safety of others while at work (s 28).

The standard and what is required to be met in relation to a health and safety duty is set out in section 18 of the model WHS Act.

Safe Work Australia understands that Mable is an online platform that facilitates NDIS clients to connect with carers that provide home care services.

In general, a gig platform such as Mable is likely to be a PCBU as they will be a person conducting a business. Whether a platform owes a carer a duty of care as a worker depends on a range of factors including:

- the characterisation of the platform's business or undertaking
- who the gig participant is carrying out the work for and the nature of the work
- the terms and conditions governing the arrangement between the platform and the gig participant.

The principles in the model WHS Act provide that a person can have more than one duty and more than one person can concurrently have the same duty (ss 15,16). Depending on the arrangement between Mable and the parties using the Mable platform, there could potentially be multiple duty holders responsible for health and safety. For example, the shared duty holders could be Mable, the NDIS client who engages the carer, and the carer who is performing the work. The specific WHS requirements that must be discharged by duty holders will turn on the particular arrangements.

Any primary duty of care owed would be qualified by what is 'reasonably practicable'. Again, this would inherently be fact dependent and would depend on a number of factors including:

- how activities may be carried out and the hazards and risks that may arise
- the availability and suitability of particular control measures to eliminate or minimise risk
- the people involved in the activity, including their experience, qualifications and expertise.

Where there may be more than one PCBU that owes a duty to the same worker, PCBUs must consult, cooperate and coordinate their activities to ensure the health and safety of workers and other persons affected by their work, so far as is reasonably practicable (s 46).

Where there are shared duties, a PCBU does not necessarily have to take the required action themselves but ensure another duty holder is doing so. Duty holders, including PCBUs cannot transfer their WHS duties to another person (s 14).

Senator Sheldon asked the following question on 10 June 2021:

CHAIR: *Have there been any circumstances that you're aware of that have been inquired into, regarding a PCBU? Have there been opinions given in regard to PCBU applying to clients? Have there been any cases that you're aware are where there have been settlements reached in cases involved PCBU clients?*

Mrs Costelloe: *I'm not aware, no.*

CHAIR: *Would you be able to take that on notice?*

Mrs Costelloe: *Sure. We can, yes.*

The response to the honourable senator's question is as follows:

The Safe Work Australia Agency is not aware of specific inquiries, opinions or settlements regarding whether a particular person in an NDIS working arrangement owes WHS duties as a PCBU. The Agency is however aware through public submissions to the 2018 Review of the model WHS laws, that WHS regulators are considering emerging issues arising from the introduction of the NDIS.

The Agency is not aware of any published case law regarding an NDIS participant as a PCBU.

Senator Sheldon asked the following question on 10 June 2021:

Mrs Costelloe: *The NDIS being a Commonwealth scheme established by Commonwealth legislation, how that interacts with other legal frameworks such as work health and safety laws in the Commonwealth, states and territories would be a matter for the Commonwealth. So I couldn't give you advice on how that would apply.*

CHAIR: *You're not aware that they've made any representations to try to find advice?*

Mrs Costelloe: *I have to take that on notice, Senator, thank you.*

The response to the honourable senator's question is as follows:

Safe Work Australia is unable to provide advice on behalf of other Commonwealth agencies.