

Friday 31 May 2024

Submission

Non-competes and other restraints: understanding the impacts on jobs, business and productivity

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1. Executive summary

- Mable does not use the term “gig workers” to describe the independent contractors that work via its platform, but accepts that others have used the term “gig workers” to refer to individuals on its platform.
- Mable does not have non-compete clauses in its Terms of Use nor does it require exclusivity by independent contractors, however, Mable has what might be considered a non-solicitation requirement.
- Mable strongly supports innovation and dynamism in a section of the economy that has too often been characterised by a lack of competition but competition must be undertaken in an ethical manner and the Government should not reward unethical business practices.
- Businesses should have a right to compete within a fair framework and individuals that deliberately subvert systems established by competitors for their own benefit should not be rewarded. Businesses should retain the right to prevent avoidance conduct.
- In this context, avoidance conduct refers to individuals who use the benefits of the Mable platform but seek to avoid paying the service fees from which Mable generates revenue.
- Avoidance conduct is a significant issue for Mable for two reasons: safety and the financial viability of the marketplace. Notably, when relationships move off platform they lose the protections available including, most significantly, Mable's insurances and Trust & Safety processes.
- The actions Mable takes against individuals it suspects of avoidance conduct are limited to education (which emphasises the safety risks of moving off platform), suspension of accounts or off-boarding from the Mable platform.
- Mable has identified a number of behaviours of potential concern to the Government, including people with disabilities whose services have avoided platform protections *without their consent*, and anti-competitive behaviour by bad actors who have impersonated independent contractors or clients for the sole purpose of harvesting clients or harvesting independent contractors to build their own business.

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2. About Mable

Mable is a health tech platform 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 17,000 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 21,000 people with disability and older Australians.

3. Rationale

In this submission Mable seeks to answer Question 14 posed in the discussion paper “Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?”¹ It is worth noting, Mable does not use the term “gig workers” to describe the independent contractors that work via its platform. Mable is a marketplace and independent contractors that work on the Mable platform are characterised by high bargaining power, high authority over work and earn, on average, more than their employed counterparts (as they are able to set their own rates of remuneration). Further the dominant mode of work on the Mable platform is long term relationships, not short term “gigs”. In the 2023 financial year, - 66 per cent of support relationships were 3 months or older and 52 per cent were 6 months or older. However, Mable accepts that others have used the term “gig workers” to refer to individuals on its platform.

To this end, Mable provides this submission to explain its approach to the issue of non-solicitation which Mable terms as avoidance conduct. For the avoidance of doubt, Mable does not have non-compete clauses in its Terms of Use nor does it require exclusivity by independent contractors. Indeed, the dominant mode of work for independent contractors on Mable is to work both on and off platform. However, Mable has what might be considered a non-solicitation requirement, this is discussed further below.

4. Mable’s views on competition

As a digital disruptor and relatively new entrant to the Care and Support Economy, Mable strongly supports innovation and dynamism in a section of the economy that has too often been characterised by a lack of competition. As the Treasurer Jim Chalmers in his 2023 essay, *Capitalism after the crises*, noted, “the entrenched systems and institutions that dictate and drive public and private spending are so complex and vast, and powerful economic interests have so much at stake in keeping them in place”.²

Mable recognises the importance of choice and control for individuals seeking care. Mable was built to enable this connection, to permit independent contractors and older persons and people with disabilities to engage in direct connections in a safeguarded marketplace. The issue is only with relationships which form on-platform being taken off-platform and the risk

¹ “Non-competes and other restraints: understanding the impacts on jobs, business and productivity Issues Paper”, Competition Review, Treasury, April 2024, [link](#), p. 31.

² Hon Jim Chalmers MP, “Capitalism after the crises”, *The Monthly*, 1 February 2023, [link](#).



this creates as set out below.

However, it is important that competition is undertaken in an ethical manner and that well intentioned attempts by Government to promote competition do not reward unethical business practices. Specifically, businesses should have a right to compete within a fair framework and individuals that deliberately subvert systems established by competitors for their own benefit should not be rewarded. Put simply, Mable suggests that while some restraint of trade clauses might be inappropriate, it is important to acknowledge that some represent a fair attempt by businesses to prevent avoidance conduct.

5. Avoidance conduct explained

Avoidance conduct refers to actions undertaken by clients, support providers or third parties (such as support coordinators) to avoid paying Mable's fees. Put simply, users who join the platform agree via acceptance of Mable's Terms of Use that any commercial relationship formed on the platform must be billed through the platform. This clause exists to ensure support relationships formed by the platform continue to be protected by Mable's safeguarding measures such as insurance and access to its trust and safety team to assist with addressing incidents and complaints. It also ensures the financial viability of Mable's platform in which it has invested over \$100 million.

As a non-employer, independent contractors working via the Mable platform have a high authority of their work, so Mable's ability to exercise control over independent contractors is limited.

As such, Mable's actions against individuals are limited to:

1. *Education* – In the first instance, Mable seeks to provide information to both clients and support providers about the safety risks of taking work off platform and reminds them of their obligations in line with Mable's Terms of Use.
2. *Offboarding* – Mable has the ability to remove or suspend clients or support providers from its platform over breaches of Government regulations or of its Terms of Use, including for the issue of avoidance conduct.³

As outlined above, Mable does not and would not seek to prevent a support provider from undertaking work elsewhere with clients they have not met via the Mable platform. To the contrary, Mable understands that the majority of independent contractors work both on Mable and off-platform.

Mable contends that its right to off-board individuals that deliberately violate its Terms of Use is in the best interests of clients, support providers and the Government.

6. Why is avoidance conduct a problem?

There are two main reasons why avoidance conduct is a significant issue to Mable. Firstly, there is safety, relationships which move off platform lose the protections available including,

³ See "15. Suspension/Termination", "Terms of Use", Mable, 2022, [link](#).



most significantly, Mable's insurances⁴ and Trust & Safety processes⁵. Secondly, Mable has invested significantly in building its platform, and its revenue is limited to the fees charged to both support providers and clients. Avoidance conduct creates a threat to Mable's sustainability and the benefit it provides to support providers and clients that utilise its platform.

From time to time, an individual independent contractor and their client will decide that the Mable platform is no longer providing value in return for the fees paid on a service. Ultimately, they can choose to leave the platform. Mable's position is to take no action beyond potentially preventing such individuals from using the platform again. As such, the only consequence for those parties is that they will not be able to use Mable again in the future.

However, there are a number of behaviours which have occurred on the platform which should be of concern to the Government. This includes people with disabilities who have their services avoid platform fees *without their consent*. Mable has had multiple former clients approach its Trust & Safety teams for assistance only for the client to learn that they had been off-boarded from Mable. This has occurred because the independent contractor has chosen to bill directly to the client's plan manager, and the plan manager has agreed to pay invoices without consulting the client. Mable has had such clients attempt to make claims against insurance or seek redress through Mable's Trust & Safety processes only to learn that the supports had been provided off-platform without their knowledge and were, as such, uninsured nor subject to the protections offered through the platform.

Mable has also been the victim of anti-competitive behaviour by bad actors who have impersonated independent contractors or clients but appear to have had no intention to ever conduct commerce through the platform. Instead, such individuals have sought access to the Mable marketplace for the sole purpose of harvesting clients or harvesting independent contractors to build their own business without paying fees to Mable for usage of the platform's functionality

Mable contends it is in the interests of all parties – Government, clients and support providers – that it retains the right to prevent anti-competitive and dishonest conduct through its platform. Mable is grateful for the opportunity to participate in this important discussion.

⁴ For more information see - "HMD Insurance and Mable: Working Together, accessed: 11 April 2024, [link](#).

⁵ For more information see - "Incidents and Complaints Management Policy", accessed: 11 April 2024, [link](#).