

# *Independent Contractors of Australia*

[www.contractworld.com.au](http://www.contractworld.com.au)  
Fax: 03 9563 2731

[office@contractworld.com.au](mailto:office@contractworld.com.au)  
ABN: 54 403 453 626

## **Response to Consultation Paper “Review of Workers’ Compensation and Occupational Health, Safety & Welfare Systems” South Australia**

**22 November 2002**

Independent Contractors of Australia (ICA) welcomes the opportunity to respond to the South Australian Consultation Paper. ICA responds to Section 2 of the Consultation Paper *Access to Workers’ Compensation* and the special paper by Professor Stewart that forms the substance of the proposal for a ‘new definition’ of employment.

ICA is strongly against the proposal contained in the Consultation Paper to dump the common-law definition of employment and to create a wholly new and untried definition that will have consequences beyond that asserted in the ‘Stewart paper’.

ICA submits that the Stewart proposed definition will

- (1) not achieve its stated intent to capture ‘sham’ arrangements.
- (2) extend the scope of the workers’ compensation regime into areas not intended.
- (3) create confusion as to the scope of the Act and result in protracted and expensive legal dispute which will impede the delivery of quality workers’ compensation outcomes for South Australian workers.

ICA recommends that extensive, careful and detailed investigation and community consultation be undertaken before initiating any non-common-law legislative path. The Stewart special paper, however, does provide a valuable platform upon which critical issues can be raised.

In responding to the Stewart special paper, this ICA submission:

- Looks at and rejects the ‘dependent’ contractor argument.
- Rejects suggestions of confusion over independent contractor definitions.
- Rejects allegations that independent contractors systemically rort tax, workers’ compensation schemes or other legislative arrangements.
- Argues for the rights of independent contractors.
- Considers in detail the Stewart paper recommended definition and highlights problems.

Addendums to this submission are taken from ICA’s Website.

## **Independent Contractors of Australia (ICA)**

ICA is the first (and probably only) organisation in Australia exclusively dedicated to the interests and rights of independent contractors.

ICA is new: it was formed in July 2001 and incorporated as a non-profit organisation under the South Australian *Associations Incorporation Act*. ICA has three principal aims:

- 1) To conduct an education campaign to assist independent contractors and the community at large to understand the legitimate status of independent contractors and the important issues relating to them.
- 2) To act as a network for industries structured around or dependent on independent contractors.
- 3) To lobby for the rights of independent contractors.

ICA operates through its Website at [www.contractworld.com.au](http://www.contractworld.com.au).

ICA is truly a 'virtual' organization. Through its Website:

- The public can access significant quantities of information about independent contracting.
- People can join (\$50 per year) and access the "members only" section of the site, where core legal, tax and other information is stored.
- Members can engage in discussion on independent contractor issues and have policy input.
- Members and interested registered persons can receive regular e-mail alerts on independent contractor issues.

The ICA committee is drawn from across Australia with representatives from a range of industries including farming, IT, housing/construction, transport, labour hire and others.

*A brief history:* With 28 per cent of the private sector workforce now not engaged as employees and with non-employees under such sustained attack for so long, it is little wonder that an organisation such as ICA has come into existence. The spur for ICA's formation, however, was the Personal Services Income (PSI) tax debate of 2000--2001. It became clear with the early PSI proposals (the so-called '80% rule') that independent contractors were to be denied their legitimate entitlement to business-style tax status and treatment. ICA emerged from the ensuing grass-roots political eruption against the early PSI proposals and became an important network for focusing on constructive tax system outcomes. Issues encountered in the PSI debate are covered in the Stewart special paper.

## **Content**

1. Background.       What is independent contracting?
2. Background.       The Dependent Contractor argument and Independent Employees.
3. Background.       Some practical issues. Discussing the facts.
4. Background.       Why the trend to independent contracting?
5. Specific Issues     Problems with the Stewart special paper
  - 5.1     The attack against common law
  - 5.2     The Stewart paper alternate definition.
6. Conclusion and Summary

## **Addendum**

Attached with this submission are documents taken from ICA's Website.

- (1) Who is an independent contractor? ICA's laypersons 'legal' understanding.
- (2) Independent contractor or employee. Brief comment on leading legal test cases.
  - Stevens v Brodribb.
  - Sammartino v Mayne Nickless Express
  - Odco P/L v BWIU
  - Hollis v Vabu (Crisis Couriers) Pty Ltd
- (3) Regulating Independent Contractors. ICA submission to *Trade Practices Act* Review.

## **1. Background**

### **What is independent contracting? A general overview**

The Stewart paper presents a view of independent contracting that ICA believes contains significant misconceptions. ICA presents an alternative view by way of comparison. Independent contracting is not an obscure, artificial legal construct. Independent contracting is a reflection of a real-life choice in how to work.

Independent contracting is one of those things that when understood appears so simple. Yet, when not understood, it appears unfathomably complex. And it is on the basis of alleged complexity and confusion that many of the anti-independent arguments are mounted.

*Independent contracting is the achievement of an individual's desire to have control of ones own working life. This reality is reflected in its legality held sacred under the common law.*

*Independent contracting comprises both an attitude and a set of behaviours.*

Independent contractors are, by definition, people who want and have achieved independence in their thoughts and actions in their working lives. They have adopted business attitudes as their motivations in their working lives. They accept the disciplines of the commercial contract, in which they exercise equal rights to control the terms of their contract/s, as the process by which they organise their work.

And it is only when the reality of this commercial-contract-organised independence is in clear evidence, that the common-law courts will accept that independent contracting exists. Where the tag of independent contracting is used but the real-life evidence presented to a court indicates traditional employment-type control, the courts reject the independence tag and state the truth.

The process and the tests that the courts use to undertake examinations of contractual independence or [employment-like] dependence are well known and publicly available. However, many labour academics, lawyers, unions, industry organisations and public policy bodies claim that the definition of employment/independent contracting is vague and uncertain. They are wrong.

Consequently, it is not surprising that people without specialist knowledge of employment law can be confused. This is one of the reasons that ICA came into existence. ICA's Website seeks to create clarity on the definition of independent contracting by describing the major sub tests (there are approximately 21 of them) that the courts use for making their determinations. ICA describes the application of these sub-tests as the 'swinging pendulum' test. It suggests that people review their behaviour in light of each test and see which way the overall pendulum

swings—towards employment or towards independent contracting. If a person wishes to be an independent contractor or use independent contractors, they must first ensure that the real-life conduct exhibited in their working arrangements points strongly to independent contracting.

And, of course, in the final analysis, that sort of assessment can and should only be conducted by independent courts. On the balance of evidence, an individual will be either an independent contractor or an employee. A person is either independent in their thoughts and actions (independent contractor) or they are subject to potential control by another (that is, they are an employee).

## **2. Background**

### **The ‘Dependent Contractor’ argument and ‘independent employees’**

The Stewart paper constructs its thesis around the “dependent contractor” argument. ICA submits that ‘dependent contractor’ is a notion which at law and in reality has no meaning, is illegitimate, confuses rather than clarifies issues and is an artificial creation which, if translated into legislative form, creates significant and often unpredictable problems.

The dependent contractor argument was:

- Used to justify New Zealand proposals to pull independent contractors into industrial relations regulation, but was rejected after extensive community and parliamentary inquiry.
- Used as the justification for Queensland’s *Industrial Relations Act*, section 275 that has run into considerable difficulty because of issues encountered in the test case for the provision, and which for similar reasons is now bogged down in the current TWU application.
- Used as the justification for similar legislation that was rejected in Victoria and withdrawn in New South Wales following significant community objection.
- The basis for arguing that ILO conventions extend the definition of employee in the Federal industrial relations act. (The legal arguments were firmly addressed through the Federal Courts and rejected.)

The Stewart paper makes repeated reference to ‘dependent contractors’ but does not detail the full idea of what is now a comparatively old argument.

ICA research has discovered that wherever Australian-based dependent contractor arguments arise, the intellectual source most often quoted is that of HW Arthurs, a Canadian academic and his article published in *The University of Toronto Law Journal* in 1965 titled “The Dependent Contractor: A study of the legal problems of countervailing power.” Arthurs described “dependent contractors” as follows: “they are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganised market

conditions... They are dependent economically, although legally contractors... They are prisoners of the regime of competition.” In demonstrating his point, Arthurs case-studied disputes around the 1950s between newspaper vendors at odds with their newspaper suppliers and fishermen working off the coast of Canada who, because of geographic considerations, could only sell their produce through one canning works. Arthurs reasoned that these “prisoners of competition” deserved the legislative protection of employment law to breach competition rules and collectively collude against their sole supplier or buyer.

In the creation of the Australian version of the dependent contractor argument, Arthurs’ reasonings have been adopted and simplified to an extraordinary degree by highly respected economic statisticians and economic organisations who have created a statistical definition of “dependent contractor,” namely that of a ‘contractor’ who works for only one client. This is simplistic and naive to the extreme. It is a definition that completely ignores the law of contract.

The dependent contractor argument is fundamentally flawed. It ignores the economic and legal fact that an independent contractor has escaped the imprisonment of the employment contract and has found freedom in the regime of competition.

The simple fact is that the common-law definition of employment involves a process of finding the truth of economic and commercial contract relationships. If, in a common-law investigation a person is found to be economically dependent, their contract is of an employment nature. Yet some economists and lawyers choose to ignore this truth and pretend that a person can be a contractor and dependent—both at the same time.

But even if ICA’s position on this matter is not accepted, and the dependent contractor argument is found to have some intellectual force, then it must also follow that the reverse argument must apply, namely, that there are persons who are ‘independent’ employees. An independent employee would be a person who had all the desires and attitudes of independence but was forced to be an employee either through duress or because of the lack of opportunity to become a contractor.

ICA rejects both notions—dependent contractor and independent employee—as either contractual or legislative possibilities. Both ideas deserve to remain in the realm of academic musings.

The raising of the ‘dependent contractor’ argument in the Stewart special paper as the central premise for dumping the common law definition of employment is unfortunate because it distracts from other issues specific to workers’ compensation and which should be addressed.

### **3. Background**

#### **Some practical issues. Discussing the facts.**

If the issues relating to independent contracting are to be properly understood, clarity on definitions is critical. Definitional clarity forces clarity of legislative intent. The Stewart proposals and the ICA position can be clearly understood within this larger context.

Independent contracting is simply the reverse of employment. Confusion has, however, been created in the minds of some because of an historically-developed lazy use of the word ‘employment’.

The laziness has developed for simple reasons. After the Second World War, when income tax, payroll tax and workers’ compensation regimes were invented, the vast bulk of workers were ‘employed’. That is, people were engaged under the specific type of contract known as the ‘employment contract’ or contract *of service*, which at that time was highly akin to the ‘master-servant’ relationship. When income tax, payroll tax, and workers’ compensation were invented, it was natural for public policy-makers to structure both the legislation and schemes around the presumption of master and servant employment. Independent contracting was comparatively little used.

As a swing away from employment began to emerge, perhaps around the 1970s, this created challenges to the near-universal reach of these government-created regimes. The challenge increased as the percentage of employees decreased.

3.1 *Workers’ compensation and payroll tax* authorities responded by legislatively increasing the reach of their regimes through legislative amendments that described other forms of contracts, or specific professions, so that they were caught within the legislation. Foolishly, the term ‘deemed employment’ was adopted as a generic description of these broadened forms of legislation. The ‘deeming’ of employment, however, is a misnomer, because the legislation of the different States does not change the nature of the common-law non-employment contracts being described, they simply describe them as within the legislation.

3.2 *Occupational Health and Safety* legislation has not suffered from the same legislative problems of ‘employment’ dependency because, from the outset, legislation has been modelled largely on outcome descriptions rather than contractual descriptions. OH&S, however, sometimes becomes confused when administered by workers’ compensation authorities, because of different legislative models being administered by the same bodies.

- a) *Equal opportunity and anti-discrimination* legislation is, likewise, largely structured around outcome descriptions rather than contractual descriptions.

3.4 *The Australian Tax Office (ATO)* was challenged on two fronts with the shift to independent contracting, one affecting withholding payments (PAYE); the other impacting on individuals' entitlements to deductible items. Withholding was the greatest of worries and the ATO responded to the challenge by arguing that the Tax Act's legislative wording under PAYE (where it referred to "wholly or principally for labour") extended the definition beyond common-law employment. On some ten occasions over ten years during the 1980s and 1990s, however, the High Court rejected this view, stating repeatedly that the withholding legislative powers under the Tax Act were restricted to common-law employment. After a decade of administratively trying to fix the tax collection issue through PPS, the entire system was reorganised in 2000 under PAYG. Now, the withholding powers of the ATO are legislatively clear and robust and there is no attempt or need to 'deem employment'. Rather, the contractual models that the government wants captured are individually and specifically described with the appropriate administrative withholding arrangements. These are all detailed within the encompassing PAYG system. The remaining issue of deductibility entitlement was resolved in 2001 under PSI, in as probably a satisfactory manner as could be expected.

- b) *Regulation of labour contracts* fall into a different area to that of income and payroll tax collection, workers' compensation, occupational health and safety and equal opportunity and anti-discrimination. Regulation of labour contracts began in Australia at the turn of the 19<sup>th</sup> Century when the 'employment' contract was 'at will' and was truly that of 'master and servant'. The great nineteenth-century American jurist Oliver Wendell Holmes explained the employment contract this way in 1892: "There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered to him." It was because of this implied suspension of rights to "free speech and idleness" that regulation of labour contracts was created. In essence 'employment'-regulating legislation removes from the employer the exclusive capacity to control the terms of the employees' contract and gives ultimate control to semi-judicial bodies. This legislative transference of employer control has been so substantial that the common-law definition of 'employment' in Australia shifted in the mid-1980s to only 'right to control' (*Stevens v Brodribb Sawmilling Co Pty Ltd*).

Labour regulation under Australian industrial relations law derives its moral and legal justification from the implied inequality and suspension of rights contained in the modified master-and-servant contract that is employment. This concept of 'employment' continues to be the dominant managerial concept that is perceived to hold 'the firm' together.

Even though this definition of 'employment' has remained as the foundation of Australian industrial regimes, the rise of independent contractors, particularly in the

1990s, has lessened the influence of industrial relations law as a socially organising instrument. The decreasing influence of industrial relations law should not be seen as a good or a bad, but rather as one consequence of a social trend which is moving away from the debilitating aspects of the employment contract. But, the contract *for* services should be seen as a good thing because it is a deliverer of rights, principally the right of the independent contractor to have control of her or his contract. This contract comes under the regulating regimes of common law, *The Trade Practices Act* and State Fair Trading Acts. [See accompanying ICA submission to Trade Practices Review].

It can be seen, then, that the alleged ‘confusion’ over the definition of “employee” (and in turn “independent contractor”) has been created by policy makers as a result of historical circumstance. To fix this created confusion, the way forward is to do what has happened with the Federal tax reforms—accept that the definition of ‘employment’ is only that as described under common-law, and that if other contractual types need to be included, then embrace those. Embracing contractual types other than employment, however, needs to be done with a firm eye on the specific objectives of each policy.

Within this context, ICA *rejects* suggestions that a ‘common universal’ definition of employment is needed—because one already exists, namely, that supplied by common law. To try to create some other definition inevitably creates confusion and has the potential to corrupt policy objectives. Instead, ICA urges:

- c) *Tax*: Legislation designed to collect tax must focus on the specific integrity measures to suit the purposes and intent of the tax regime. The new PAYG system has provided one model for how this can be achieved.
- d) *Workers’ Compensation*: Most workers’ compensation is caught in a dilemma. The schemes are alleged insurance schemes, but are predicated on an actuarial assumption that the ‘employer’ is always to blame for injuries. Compare this with road accident insurance, where actuarial blame is not apportioned but instead blame is subject to separate criminal considerations. Further, workers’ compensation schemes usually specifically prevent individual, self-employed, natural persons from registering—although South Australia has a voluntary opt-in clause. Presumably the exclusion of the self-employed has been done in the belief that this would turn workers’ compensation into a universal form of medical insurance with potential uncontrollable cost blow-outs. As more people have become self-employed, independent contractors, the assumptions underpinning the schemes have come under stress. Each State and Territory has responded differently to the stress. But the stress is not that of independent contracting, but rather the problems of a fault-driven ‘insurance’ concept interfacing with a changing world.

In South Australia, this is the key issue to be addressed—how to reconcile a fault-driven ‘insurance’ concept with an environment where people want to have the

legal right to control themselves. The Stewart proposals are a diversion from this larger and more substantial core issue.

## **4. Background**

### **Why the trend to independent contracting?**

The Stewart paper makes one comment with which ICA is in full agreement:

“It must after all be a fundamental tenet of any democratic capitalist society that each person is free to choose to be an entrepreneur if they so desire.”

The move to independent contracting is a consequence of people exercising that free choice, a choice secured and protected through the common law processes. This exercise of choice is no ‘con’, subterfuge or trick.

Given that Australia’s traditional institutional arrangements are so heavily employment- focused, why have people moved to become independent contractors? Is it—as the Stewart paper implies—nothing more in many instances than an orchestrated sham and ‘con’ for the purposes of imposing exploitation and the avoidance of obligations in the Australian workplace?

ICA submits that the rise of independent contractors is a direct and growing part of a phenomenal social movement reflected in other areas, such as the movements for equal rights for women and the disabled, the rise in the demand for justice and the peace movements, and the splintering of politics from a two-polar to a multiply-polar system. A major single thread exists in each of these movements, namely, the very desire of humans to control their own lives, to not have others tell them what to do or when, whether that be to go to war, to cook and clean, or how to vote, or how to work.

This broad phenomenon poses a huge challenge to the ability of humans to organise themselves into social structures. All government policy-makers face the same dilemma, namely, how to create and manage legitimate organising institutions when authority is diffused and constrained.

Businesses are still conceptually driven by the need for hierarchical structures (often portrayed as a ‘pyramid’ of control with strong overtones of class consciousness and a whiff of class warfare). Unions and employer associations believe all businesses want and need this pyramid-like, class conscious form of control. Public policy-makers assume the same. But the people want something different. Whatever their education level or apparent sophistication, all people are becoming increasingly money savvy and business-focused. By adopting independent contracting, people compete fully in the capitalist, market system, controlling their own destiny and willingly allowing true competitive forces and market interactions to determine outcomes. The

issue is at the core of a just, market-driven society in which the freedom to contract (or not to contract) and to choose freely the type of contract into which one enters, is integral to the existence of justice in such a society.

This is what drives independent contractors. This is no sham or ‘con’. It would not last if it were. It would not grow in significance in the face of the conservative institutional forces opposing it if it were a sham. It is a movement of substance which neither needs nor wants to be funnelled politically. In fact, it rejects all such moves. Independent contracting is about people getting on with the business of doing business!

And this movement receives much of its protection through the common-law processes of assessing whether a contract is employment or independent contracting. The common law genuinely and effectively searches for the shams, the cons and subterfuge to search for the truth.

## **5. Specific Issues**

### **Problems with the Stewart Special Paper**

#### 5.1 The attack against common law

The Stewart paper seeks to deconstruct the legitimacy of the common-law approach to testing for employment and independent contracting arguing that the test is ill-defined, poorly executed and subject to being rorted. ICA rejects this proposition.

The Stewart paper is exhaustive in its accusations and reflects a poor view of the judiciary who are charged with undertaking considerations. ICA highlights a few of the problems with the Stewart paper.

- 5.1.1 *Common-law definition.* The Stewart paper suggests (p 3) that the common law does not establish a clear definition of employment. This is wrong. The establishment of indicia under common-law sets out all the considerations to be taken into account when considering whether someone is a ‘dependent employee’ or an ‘independent contractor’. The approach taken under common law is consistent. ICA has summarised these in lay language. [refer to attachment]
- 5.1.2 *Impressionistic.* The Stewart paper says that the common-law approach is ‘impressionistic’. (p 3) This is true, but it cannot be any other way. And the Stewart paper is also impressionistic, it simply exhibits this from a different perspective. The issue is about one impressionistic approach that is known, has been developed over centuries and has precedential consistency, compared with one that is newly invented in the Stewart paper, has no precedential support and is highly unpredictable.
- 5.1.3 *Legal constructs.* The Stewart paper asserts that “ any competent lawyer can take almost any form of employment relationship and reconstruct it as

something that the common law would treat as a relationship between principal and contractor.” This is not true. The Stewart paper suggests, by inference, that judges cannot see through artificial constructs. In fact they do, and repeatedly see through artificial constructs. There is a significant body of cases where the legal construct has not been reflected in the behaviours of the parties, and the courts have declared the legal construct not to be a true reflection of the contract in play.

- 5.1.4 *Form v Substance.* The Stewart paper states that “...I (and many other commentators) have long argued that the law as it stands is deficient, in that form is so readily allowed to prevail over substance.” This view is simply wrong and does not accord with facts. An examination of any number of court decisions will show that the principal and primary concern of the judiciary is to look through form to find substance. The Stewart paper accusation against the judiciary is not in accord with the facts of the considerations and the history of rulings of the judiciary.
- 5.1.5 *Harmonisation.* (page 1) The Stewart paper proposes a ‘harmonisation’ of the definition of employment under workers’ compensation definitions and industrial relations definitions. ICA believes that this is too narrow an approach for the purposes of workers’ compensation regimes. Different regulatory regimes have different intentions and need to be considered on their merits. Workers’ compensation is about insurance-like issues and industrial relations is about the regulation of terms of contracts in which one party has the right to control the other. To treat workers’ compensation definitions as if they are industrial relations issues is to run the real risk that important actuarial considerations may be missed—to the detriment of the workers’ compensation scheme and workers.
- 5.1.6 *The right to be a business person.* The Stewart paper does, however, conceptually concede the rights of those who “are genuinely in business in their own account.” Unfortunately, in seeking to remove the common-law definition, the Stewart paper seeks to apply a different definition of what constitutes a genuine business to that which prevails as the central tenet of a democratic, market-based society. It is here that ICA strongly disagrees with the Stewart paper. ICA sees the common-law definition as the key to the protections that independent contractors must be afforded as well as the key to preventing scams and rorts from being conducted.

ICA believes that a simple fact of law must be recognised, namely, that the dividing line between what constitutes a business and what does not, and what distinguishes commercial law from employment law, is and must be the common-law definition. This is fundamental to the law of contract and the nature of the commercial contract. In rejecting the common-law definition, the Stewart paper overturns known commercial contract law,

replacing the law of contract with a new and unknown definition of contract.

The Stewart paper concludes that reforms must “...tackle the problem at source—the common law definition of employment itself.” Rather than being the problem, ICA submits that the common-law definition of employment is the starting point for finding solutions.

## 5.2 The Stewart paper alternate definition

ICA submits that the Stewart paper alternate definition of employment has serious flaws the full consequences of which cannot be known. Some of these problems are potentially as follows;

The Stewart paper suggests the following clause as the beginning of the new definition:

- (1) *A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.*” (p 12)

This first clause is fraught with danger evidenced by the following considerations:

- 5.2.1 The identification of the word “person” with “worker” runs into immediate difficulty with the legal definition of the word “person”. A “person” at law can be an individual (natural person) or a corporation or a trust. In this context, the drafting offers enormous difficulties for the workers’ compensation scheme because it raises the strange prospect that a “corporation” or a “trust” could be considered a “worker” for the purposes of workers’ compensation and liable to be compensated for injuries. The idea of a corporation or a trust is unrestricted and it is hard to imagine how a “corporation” could be liable to receive workers’ compensation payments.
- 5.2.2 The use of the word “contracts” is unrestricted, thereby revealing the prospect that any contract—even those not intended to be embraced—could be embraced. For example could this extend to franchise contracts or even leases?
- 5.2.3 The use of the words “to supply their labour” is similar in structure to that used in Federal tax withholding legislation under the historical PAYE system, where the Australian Taxation Office argued that the words “wholly or principally for labour” extended the definition beyond common-law employment. However, the High Court rejected this interpretation on some ten occasions over ten years, stating that the wording was restricted to common-law employment. Similar challenges to the Stewart paper’s recommendation should be expected.

5.2.4 The construction of the “presumption” of employment suggests a shift away from principles of natural justice. The choice in the form of contract under which people work is presently a right enjoyed by all persons. The presumption of employment is a denial of that right. People currently have, and should be entitled to retain, the right to decide freely the sort of contract they want. The task of the law should remain to test if the choice has been freely exercised and to test if the alleged contract is the contract it purports to be.

5.2.5 The use of the words “client or customer” demonstrates the self-destructive inconsistency in the clause. The legal finding of a client or customer can only be determined by an investigation of the nature of the contract between the supposed “client/customer” and the other party. For a person to be a “client/customer”, the nature of the contract between the parties must be commercial (a contract *for* services). The Stewart paper wants to avoid a common-law definition of contract, but in constructing its new definition it has reverted to common-law considerations. If the Stewart paper’s proposal were implemented, it should be expected that the issue of defining what constitutes a “client or customer” would be a key issue raised in legal testing of the clause. Stewart does not provide a definition of “client” or “customer” and it must be presumed that common law would prevail.

5.2.6 The word “genuine” takes on significant importance. The Stewart paper offers a definition of “genuine” at clause (3) which opens up an entire legal consideration of the meaning of “genuine”. Once again, inconsistency is displayed. The Stewart paper’s definition is heavily dependent on elements of existing common-law definitions of employment, namely:

- The “extent of control”. Here the Stewart paper reverts to a 19<sup>th</sup> Century application of common law where “control” was actual and real as opposed to the broader definition used today, where only the “right to control” has to be demonstrated.
- ‘Integration’ into the business. Here the Stewart paper has picked up a common-law indicator used in the USA and UK, but not normally used in Australia.
- The degree of economic dependence. It is hard to see how defining “economic dependence” can be adequately accomplished other than through the common-law test. If the Stewart paper defines “dependence” as working for one client, then issues of timing must be addressed. Given that workers’ compensation reporting is required on a financial-year basis, could the fact that someone works for two clients in a year, even if work for the second client is only for one day, enable a person to be classed as not dependent? Could this create loopholes in

the coverage of the workers' compensation scheme coverage not currently present in existing definitions?

In effect, the test for finding if a person is "genuinely carrying on a business" replicates some of the common-law tests. The words "regards should be had" used further in the Stewart paper definition, suggests a need to consider all the facts on the balance of evidence; a key common law requirement. Indeed, the Stewart paper looks as if it has invented a narrower but unbalanced version of common law.

ICA has similar concerns with many other aspects of the Stewart paper's proposed definition which could be detailed if requested. Our major concern is that the Stewart paper's definition opens a Pandora's Box of unknowns with seemingly limitless possible outcomes dependent, in part, on the outcome of the numerous legal challenges that should be anticipated if the Stewart paper definitions gain any support. The likely outcomes could be quite the reverse to those intended by the Stewart paper. There is the potential in some areas of narrowing the scope of the South Australian workers' compensation coverage and in other areas of extending the scope in ways not intended.

## **6. Conclusion and Summary**

ICA is gravely concerned with the Stewart paper thrust and proposals.

- The central argument of the Stewart paper being the allegation of 'dependent contractors' is not valid at law or in reality.
- The proposal to dump the common law definition of employment poses dangers for all workers, the South Australian workers compensation scheme and constitutes an assault against the rights of independent contractors.
- The new proposed definition contained in the Stewart paper is seriously flawed with consequences that must be assessed and considered in detail.

In summary, the Stewart paper poses threats to the integrity of the South Australian workers compensation scheme and is a diversion from core issues of substance that need to be considered.