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## Dependency under the *Workers' Compensation and Rehabilitation Act 2003*

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## Background

Ever since the introduction of legislation to compensate employees injured at the workplace it has been recognised that other persons, associated with the injured worker, may also suffer financially as a consequence of workplace injuries. If the injury results in death, then those who were financially dependent upon the worker may also need to be compensated. It is this category of claimant for workers' compensation who will be examined in this paper.

The present Act, being the *Worker's Compensation & Rehabilitation Act 2003* ('the WCRA') focuses on three matters when seeking to establish an applicant's entitlement to compensation in the case of the death of a worker on whom they claim dependency: -

- (a) their **relationship status** with the deceased worker;
- (b) the extent, if any, of their **dependency on the deceased worker**; and
- (c) the **nature of the deceased worker's earnings**, upon which dependency has been claimed.

The resolution of these issues are questions of fact<sup>1</sup>. Section 27 of the WCRA requires the person alleging dependency to be a member of the deceased worker's family who was completely or partly dependent on the worker's earnings at the time of the worker's death or, but for the worker's death, would have been so dependent. The words "dependent" and "earnings" are not defined by the WCRA. Despite that, the cases show that the Courts have, over time, generally not taken a restrictive view of these terms, no doubt reflecting the beneficial nature of the legislation.

### (a) Relationship status

Section 27 of the WCRA uses the expression "member of the deceased worker's family", in the context of referring to those persons who may have been either fully or partly dependent on the earnings of the deceased worker. The persons who qualify as members of a deceased worker's family are then identified in section 28 of the WCRA to be the following: -

- (a) a spouse, see: section 28(a)(i)
- (b) a parent, grandparent and step-parent, see: 28(a)(ii)
- (c) a child, grandchild and step-child, see: section 28(a)(iii)
- (d) a brother, sister, half-brother and half-sister, see: section 28(a)(iv)
- (e) if the worker stands in the place of a parent to another person [then] that other person, see: section 28(b)
- (f) if another person stands in the place of a parent to the deceased worker [then] that other person, see: section 28(c).

Perhaps the most immediately obvious aspect of the statutory definition of family membership in section 28, is the fact that it really serves to confine those family members who may claim dependency compensation to immediate family members. In this regard, for example, it is not possible, given the strictures of section 28, for a cousin, nephew or niece to lay claim to dependency payments, unless of course they are *in loco parentis* with the deceased worker, pursuant to either sections 28(b) or 28(c) of the WCRA. This is a concept that will be explained further, below.

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<sup>1</sup> *Aafjes v Kearney* (1976) 180 CLR 199

## How is family membership to be established?

In all cases it is the applicant for compensation who has the onus to provide evidence that will establish their entitlement to compensation.

In the majority of cases, proof of a particular entitling relationship such as spouse or child is relatively straight-forward, as these relationships may be established by the production of an original or certified copy of a certificate under the *Births, Deaths and Marriages Registration Act 2003* (Qld). Such a certificate is admissible in a Court in Queensland pursuant to section 74 of the *Evidence Act 1977*. There is no reason why an insurer shouldn't act upon such evidence, as well.

However, quite apart from such usual matters of proof, the words and expressions used in the dependency provisions of the WCRA also throw up more conceptual aspects, which require some understanding. It is to these matters which we now turn for consideration.

### Spouse

The word "spouse" as used in section 28 of the WCRA is defined in section 32DA of the *Acts Interpretation Act 1954* as including a de facto partner. Subsection (6) of section 32DA(1) of the *Acts Interpretation Act*, says: -

"In an Act, a reference to a de facto partner is a reference to either one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family."

For the purpose of that subsection, the gender of the persons is not relevant, see: section 32DA(5)(1)(a). All that is required is that the two persons are living together on a genuine domestic basis, yet not be married, or related by family. Persons are married if they fall within the definition of same under the *Marriage Act 1961* (Cwlth). The *Marriage Act* does not yet recognise same sex relationships.

As will be discussed in more detail, further below, it can be determined whether persons are living together "on a genuine domestic basis" for purposes of section 32DA of the *Acts Interpretation Act* by assessing their circumstances against the factors listed in sub-section (2) of section 32DA. Naturally, this means that when assessing a dependency claim by any putative de-facto partner, the claim assessor must be careful to look for information from the claimant that goes towards establishing the types of factors that are outlined in section 32DA.

Use of the expression "related by family" in the context of persons whom do not fall within the definition of a de facto under section 32DA of the *Acts Interpretation Act 1954* is to be taken to be a reference to persons who are in what might be deemed to be "prohibited relationships" within section 23B(2) of the *Marriage Act*, see: section 32DA(5)(b). These are, in essence, purported marriages between siblings (including half siblings), or between ancestors and their descendants.

Although there is no specific requirement in section 32DA of the *Acts Interpretation Act* that a relationship between two persons to have existed for any specified length of time before it

officially qualifies as a de facto relationship,<sup>2</sup> section 29(1)(a) of the WCRA provides that for the purposes of applying the definition of a de facto partner afforded by section 32DA of the *Acts Interpretation Act* into the WCRA a couple must *generally* have lived together for a continuous period of at least two years, ending on the worker's death. In this sense, at least, the criteria for a de facto relationship under the WCRA is arguably more restrictive than that which applies under section 32DA of the *Acts Interpretation Act*, where there is no two year cohabitation requirement.<sup>3</sup>

Section 29 of the WCRA does provide that a relationship can still be found to exist even if the period of cohabitation is less than two years "if the circumstances of the de facto relationship of the deceased and the de facto partner evidenced a clear intention that the relationship be a long term committed relationship", see: section 29(1)(a)(ii). In cases where the deceased worker left a dependant who is a child<sup>4</sup> of the relationship, the de facto relationship status for the purposes of the WCRA crystallises immediately before the worker's death, see: section 29(1)(b). Again, these are all questions of fact, and are to be assessed and resolved on the basis of the available evidence, in each separate case.

### ***Living together on a genuine domestic basis***

Under section 29 of the WCRA a worker's de facto partner is a spouse only if the worker and the de facto partner live together as a couple on a "genuine domestic basis" within the meaning of section 32DA of the *Acts Interpretation Act* 1954. Section 32DA(2) of the *Acts Interpretation Act* 1954 says that regard may be had to any of the following circumstances to determine whether or not two persons were living together as a couple on a genuine domestic basis: -

- (a) the nature and extent of the common residence
- (b) the length of the relationship
- (c) whether or not a sexual relationship exists or existed
- (d) the degree of financial dependence or inter-dependence, and any arrangement for financial support
- (e) the ownership, use and acquisition of property
- (f) the degree of mutual commitment to a shared life, including the care and support of each other
- (g) the care and support of children
- (h) the performance of household tasks
- (i) the reputation and public aspects of the relationship.

Importantly, the above list taken from section 32DA(2) of the *Acts Interpretation Act* 1954 is not to be regarded as a checklist of mandatory criteria, for subsection (3) of the same section goes on to say that no particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons are living together as a couple on a genuine domestic basis. These matters therefore are indicative criteria and should be used as the basis for lines of inquiry when assessing the merits of a claim. Significantly,

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<sup>2</sup> Here, see subsection 32DA(3), which provides that 'no particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis'.

<sup>3</sup> This more restrictive approach to an entitlement provision is however consistent with that used under Part 19 of the *Property Law Act* (1974), which also requires that a de facto relationship have existed for two years before a de facto might seek a property settlement from their former partner.

<sup>4</sup> This is defined in the WCRA to include a child of the relationship who may be born after the worker's death who would have been partly or completely dependent on the worker's earnings, had the worker not have died.

subsection (4) further says that two persons are not to be regarded as living together as a couple on a genuine domestic basis solely because they have a common residence.

Although there are currently no reported decisions in which section 29 of the WCRA has been judicially considered, section 32DA of the *Acts Interpretation Act* 1954 was discussed in the context of the *Property Law Act* 1974 by the Queensland Court of Appeal in *KQ v HAE* [2007] 2 Qd R 32. At page 37 of the report the Court, in a unanimous judgement (per McMurdo P, Keane & Holmes JJA) said: -

"It can be seen that the legislation does not provide a precise test for the existence of a de facto relationship. None of the matters listed in s.32DA(2) of the *Acts Interpretation Act* is necessarily of decisive significance. Nevertheless, to the extent that those matters are identified as relevant considerations, the ultimate issue to which they are directed is whether the parties are "living together ...on a genuine domestic basis". This phrase necessarily draws attention to whether the parties are living, or have lived, together to maintain a household...

...

It is clear from s.32DA(4) of the *Acts Interpretation Act* that pt 19 of the PLA is not concerned with the relationship between people who merely live in the same household and share living expenses: the PLA is not concerned with the relationship between friends who share a household, or with that between carer and patient. Further, the fact that two people have a sexual relationship will not suffice to establish that they are 'de facto partners'. This is clearly so, by reason of the fundamental requirement that the parties must be 'living together as a couple on a genuine domestic basis'.

These considerations all lend support for the view taken in earlier cases that a 'de facto relationship' will not be established for the purposes of pt 19 of the PLA unless it can be seen that 'the parties have so merged their lives that they were, for all practical purposes, living together as a married couple'."

It is submitted by the authors of this paper that those comments although expressed in the context of the impact of section 32DA of the *Property Law Act 1974* are also relevant to whether or not a person is a spouse of a deceased worker for the purpose of section 29 of the WCRA.

## **Child**

Children of deceased workers are obviously one significant category of persons who may lay claim to dependency entitlements. It is important therefore to pause and consider the legal scope of the terms 'child' and 'children'.

Section 28(a) of the WCRA makes reference to both children and step-children. Yet, it is further important to remember that the definition of child includes adopted children, see: section 28 of the *Adoption of Children Act (Old)* 1964. Previous workers' compensation legislation in Queensland also referred to children of a deceased worker who were born out of wedlock. However, at least since the passage of the *Status of Children Act* 1978, section 3, no distinction is any longer drawn between legitimate and illegitimate children, such that this distinction is not referred to under the WCRA.

Whilst one often presumes the paternity of the child of a marriage, this presumption is rebuttable. In the past, paternity was usually settled through blood tests, although scientific advances nowadays make DNA testing much more probative.

### ***In loco parentis* - Persons in the position of a parent**

Children of deceased workers as well as parents of deceased workers may have dependency entitlements as family members. Under section 28(b) and section 28(c) of the WCRA, a deceased worker's family is taken to include those situations where the deceased worker may have stood in the position of parent to some other person, not their child, or where some other person stood in the position of parent to the deceased worker, even though the deceased worker was not technically their own child. These particular provisions derive from the legal concept of a person standing "*in loco parentis*", which has long been recognised as giving rise to certain rights and obligations.

To be *in loco parentis*, means to have voluntarily assumed all the responsibilities as the parent of a child who is not your own child, in the sense of that child being either your own biological issue, or in circumstances where the child has become your own via formal adoption or as a step-child, via marriage. The situation may arise, for example, were an uncle or aunt assumes parental responsibilities for an orphaned niece or nephew due to some sense of moral commitment; or, perhaps even more commonly when a de-facto partner voluntarily assumes parental obligations in respect of the children of their de facto partner. The concept of being *in loco parentis* was described by Sir George Jessel, M.R. in *Bennet v Bennet* (1879) 10 Ch D 474 at 477 as follows: -

"As regards a child, a person not the father of the child may put himself in the position of one in loco parentis to the child, and so incur the obligation to make provision for the child...

...

So that a person in loco parentis means a person taking upon himself the duty of a father of a child to make provision for that child."

Although in *Bennet v Bennet* (ibid), Jessel M.R made explicit reference to the enforceability of *in loco parentis* obligations held by a male person, in Australia in the modern era it is doubtful that the phrase would be confined to the obligations of a father as opposed to also extending to the obligations of a mother. See *Nelson v Nelson* (1995) 184 CLR 538. In any event, any such historical limitation to the scope of the *in loco parentis* concept is now overcome by the explicit wording used in section 28 of the WCRA, which refers to "parent" without gender qualification.

The authors have not been able to identify any judicial decisions in Queensland wherein section 28(b) or section 28(c) of the WCRA have been considered. However, the expression "stands in the place of a parent" which is used in the WCRA has recently been examined by Deputy President Roche in the Workers' Compensation Commission of New South Wales, where the same phrase is used in section 4 of the *Workplace Injury and Management Workers' Compensation Act 1998* (NSW). That decision is *Rose v TA Edison Pty Ltd* [2008] NSWCCPD 10.

At paragraph 46-48 of the decision in *Rose*, Deputy President Roche said as follows: -

“Having regard to the above authorities and the beneficial nature of the *Workers’ Compensation Acts*, it is my view that a worker is in the place of a parent where he or she accepts, in a real and substantial way, the responsibilities of a parent to provide for the care, maintenance and upbringing of the child concerned. The provision of shelter, food and clothing (*Roser*) will be an important and often a critical factor, but it is equally important to consider the circumstances in which the worker provides the shelter, food and clothing and the nature of the relationship the worker has with the child. The nature of the parental relationship ‘is complex and includes more than financial support’ (*Chartier*, at [43]). A generous relative may provide financial support for a child, but not be in the place of a parent. To come within the terms of s.4 of the 1998 Act the worker must also assume responsibility for other aspects of the child’s upbringing, as a parent would.

Whilst a parent’s responsibilities with respect to a child extend to every aspect of the child’s life, including the physical, mental, moral, educational and general welfare of a child..., that does not mean that it must [be] established that the worker assumed responsibility for every aspect of a child’s upbringing before he can be said to be in the place of a parent. The evidence must, however, establish that the worker accepted and fulfilled, in a significant and meaningful way, the responsibilities of a parent with respect to the child’s care, maintenance and upbringing. The fact that the worker merely provided support for the child (financial or otherwise) will be a factor relevant to that determination, but will not, on its own be determinative. The question is one of fact and degree that requires careful consideration of all the circumstances of the relationship.”

We turn now to the second matter mentioned above that must be looked at to determine whether or not a person qualifies for compensation under the Act, namely whether or not they are dependent on the deceased worker.

#### **(b) Dependency on the deceased worker**

In order to be a dependent for the purposes of section 27 of the WCRA, a claimant must not only be a member of the deceased worker’s family (as defined), but must also be “dependent on the worker’s earnings”. Dependency on those earnings may be complete or partial.

The time of death is fixed as the time for determining whether or not there is any dependency on the deceased worker’s earnings, yet that determination is only reached after considering the figures applicable to that particular time, yet in light of matters of past history as well as the probabilities for the future, see: *Bate v Workers’ Compensation Board of Queensland* (1984) 117 QGIG 6; *Aafjes v Kearney* (1976) 180 CLR 199 at 208.

The concept of examining future probabilities when assessing the extent of any dependency is further illuminated by *McCafferty’s Management Pty Ltd v Pimlott* (1995) 12 NSWCCR 360. In that case, the deceased worker and his wife were both working and contributing equally to their only child’s maintenance. However, the evidence was that the surviving parent, the mother, intended to cease work in three years, at which time the child would be entirely dependent on the earnings of the deceased worker. The Court held that the child was totally dependent on the earnings of the deceased worker, (notwithstanding partial

dependency on her mother as at the date of the worker's death), owing to the likelihood that the deceased worker would have become the only wage earner within about three years.

One of the important conceptual aspects of dependence that needs to be carefully understood is that dependence really equates to reliance rather than being in receipt of something which is merely beneficial. That distinction is perhaps better understood by considering the facts and result in *Altmann v Q-COMP*, a decision of Industrial Magistrate Risson, given in Mackay on 28 July 2006.

In *Altmann*, the claimant for dependency benefits, Ms Altmann, was the mother of the deceased worker, Joshua Hopkinson. Joshua had been an apprentice fitter and turner who had been killed in an industrial accident, on 21 July 2005. Joshua was the eldest of five siblings. His mother and father were separated. During the week, Joshua resided in Mackay with his mother and other siblings, and his mother's new partner. On weekends, Joshua generally went to live with his father, outside of Mackay. Before Joshua commenced his apprenticeship Ms Altmann and her children resided in a flat at Nelson Street Mackay. Shortly after Joshua started his apprenticeship Ms Altmann commenced a new relationship, and there was no longer room at the Nelson Street flat for Ms Altmann, her children, Ms Altmann's new partner and the growing number of vehicles owned by members of the household. Because of this, in March 2005, Ms Altmann leased a larger 4 bedroom house in Luscombe Street Mackay. At the new house Joshua occupied a room downstairs and his mother, 4 other siblings and Ms Altmann's partner occupied the 3 upstairs bedrooms. The rent at the new house was \$350 per week, compared to the \$120 per week that Ms Altmann had previously paid at the flat in Nelson Street. Joshua paid \$70 per week to his mother, as board. Shortly after taking the lease, a further boarder by the name of Lee also moved into the room downstairs, sharing with Joshua, and he also paid \$70 per week to Ms Altmann, as board. In addition to the \$70 board, Joshua and Lee each paid one quarter of the telephone bill and power bill. Joshua also helped his mother by doing maintenance work on her car, some household chores, and occasionally driving his much younger siblings to and from school and to other activities, whenever he happened to be home from work.

At the time of Joshua's death, Ms Altmann had a weekly wage of \$650 per week and her partner earned \$500. With these two wages and the \$140 per week contributed by Joshua and Lee, Ms Altmann had \$1,290 per week to cover weekly expenses estimated by her to be \$1,295, per week. Ms Altmann would meet the shortfall, plus any periodic expenses not part of the weekly budget either by drawing from a property settlement that she had received from Joshua's father, or by putting the unforeseen expenditure items on her credit card. At no time did she look to Joshua to make up the shortfall.

At the hearing of the claim Ms Altmann argued that she was at least partially dependent on the earnings of her son, the deceased worker, such that she qualified as a dependent under section 27. In particular, the claimant argued that she had only moved to the more expensive accommodation in Luscombe Street on the basis that she knew that Joshua would be making a financial contribution.

However, in rejecting the claim for dependency, Industrial Magistrate Risson held that there was simply insufficient evidence that Ms Altmann was dependent on the earnings of the deceased worker in the sense required by the Act. The \$70 per week paid as board by Joshua could only be categorised as their reasonable estimate of the value to Joshua of living in the household. Equally, his contribution to the telephone and power bill was

referable to their estimate of his use of these utilities, such that Joshua's financial contribution related to the cost of his own maintenance, rather than affording any evidence of dependency by Ms Altmann upon his earnings. Although finances in the household were tight, there was simply no evidence that Ms Altmann looked to Joshua for additional financial assistance beyond his agreed contribution, preferring instead to draw down on her own savings, or to use credit cards. Equally, Industrial Magistrate Risson was not prepared to consider evidence regarding Joshua's assistance to his mother around the house. Although a valuable domestic contribution, in and of itself these things afforded no evidence of dependence upon the deceased worker's *earnings*, as is required by the WCRA.

The WCRA is clear in stating that dependency must relate to the deceased worker's earnings. In one of the leading cases in this area, namely *Fisher v Herburn Ltd* (1960) 105 CLR 188, the High Court of Australia held that a person could not be said to be dependent upon a worker's earnings where there were no earnings.

In *Fisher* the applicant for compensation had worked as an underground coal miner continuously from 1929 until 1949. In 1949, the claimant had been forced to cease working as a coalminer due to his contracting a disease that was neither caused nor related to his employment. At that time he went on to a disability pension. Later, in 1955, he was diagnosed as suffering from pneumoconiosis as the result of years of inhaling coal dust at work. It was agreed that this condition would have rendered him permanently incapacitated for work in July 1955, had he then still been in employment. Under the then *Workers' Compensation Act 1926-1954 (NSW)*, compensation was payable by an employer to a wife of the worker who was "totally or mainly dependent on the earnings of the worker", as at the date of incapacity. In this case the notional date of incapacity was agreed to be in July 1955 yet, the High Court (per Kitto & Menzies JJ, with whom McTiernan J and Fullagar J also agreed, on this point) observed that as at the time of incapacity as the result of a work-related condition the worker was already in receipt of a disability pension for an unrelated condition and he had not been in receipt of "earnings" since retiring medically unfit, in 1949. In part (at p. 197) Fullagar J said:

"The remaining question is whether the appellant is entitled, in addition to what is payable under section 9(1)(a), to a weekly payment under section 9(1)(b) in respect of his wife. He can only be so entitled if his wife was "dependent on his earnings" at the date of the certificate of the Medical Board. At that time he was earning nothing, but was, as has been said, in receipt of a pension. His wife may be said to have been dependent on his pension, but she cannot be said to have been dependent on non-existent earnings"

It is apparent from *Fisher* that the High Court in 1960 thought there to be a clear distinction between being in receipt of a pension, and being in receipt of earnings. The decision does not however afford any elaboration of the basis for that distinction. Be that as it may, the correctness of the decision in *Fisher* appears to have been accepted by Matthews J sitting as a President of the Industrial Court of Queensland in *Gers v The Workers' Compensation Board of Queensland* (1985) 119 QGIG 104. In *Gers*, his Honour said, when discussing what could be looked at to establish dependency, in part: -

"Capital outlays benefiting a person as distinct from maintenance items do not evidence dependency (*Campbell v Westcourt Coal Co* (1911) 14 TLR 323). In this respect there is no suggestion in the evidence [that] purchase of the

motor car evidenced any dependency of the appellant although payment of the sums necessary for registering and insuring a motor vehicle and some maintenance on the house would in my opinion go towards establishing it.”

The matter of dependency is a question of fact, see: *Aafjes v Kearney* (1976) 180 CLR, 199, per Barwick CJ at 202. As such, there is no room for legal presumptions which are in conflict with the actual facts. For example, the fact that it may be presumed that a husband would support his spouse out of his earnings is of no assistance where the facts go against that presumption and establish that a wife had moved out of the family home with the children of the marriage some 20 years prior, made her own way in the world, and had received nothing from her husband, see: *New Monckton Collieries Limited v Keeling* [1911] AC 648. It is clear that the view of the House of Lords in *New Monckton Collieries* was that the wife had, in reality, abandoned any dependency on the obligation of the husband to support her.

The decision in *New Monckton Collieries* may then be contrasted with the House of Lords' decision in *Potts v Niddrie and Benhar Co. Ltd.* [1913] AC 531 where no such abandonment of the husband's obligation to support the wife and children had transpired. The House of Lords found that, although the wife and children had not been in regular receipt of support from the deceased worker prior to his death, the wife had not forgone her expectations of support from her husband, and had instead merely been waiting for an opportunity to enforce them. Even though the children of the marriage had, in the interim, relied upon the charitable assistance of their older brothers (which could cease at any time), they were still held to be totally dependent on the deceased worker who was their father.

At first blush it sometimes appears quite difficult to reconcile the different outcomes in the cases, and it can be an infuriating exercise when attempting to glean points of principle. In this regard as was observed by Mason J (as he then was) in *Aafjes v Kearney* “as so often happens in the field of worker's compensation, where the questions are primarily of fact, the decisions are not notorious for their uniformity. Consequently it is not an illuminating experience to explore the cases in any detail”.<sup>5</sup>

Despite that difficulty, there is at least a constant and unifying theme running through the cases. It is that the question of dependency on the earnings of the deceased worker is a question of fact, and is a judgment to be made by the decision-maker once all the facts have been carefully assembled (that is “formally found”), by the decision maker. Once so found, the judgement becomes whether or not there is on those facts any dependency, and whether it is complete or partial.

This approach is illustrated by the High Court of Australia's decision in *Aafjes v Kearny*, supra. In *Aafjes*, the deceased worker had been killed in 1973 at work, leaving the putative dependent, a female child, Peta Kearney (the respondent in the appeal). Peta's mother and the deceased worker had divorced in 1965, and the mother had then re-married, in 1968. By the terms of their divorce settlement, the deceased worker was required to pay \$6 per week for Peta, as well as \$12 per week for the mother. The payments on account of Peta were only made infrequently and, for a period during 1972, these were not made at all. During the early part of 1973, and shortly prior to his death, the deceased worker started paying \$12 per week on account of Peta, in response to a new informal agreement made by him with Peta's mother. Peta lived with her mother in the matrimonial home established by the mother and her new husband. During the period of failure by the deceased worker to

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<sup>5</sup> (1976) 180 CLR 202, at 210.

pay any maintenance on account of his daughter the mother paid for Peta's food, clothing, medical, dental and educational needs from the sum of \$12 per week provided to her by the deceased worker on account of her own maintenance. The mother also made some of the respondent's clothing. The stepfather provided accommodation for Peta in the matrimonial home, but made no other provision for her. The decision by the NSW Worker's Compensation Commission was that the child was wholly dependent on the earnings of her deceased father. The matter was then referred to the NSW Supreme Court as a case stated, the question being whether the Commission had erred in finding total dependency. The issue argued on the case stated by the employer was that the financial support given to Peta by her mother and the fact that her step-father allowed her to reside in the matrimonial home really precluded any possibility of a factual finding of total dependence, such that the Worker's Compensation Commission had fallen into legal error during the process of fact finding. Yet, the Supreme Court of NSW dismissed the appeal, finding that the Compensation Commission was entitled to find as it did. This outcome had the result that the employer then appealed to the High Court.

The High Court unanimously upheld the findings below that the Compensation Commission was entitled to find that the respondent was totally dependent upon the deceased worker. Although the fact that the deceased worker had finally been paying \$12 per week in the few months before his death on account of Peta was a factor that was at least persuasive in the case of two of the Justices (Barwick CJ and Mason J), it was not a factor that was determinative of the outcome. In finding that the conclusion that the child was totally dependent on the earnings of the deceased worker had been open to the Compensation Commission, the High Court followed the approach of Lord Haldane in *Potts v Niddrie & Benhar Coal Co Ltd* ([1913] AC 531, where his Lordship had said (at pp. 537 – 538):

"The true question in the present case, is, in my opinion, whether there was, as one of the facts to be taken into account, an effective and valuable legal right. If there was such a right, and there was no legal difficulty in the way of enforcing it, then the mere fact that a want of opportunity to resort to it, which might have proved only temporary, had reduced the mother and children for the time to living on charity, cannot effect the conclusion that by the father's death they lost something on which they could depend."

Later, at page 212 of the report, Mason J said as follows: -

"The dominating consideration here and in the United Kingdom is a strong disinclination, founded on commonsense to attribute to the legislature an intention to deprive an applicant of a claim based on total dependency for support where a legal obligation to provide that support exists which has not been abandoned, merely because the applicant is in receipt of benefits from others, whether proceeding from charity or some other motive.

Once this approach to section 8(1) is adopted, as in my opinion it should be, the conclusion is inevitable that there was evidence to support the Commission's decision on the issue of fact. The deceased was under a legal duty to maintain the respondent. This duty had been enforced by a Court order. Although the order was not complied with for some time, a subsequent agreement between the deceased and the mother had resulted in the deceased paying \$12 per week, twice the amount specified in the Court order. The fact that the respondent was permitted by her stepfather to live in the home which he and her mother had established should not be regarded as a contribution by him to her support or maintenance but rather as a kindness and benefit on his part to the respondent's mother so as to enable her to enjoy the society and companionship of her daughter. Seen in this light the provision of accommodation did not detract from the respondent's total dependence for support on her father. Nor, for that matter, did the provision of some clothing by the mother have that effect."

It should be noted that that decision of the High Court in *Aafjes* was upon the New South Wales legislation which had been amended since the High Court's decision in *Fisher v Herburn Ltd* (supra) which variation altered the word "earnings" to the word "support". However, that change does not alter the relevance of the decision in *Aafjes* to the WCRA's provisions, which still speak of earnings.

Partial dependency may be established in many ways. For example, in *Toombs v The Insurance Commissioner* (1941) 26 QIG 615, Webb J (as he then was), President of the Industrial Court of Queensland, upheld a finding by an Industrial Magistrate that partial dependency was established where the deceased worker had bought clothes for the dependent. Similarly, in *Park v The Insurance Commissioner* [1937] QWN 21, a wife was found to be partially dependent on a deceased worker where even though she was compelled to live apart from him because of his drunkenness and ill-treatment of her, he had made three payments for medical expenses incurred by her, but no other payments.

We turn now to consider the word "earnings" as used in section 27.

### (c) Nature of the Deceased Worker's earnings

As already discussed, the claimant's dependency must be on the deceased worker's earnings. As will be recalled from the discussion above of both *Altmann v QCOMP* and *Fisher v Herburn* the dependency cannot be in relation to domestic assistance, and nor can it be on a disability pension received by the deceased in circumstances where the disability giving rise to that pension is wholly unrelated to employment.

Far more difficult issues for resolution arise whenever the deceased worker receives remuneration by means other than traditional wages. However, even if remuneration is received in forms other than wages, that remuneration may still constitute "earnings" for the purposes of the WCRA. In *Rogers v State Mines Control Authority* (1964) 64 SR (NSW) 486 at 489, Sugerman J, in the Full Court of the Supreme Court of New South Wales, said as follows: -

"In my opinion the context in which 'earnings' is used in that definition shows that it is there used to refer to what is earned by the worker – the rewards which he receives for his efforts – in employment or, as will be seen in some business which he carries on; it is not necessary, for present purposes, to decide whether or not the proceeds of some other form of gainful activity may not also be included in the term as he used. A pension paid by an employer to a worker retired from his employment may be capable of being viewed as a deferred payment in return for past service; but it is clear that the 'earnings' of which the definition speaks are current earnings such as are dependent upon the continuance of a capacity to earn and cease when that capacity ceases."

*Rogers v Henlys Ltd* [1945] 1 All ER 423 is authority for the proposition that earnings can include what a worker has been accustomed to earn in a business carried on his own account in addition to what he earned in his employment.

In *Azzopardi Haulage Pty Ltd v Azzopardi* [2008] VSCA 241, the Court of Appeal in Victoria held that distributions of profits from a family trust to a deceased worker could fall within the meaning of the word "earnings". In *Azzopardi*, the deceased worker was a truck driver who had worked for many years under a simple partnership structure with his wife, delivering poultry products for one customer "Eatmore Poultry". A few years prior to the worker's death that customer had demanded that the Azzopardi's incorporate in order to receive further business from Eatmore Poultry. At that stage advice was taken from an accountant who advised that a family trust should be established in conjunction with the corporate entity Azzopardi Haulage Pty Ltd, which then became the corporate trustee for the Mario Azzopardi Family Trust. The deceased worker and his wife were the sole directors, shareholders and office holders for the new company. They each paid themselves a modest wage, and then took the remainder of their remuneration as a trust distribution from the annual profit of the company, although there was never any express document that said that the trust distribution was part of their remuneration package. When the case came on for determination before the Victorian Supreme Court, the Victorian WorkCover Authority argued that there was no evidence that could support the decision by the Victorian County Court that the deceased's earnings included the trust distribution, and his earnings for dependency calculation purposes must be confined to the far more modest wage paid to him by the company. Ultimately, the Victorian Supreme Court upheld the decision of the County Court below and held that the trust distributions could form part of the deceased worker's

earnings. In giving his decision for the Court Ashley JA (with whom each of Redlich and Dodds-Streeton JJA agreed), his Honour was of the view that, for the trust distributions to form part of the deceased's earnings there must be more than a loose agreement which fell short of imposing a binding obligation upon the trustee to make the distributions and there needed to be an agreement that such distributions were to form part of the reward for the services rendered by the deceased worker, even though attended by informality. In part, His Honour said [at pars 69 - 71]:

"In the event, the constant theme is that 'earnings', by this measure, are to be determined by reference to whichever one or more of a worker's individual employment contract, an arbitrated award, a collective agreement not embodied in an award, or legislation, is or are pertinent in the particular case. In the present case, if [trust] distributions were paid as earnings, it could only have been by operation of the respective employment contracts.

Appellant's counsel was therefore correct in submitting, in this Court, that the existence of an obligation to make the distributions, as part of the amounts paid for the performance of work by the deceased and the respondent for the company was the *sine qua non* of such distributions being 'earnings'. But this is not to say that such contracts must have been express; or that they must have been in a particular form. A relevant agreement might have been implied.

In the present case, respondent's counsel did not contend that there was evidence of an express agreement before the County Court. He argued, in part, that it would be enough if there was evidence of 'an arrangement' pursuant to which the distributions were made as part of the reward for services rendered to the company. If by that he meant that it was enough that there had to be an agreement between the parties which was not attended by formality, I agree with his submission. And if he meant that a consideration of all the circumstances in which the distributions were made might lead to the conclusion, founded in inference, that they had been made pursuant to an informal agreement between the parties that such distributions were to be made as part of the reward for services rendered, then I also agree with his submission. But if he meant that it was enough if there was something less than an agreement which imposed a binding obligation upon the company to make the distributions which it did, then I do not agree."

As will be recalled from the discussion of *Fisher v Herburn Ltd*, above, it was found that a wife was not dependent upon the earnings of her deceased husband when he was only receiving a disability pension for a condition unrelated to his employment as a coal miner, and had already been so receiving it, for about 6 years, when another work-related condition rendered him theoretically incapacitated for employment. The High Court held that in no sense could it be said that at the date for determination was she dependent upon her husband's "earnings".

The most recent case in Queensland dealing with this issue is *WorkCover Queensland v Cook* [2003] QIC 47; 173 QGIG 1416. In that case, his Honour President Hall found that the word "earnings" is sufficiently broad to be able to cover the receipt of workers' compensation payments and fortnightly payments pursuant to a Q-Super superannuation

policy. In so finding, his Honour did not refer to what Sugerman J had said in *Rogers v State Mines Control Authority*, supra, at pages 489-490, where Sugerman J had said: -

“It is not to be taken thereby that payments of workers’ compensation are, in fact, earnings. They are in truth compensation for loss of the capacity to earn ...”.

Further, his Honour President Hall referred to what Justice Moynihan had said in *Cullen v Workers’ Compensation Board of Queensland* (1988) 127 QGIG 301 at 302, wherein Moynihan J had said that ‘pension income’ might be considered to be ‘earnings’.

However, there is a contrary view that what Justice Moynihan was referring to in *Cullen’s* decision was the earnings in the hands of the claimant in a partial dependency case and whether or not her own receipt of a pension could be taken into account in deciding the question whether or not she was partially dependent upon the earnings of the deceased worker. Therefore, *Cullen* is not direct authority for the proposition that pension income may be included in the deceased’s earnings.

Further, in considering whether payments under a superannuation policy might be considered to be earnings, his Honour President Hall in *Cook* also made reference to *Bowmaker v Bowmaker* (1966) 85 WN (Pt 1) (NSW) 4 at 6, where payments by way of superannuation were held to be earnings for the purposes of the *Matrimonial Causes Act* 1959 (Cwth). I note however, the definition of earnings in that Act clearly referred to sums payable to a person by way of a pension and that no such extension of the definition of earnings is available under the WCRA by reason that the term earnings remains undefined such that we are reliant on its ordinary meaning.

It could be contended that if the superannuation policy from which payments were made could be regarded as a deferred payment in return for past service (per Sugarman J in *Rogers v State Mines Control Authority*, supra) then that payment may also be considered to be earnings under the WCRA. In *Cook*, President Hall made no reference to *Rogers* and appears to have taken a far more global approach to the notion of earnings. However, a more liberal approach is not supported by the authorities.

Having now dealt with the more conceptual aspects of the WCRA dealing with ascertaining entitlement to bring a dependency claim we turn now to those provisions that are used once dependency has been ascertained, in order to calculate compensation entitlements.

### **WCRA Part 11 - Calculation of partial dependency**

The “mechanical” provisions that relate to the method for determining and paying compensation to dependents are to be found in Part 11 of Chapter 3 of the WCRA. Part 11 contains sections 194 – 204, inclusive.

### **Statutory Objectives**

Section 194(1) & (2) specify the circumstances in which Part 11 will apply. Section 194(3) then sets out the statutory objectives for Part 11:

## 194 Application and object of pt 11

- (1) This part applies if a worker dies because of an injury.
- (2) However, this part does not apply if—
  - (a) a worker dies because of a latent onset injury that is a terminal condition; and
  - (b) the worker had received a payment of lump sum compensation or damages for the latent onset injury under this Act, another Act or a law of another State or the Commonwealth.
- (3) The object of this part is to provide for payment by an insurer of—
  - (a) particular expenses arising from the worker's injury and death; and
  - (b) compensation to persons having an entitlement to compensation under this part.

From the foregoing, it becomes clear that Part 11 applies in all cases where a worker has died because of an injury,<sup>6</sup> except in those cases where the worker has died because of a latent onset injury that happens to be a terminal condition (for example, asbestosis) when the worker has already received statutory compensation or common law damages for that condition “under this Act, another Act or a law of another State or the Commonwealth”.

As can be seen, section 194(2)(b) is an “anti-double dipping” provision, intent to preclude claimants from receiving dependency compensation in cases in which they have already been compensated elsewhere for the death of a person upon whom they were financially dependent.

Section 194(2)(b) has been considerably tightened more recently. Up until 28 October 2008, the provision only provided that Part 11 did not apply in cases in which a worker had died as a result of a latent onset injury that is a terminal condition if the worker “had received a payment of lump sum compensation for the latent onset injury”.

Subsection 194(3) specifies the objects for Part 11, making it clear that Part 11 of the WCRA is intended so as to ensure that the relevant workers’ compensation Insurer will pay “particular expenses” arising from a worker’s injury and death, see: section 194(3)(a); as well as compensation to those persons who have an entitlement to compensation under this part, see: section 194(3)(b).

The “particular expenses” referred to in section 194(3)(a) may be taken as a reference to the reasonable expenses associated with medical treatment of the worker, and the worker’s funeral, as are referred to in section 199 of the WCRA.

### Definitions and ‘Housekeeping’ Provisions:

Section 195 provides the definition of a student for purposes of Part 11. Perhaps

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<sup>6</sup> Here referring to an injury as defined in section 32 of the WCRA

predictably, the term "student" is defined to mean those persons engaged in full-time education at a school, college, university "or similar institution". The noteworthy aspects of the definition are that students are taken to include only those who are engaged in full-time studies, and who are aged less than 21 years. This means that, in order to qualify as a student, an applicant would need to provide some reasonable evidence of their enrolment status, demonstrating that they are, in fact, enrolled for full-time studies (and are under 21 years of age). Even if the child of a deceased worker is a full-time student, and totally dependent on the earnings of the worker they will not then qualify as a student for the purposes of Part 11, if they are older than 21 years. This may not however necessarily preclude their qualifying as a dependent by other means.

What constitutes full-time studies for the purposes of the WCRA has not been defined. It is submitted that in the case of university or TAFE students, evidence from the Applicant's institution of higher education that shows that they qualify for full-time status within that institution should afford sufficient evidence. In the case of school-aged students, it would be sufficient to establish that they are enrolled at school.

Sections 196 and 198 are further housekeeping provisions, providing statutory guidance as to whom may be paid either compensation or expenses related to the worker's injury or death, for the purposes of Part 11. Section 196 provides that compensation amounts may be paid to either the worker's personal legal representative, or, in cases where there is no personal legal representative, directly to the dependants who are entitled to compensation. In the case of expenses, these may be paid to the person who has incurred the expense on behalf of the worker. For example, expenses may be paid directly by an Insurer to a funeral director or to a palliative care service provider, or another person, such as a relative of the injured worker, may be reimbursed for such expenses if these have already been paid on behalf of the injured worker.

Section 198 provides that compensation payable to a worker's dependent may also be paid to the Public Trustee, to hold on trust for the benefit of the dependent.

### **Substantive Matters**

The more substantive aspects of Part 11 of the WCRA are to be found in sections 197, 200, 201, 201A, 202. Section 204, also within Part 11 is a provision that only applies in circumstances when a dependent dies shortly after the deceased worker.

Within this clutch of substantive provisions, section 200 deals with total dependents, section 201 deals with partial dependents, and section 197 provides statutory authority for an apportionment between total dependents and partial dependents, if there are multiple dependents of the deceased worker falling in both categories.

Section 197 does not provide any specific guidance as to how an Insurer should apportion compensation lump sums between total and partial dependents. It is submitted that the appropriate guidance should be taken from the principles governing dependency as discussed earlier in this paper. The extent of any dependency is a question of fact. As such the correct basis for any apportionment between partial and total dependents under section 197 cannot be determined until such time as there has been a complete fact finding regarding the extent of any dependence on the earnings of the deceased worker of all claimants.

## **Total Dependents: section 200**

In general terms, in the case of total dependents, these provisions provide for the payment of a lump sum amount (currently \$374,625.00, see: section 200(2)(a)), to the totally dependent members of the worker's family; together with the payment of additional lump sum amounts to specified dependents, as well as a recurrent weekly entitlement. The recurrent weekly payments are generally unproblematic to calculate as they are formulaic, requiring only an arithmetic calculation of a percentage amount of 'QOTE'.

'QOTE' is an acronym for 'Queensland Ordinary Time Earnings' and is a statistical average of weekly earnings, excluding overtime, as compiled by the Government Statistician's Office. QOTE is an officially published figure, which is updated from time to time.

## **Partial Dependents: section 201**

The compensation entitlements of partial dependents are to be determined via recourse to section 201. This section provides that, in the case of partial dependents, their entitlement to compensation is to be an amount that "the insurer considers is reasonable and proportionate to the monetary value of [their] loss of dependence", see: section 201(2)(a). The amount that an Insurer deems to be "reasonable and proportionate" for partial dependents is however subject to a statutory minimum and maximum, see: section 201(3). The minimum amount that an Insurer may allow for partial dependents is currently \$56,193.75,<sup>7</sup> and the maximum amount is \$374,625.00.<sup>8</sup>

How should an Insurer go about assessing what is reasonable and proportionate? As a starting point, the notion of dependence as referred to in the section must be informed by the meaning of that term that has been discussed earlier in this paper. Furthermore, whenever the word "reasonable" is used in legislation it stands as code for a requirement to do that which is objectively reasonable. In other words, there must be an evidential basis for the determination that is objectively reasonable, given all of the available information. It is submitted by the authors that the further requirement for proportionality will then be satisfied by ensuring that each partial dependent receives an amount that is commensurate with their own degree of dependency, yet proportionate (when expressed in percentage terms of the available pool available for distribution), with the level of dependency found to exist for all the other claimants.

In addition to amounts payable under section 201(2)(a), partially dependent children under 16 or students of the deceased worker have a further entitlement, to a weekly compensation payment, currently equal to 7% of QOTE, see: section 201(2)(b).

## **Non-Dependent Family members: section 201A**

In some instances, a deceased worker will leave family members who are not dependent on the earnings of the worker. Some of these persons are also provided for under Part 11, see: section 201A. According to that provision, in those cases where a deceased worker is defined by either a spouse or "issue" or "next of kin" as defined under the *Succession Act 1981*, then the estate of the deceased worker is to be paid \$37,462.50.<sup>9</sup>

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<sup>7</sup> 15% of the amount allowable under section 200(2)(a).

<sup>8</sup> The same amount as is allowable under section 200(2)(a).

<sup>9</sup> Being 10% of the amount payable under section 200(2)(a), see section 201A(2).

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## **Claims by the Parents of Young Workers: section 202**

Part 11 of the WCRA also makes provision for the payment of compensation to the parents of young workers, who may die from work-related causes. Here, section 202 provides that an amount of \$22,500.00 is payable by an Insurer to the parents of a deceased worker, on the proviso that the deceased worker is under 21 years of age, left no dependents, and at least one parent is ordinarily resident in Queensland. In cases where more than one parent is entitled to compensation (a scenario only likely to arise in cases where the deceased worker's parents are separated, yet at least one of them is resident in Queensland) the maximum available compensation for both parents remains \$22,500.00 and the amount payable to each parent is to be decided by the Insurer, see: section 202(3). No guidance is provided in the provision as to how any such apportionment is to be made, however the provision makes no reference to dependency, such that dependency principles need not govern the allocation of compensation monies between the surviving parents.

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