Impacts of superannuation changes on personal injuries damages– 2020 Update

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On 19 April 2012 Vincents (Michael Lee and Mark Thompson) issued a paper (our "original paper") in relation to changes in Superannuation Guarantee rates and what we believed could be the impact of those changes on the assessment of future economic loss and future loss of superannuation. Each year we have updated those rates to take account of changes in superannuation rates following amendments to subsection 19(2) of the Superannuation Guarantee (Administration) Act 2012 and the passage of time ("the 2014 to 2019 Updates").

The current rates

At the time of writing this paper the rates of compulsory employer sponsored superannuation support are as follows:

Period	Rate
Year starting on 01 July 2020	9.50%
Year starting on 01 July 2021	10.00%
Year starting on 01 July 2022	10.50%
Year starting on 01 July 2023	11.00%
Year starting on 01 July 2024	11.50%
Years starting on or after 01 July 2025	12.00%

Table 1

The issue

As noted in our previous papers, the obvious question arises as to whether or not future wage increases (that are factored into the real discount rate employed) will be affected by virtue of the mandated increase in compulsory employer sponsored superannuation contributions.

We concluded that if history is used as the judge in this matter it would appear that this may be the case.

Further, it was our opinion (in our original paper) that the appropriate "conceptual approach" is to make an adjustment to reflect that during the "phase in" period for the increase in Superannuation Guarantee real wages should be reduced by a corresponding amount.

We noted however, that the Courts may take a different approach.

The approach adopted by the Courts since the previous changes

Subsequent to the issue of our previous paper we note that the Courts would appear to have continued to adopt a "rule of thumb" approach but used a variety of differing rates.

Queensland

As noted in our previous papers in the Queensland Court of Appeal decision of *Heywood* v *Commercial Electrical Pty Ltd* [2013] QCA 270 the Court took the approach of allowing superannuation at a rate of 11.33%.

No detailed reasoning would appear to have been provided as to how that rate was determined. However, we note that the Court appears to have considered the increased rates of employer sponsored superannuation contributions as set out in the *Superannuation Guarantee (Administration) Amendment Act 2012 (Cth)* and also *"the five per cent multiplier tables and the deferred aspect of the above rates"*.

In our 2019 paper we noted there was a return to the *Heywood* "rule of thumb" which was modified the rate depending on the claimant's age at the date of trial and the number of years until retirement. In previous years the Courts did not appear to uniformly use that approach.

Since July 2019 there appears to be a number of judgments that use the forward rates and years to retirement. In particular we note the following judgments:

- *Peebles v Work Cover Queensland* [2020] QSC 106 which adopted 11.74% which was the weighted average of the proposed superannuation rates for a further 29 years.
- *Zavodny v Couper & Anor* [2020] QSC 42 which adopted 9.64% which was the weighted average of the proposed superannuation rates for a further 1.8 years.
- *Krobath v Thiess Pty Ltd* [2018] QSC 309 which adopted 10.5% and the claimant was aged 56 years at trial.

That said, there are various judgments in which the *Heywood* rate or a comparable rate continues to be adopted,

- *Dance* v *Jemeas Pty Ltd (No 2)* [2019] QSC 303 adopting Heywood's 11.33%.
- *Griffin v Burleigh Marr Distributions Pty Ltd & Anor* [2019] QSC 321 which adopted an agreed rate of 11.265%. This appears to be an average between 11.2% and 11.33%.

New South Wales

In our 2019 paper we noted that during the period July 2018 to June 2019 the Courts had reverted to the *Nadjovski* approach and used the rule of thumb of 11% of future economic loss as opposed to previous years whereby the Courts used varies rates based on the claimant's age and years to retirement.

Since July 2019 our review of the decisions of the NSW Courts suggests there was been a return to the age of claimant approach. In this regard we note the following decisions:

- *Hossain v Unity Grammar College Ltd and Ors* [2019] NSWSC 1313 which used 12.48% for a further 7 years (comparable to our rate in the 2017 paper)
- *Rodd v Hall* [2019] NSWSC 1304 which used 11.5% for a further 6 years.
- *Davies v Whitehaven Coal Mining Ltd* [2019] NSWSC 1125 which used 13.44% for a further 14 years.
- *Ward v Allianz Australia Services Pty Ltd* [2019] NSWDC 293 which used an agreed 12.95% for 15 years.
- *Gray v Coles Supermarkets Pty Limited* [2019] NSWDC 749 which used 13.77% for a further 17 years.

Rule of Thumb Approach

As noted in our previous paper, whilst the "rule of thumb" approach provides for a convenient and simple method of assessment, in nearly all circumstances it leads to over or under compensation due predominantly, to the variance in tax rates applying to income and superannuation.

Regardless of the above, having regard to the decisions subsequent to the issue of our previous paper and the current levels of employer sponsored contributions (see Table 1) we set out below the future average weighted rates of employer sponsored superannuation contributions.

A possible Queensland Approach

With the changes in mandated percentages the "rule of thumb" as applied will need to be amended to reflect varying future rates. The following table provides a guide to the future "weighted" average percentage that may be appropriate for varying periods of years until retirement (as at today).

Years to retirement	Average Super %	Years to retirement	Average Super %	Years to retirement	Average Super %	Years to retirement	Average Super %
1	9.50%	13	11.42%	25	11.70%	37	11.80%
2	9.75%	14	11.46%	26	11.71%	38	11.80%
3	10.00%	15	11.50%	27	11.72%	39	11.81%
4	10.25%	16	11.53%	28	11.73%	40	11.81%
5	10.50%	17	11.56%	29	11.74%	41	11.82%
6	10.75%	18	11.58%	30	11.75%	42	11.82%
7	10.93%	19	11.61%	31	11.76%	43	11.83%
8	11.06%	20	11.63%	32	11.77%	44	11.83%
9	11.17%	21	11.64%	33	11.77%	45	11.83%
10	11.25%	22	11.66%	34	11.78%	46	11.84%
11	11.32%	23	11.67%	35	11.79%	47	11.84%
12	11.38%	24	11.69%	36	11.79%	48	11.84%

Table 2

For example, for the most extreme case of a 19 year old worker injured with a working life of an additional 48 years the appropriate average percentage would appear to be 11.84% of the future economic loss.

The NSW Approach

As noted in our previous paper the approach in *Najdovski* v *Crnojlovic* [2008] NSWCA 175 would appear to have attempted to take account of the issues of the different taxation treatment of income and superannuation and that superannuation is based on gross earnings. The Court therefore adopted a superannuation loss percentage of 11% of the future economic loss.

If in fact the approach arrived at in *Najdovski* is to be preferred then the percentages set out in Table 2 ought to be "grossed" up on the same basis. The impact of this "gross up" would be to provide for a range of superannuation loss percentages as follows:

Years to retirement	Average Super %	Years to retirement	Average Super %	Years to retirement	Average Super %	Years to retirement	Average Super %
1	11.61%	13	13.96%	25	14.30%	37	14.42%
2	11.92%	14	14.01%	26	14.31%	38	14.43%
3	12.22%	15	14.06%	27	14.33%	39	14.43%
4	12.53%	16	14.09%	28	14.34%	40	14.44%
5	12.83%	17	14.13%	29	14.35%	41	14.44%
6	13.14%	18	14.16%	30	14.36%	42	14.45%
7	13.36%	19	14.18%	31	14.37%	43	14.45%
8	13.52%	20	14.21%	32	14.38%	44	14.46%
9	13.65%	21	14.23%	33	14.39%	45	14.46%
10	13.75%	22	14.25%	34	14.40%	46	14.47%
11	13.83%	23	14.27%	35	14.40%	47	14.47%
12	13.90%	24	14.28%	36	14.41%	48	14.48%

Table 3

For example, for the most extreme case of a 19 year old worker injured with a working life of an additional 48 years the appropriate average percentage would appear to be 14.48% of the future economic loss.

If you have any questions in relation to

the content of this document please

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