

A golden egg is nestled in a nest of sticks and twigs, resting on a wooden surface. The background is a red and white geometric pattern.

IMPACTS OF
SUPERANNUATION CHANGES
ON PERSONAL INJURIES
DAMAGES – 2018 UPDATE

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Previous Papers

On 19 April 2012 we 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, 2015, 2016 and 2017 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 2018	9.50%
Year starting on 01 July 2019	9.50%
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

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”.

Since July 2017 there have been a number of decisions rejecting that rate. In particular McMeekin J pointed out that changes in legislation delayed the rates increasing to 12% until 01 July 2025, thereby changing any future average rate of superannuation. In this regard, we note the following decisions which adopted lower amounts:

- *Souz v CC Pty Ltd* [2018] QSC 36 which adopted 10.5%.
- *Schofield v Hopman* [2017] QSC 297 which adopted 10%.
- *Mandrek v Marstella* [2018] QSC 8 which adopted 10%.

That said, there are various judgments in which the *Heywood* rate continues to be adopted, including, but not limited to the following:

- *Baig v AWX Pty Ltd* [2017] QSC 325 which adopted 11.33%.
- *Colwell v Top Cut Foods Pty Ltd* [2018] QDC 119 which adopted 11.3%.
- *Cincovic v Blenner's Transport Pty Ltd* [2017] QSC 320 which adopted 11%.

New South Wales

Whilst in previous years the NSW Courts had previously adopted the rates and approach we envisaged at Table 6 of our previous papers (i.e. the *Najdovski* approach of 11% superannuation but then “grossed-up” the rate to take account of the future average rates of superannuation), since 01 July 2017 it would appear there is no consistent approach that has been adopted by the Courts.

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In this regard we note the following decisions:

- *Webb v Edwards* [2018] NSWDC 67 which adopted 11.53%.
- *Croizet v Shustov* [2017] NSWDC 331 which adopted 12%.
- *Steven George Villanti v Coles Group Supply Chain Pty Limited; Steven George Villanti v All Staff Australia NSW Pty Ltd t/as Allstaff Australia* [2017] NSWSC 1231 which adopted 13%.
- *Benton v Historic Houses Trust of NSW* [2017] NSWDC 324 which adopted 11%.
- *NRMA Insurance Limited v Mulcahy* [2017] NSWSC 1499 which adopted 13.2%.

As noted in our 2017 paper in *Rafferty-Butfield v Antonio* [2017] NSWDC 2 a rate of 13% was adopted and described as the “well settled practice”. We note that a rate of 13% may be an average of upper and lower rates of Table 3 below.

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 predominantly due 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 papers 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	11.23%	25	11.60%	37	11.73%
2	9.50%	14	11.29%	26	11.62%	38	11.74%
3	9.67%	15	11.33%	27	11.63%	39	11.74%
4	9.88%	16	11.38%	28	11.64%	40	11.75%
5	10.10%	17	11.41%	29	11.66%	41	11.76%
6	10.33%	18	11.44%	30	11.67%	42	11.76%
7	10.57%	19	11.47%	31	11.68%	43	11.77%
8	10.75%	20	11.50%	32	11.69%	44	11.77%
9	10.89%	21	11.52%	33	11.70%	45	11.78%
10	11.00%	22	11.55%	34	11.71%	46	11.78%
11	11.09%	23	11.57%	35	11.71%	47	11.79%
12	11.17%	24	11.58%	36	11.72%	48	11.79%

Table 2

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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 11.79% 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	13.73%	25	14.18%	37	14.34%
2	11.61%	14	13.79%	26	14.20%	38	14.35%
3	11.81%	15	13.85%	27	14.21%	39	14.35%
4	12.07%	16	13.90%	28	14.23%	40	14.36%
5	12.34%	17	13.95%	29	14.25%	41	14.37%
6	12.63%	18	13.99%	30	14.26%	42	14.38%
7	12.92%	19	14.02%	31	14.27%	43	14.38%
8	13.14%	20	14.06%	32	14.28%	44	14.39%
9	13.31%	21	14.08%	33	14.30%	45	14.40%
10	13.44%	22	14.11%	34	14.31%	46	14.40%
11	13.56%	23	14.14%	35	14.32%	47	14.41%
12	13.65%	24	14.16%	36	14.33%	48	14.41%

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 14.41% of the future economic loss.


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