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IMPACTS OF SUPERANNUATION CHANGES ON PERSONAL INJURIES DAMAGES – 2016 UPDATE

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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. On 14 September 2014 and 20 July 2015 we updated those rates to take account of changes in superannuation rates following amendments to subsection 19(2) of the *Superannuation Guarantee (Administration) Act 2012* ("the 2014 and 2015 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 2016	9.50%
Year starting on 01 July 2017	9.50%
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"*.

The rate of 11.33% / 11.3% or 11% (rounded down) has subsequently been adopted in, but not limited to, the following decisions subsequent to our 2015 paper:

- *Schneider* v *Smith* & Anor [2016] QSC 47; and
- *McGreevy* v *Cannon Hill Services Pty Ltd* [2016] QSC 29

We note however that some decisions would appear to have adopted differing rates namely, *Martin* v *Andrews & Anor* [2016] QSC 20 which only allowed future losses at 10.15% being a weighted average of the gross contributions.

New South Wales

In contrast to the approach adopted in the Queensland Courts, it would appear that, generally speaking, NSW Courts have adopted the rates and approach we envisaged at Table 6 of our previous papers. In this regard we note, generally speaking, the Courts have adopted the *Najdovski* approach of 11% superannuation but then "grossed-up" the rate to take account of the future average rates of superannuation. The rate adopted will differ depending on the number of years until retirement.

As examples we note the following decisions subsequent to our 2015 paper:

- *Briggs v State of New South Wales [2015] NSWDC 235* which adopted a rate of 13.82% (ie. 29 years of future losses); and
- *Alan Lloyd Garvie v Rodney William Bulmer [2015] NSWDC 200* which adopted a rate of 11.61% (ie. 4 years of future losses).

We note however that some decisions would appear to have adopted the Najdovski rates (see below) namely, *Catherine Robertson* v *Joshua Liebmann* [2015] NSWDC 231 or a rate of 13% for example see *Stuart Douglas Parker v Charles Youmaran* [2015] NSWDC 199 and *Hobby v Workers Compensation Nominal Insurer* [2015] NSWDC 273. It may be this is an average of upper and lower rates (see below).

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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	10.65%	25	11.30%	37	11.53%
2	9.50%	14	10.75%	26	11.33%	38	11.54%
3	9.50%	15	10.83%	27	11.35%	39	11.55%
4	9.50%	16	10.91%	28	11.38%	40	11.56%
5	9.50%	17	10.97%	29	11.40%	41	11.57%
6	9.58%	18	11.03%	30	11.42%	42	11.58%
7	9.71%	19	11.08%	31	11.44%	43	11.59%
8	9.88%	20	11.13%	32	11.45%	44	11.60%
9	10.06%	21	11.17%	33	11.47%	45	11.61%
10	10.25%	22	11.20%	34	11.49%	46	11.62%
11	10.41%	23	11.24%	35	11.50%	47	11.63%
12	10.54%	24	11.27%	36	11.51%	48	11.64%

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 11.64% of the future economic loss.

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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	13.02%	25	13.81%	37	14.09%
2	11.61%	14	13.14%	26	13.84%	38	14.10%
3	11.61%	15	13.24%	27	13.87%	39	14.12%
4	11.61%	16	13.33%	28	13.90%	40	14.13%
5	11.61%	17	13.41%	29	13.93%	41	14.14%
6	11.71%	18	13.48%	30	13.95%	42	14.16%
7	11.87%	19	13.54%	31	13.98%	43	14.17%
8	12.07%	20	13.60%	32	14.00%	44	14.18%
9	12.29%	21	13.65%	33	14.02%	45	14.19%
10	12.53%	22	13.69%	34	14.04%	46	14.20%
11	12.72%	23	13.74%	35	14.06%	47	14.21%
12	12.88%	24	13.78%	36	14.07%	48	14.22%

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 14.22% of the future economic loss.

If you have any questions in relation to the content of this document please do not hesitate to contact either:

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