



Impacts of superannuation changes on personal injuries damages– 2021 Update

Michael J Lee CA (Accredited Forensic Accounting Specialist)

James Thorburn CA (Accredited Forensic Accounting Specialist)

01 July 2021

 .VINCENTS

Impacts of superannuation changes on personal injuries damages – 2021 update

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 2020 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 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.

Impacts of Superannuation Changes on Personal Injuries Damages – 2021 Update

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 previous papers we noted that there has been a divergence of opinions in how future losses of superannuation have been calculated. In most instances the approach appears to fall into the following categories:

- (i) The *Heywood* “rule of thumb” being 11.33%; and
- (ii) The modified *Heywood* “rule of thumb” where the rate is modified depending on the claimant’s age at the date of trial and the number of years until retirement.

Since July 2020 the Courts would appear to continue to use both approaches:

- *Walker v Greenmountain Food Processing Pty Ltd* [2020] QSC 329 which adopted and cited our 2020 paper to conclude the appropriate rate was 11.74%.
- *Tyndall v Kestrel Coal Pty Ltd (No 3)* [2021] QSC 119 which adopted 11.41% which was the rate for 17 years in our 2018 paper.
- *Allen v O’Donnell & Anor* [2021] QSC 63 which adopted 11.33%.
- *Seiffert v Chadwick and TAC* [2021] QDC 8 which adopted 11.75% which was the rate for 30 years in our 2020 paper.
- *Ernst v Kumar* [2020] QDC 258 which adopted 11.42% which was the rate for 30 years in our 2016 paper

Impacts of Superannuation Changes on Personal Injuries Damages – 2021 Update

New South Wales

In our 2020 paper we noted that during the period July 2018 to June 2019 the Courts had reverted to the *Nadjovski* approach rule of thumb of 11% of future economic loss, however during the period July 2019 to June 2020 the NSW Courts had reverted to the approach of using varied rates based on the claimant's age and years to retirement.

Since July 2020 our review of the decisions of the NSW Courts suggests there has been a return to *Nadjovski* approach but sometimes using rates marginally higher, perhaps to take account of any future changes. In this regard we note the following decisions:

- *Turner v Carrington Ginning Pty Limited* [2021] NSWSC 445 which adopted 11%.
- *Tauri By His Tutor Carmelle Skipper v Janlin; Circuses Pty Limited T/As Stardust Circus (No 3)* [2020] NSWSC 1918 which adopted 13%.
- *Kelly v Thorn; Monteleone v Thorn (No 8)* [2021] NSWSC 118 which adopted 11%.
- *Formosa v Callas* [2020] NSWDC 470 which adopted 13%.
- *Filiposka v Coles Supermarkets Australia Pty Ltd* [2020] NSWDC 540 which adopted 12%.
- *Ganassin v Ulan Coal Mines Limited* [2020] NSWDC 652 which adopted 12%.
- *Moriarty v Department of Education* [2020] NSWDC 368 which adopted 11%.

There have been a few exceptions where the modified rate was adopted notably the following:

- *Metri v Nestlé Australia Ltd* [2021] NSWSC 343 where both parties agreed to a rate of 13.85% which was the rate for 15 years in our 2018 paper.
- *Franco v Workers Compensation Nominal Insurer (No 2)* [2021] NSWSC 129 where a rate of 12.92% was adopted. This is the rate for 7 years in our 2019 paper.

Another observation of the recent decisions is the prevalence of decisions in which future losses are expressed inclusive of superannuation. It would appear these decisions predominantly arise where the future losses cannot be calculated with any degree of precision.

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.

Impacts of Superannuation Changes on Personal Injuries Damages – 2021 Update

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	10.00%	13	11.62%	25	11.80%	37	11.86%
2	10.25%	14	11.64%	26	11.81%	38	11.87%
3	10.50%	15	11.67%	27	11.81%	39	11.87%
4	10.75%	16	11.69%	28	11.82%	40	11.88%
5	11.00%	17	11.71%	29	11.83%	41	11.88%
6	11.17%	18	11.72%	30	11.83%	42	11.88%
7	11.29%	19	11.74%	31	11.84%	43	11.88%
8	11.38%	20	11.75%	32	11.84%	44	11.89%
9	11.44%	21	11.76%	33	11.85%	45	11.89%
10	11.50%	22	11.77%	34	11.85%	46	11.89%
11	11.55%	23	11.78%	35	11.86%	47	11.89%
12	11.58%	24	11.79%	36	11.86%	48	11.90%

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 11.90% of the future economic loss.

Impacts of Superannuation Changes on Personal Injuries Damages – 2021 Update

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	12.22%	13	14.20%	25	14.42%	37	14.50%
2	12.53%	14	14.23%	26	14.43%	38	14.51%
3	12.83%	15	14.26%	27	14.44%	39	14.51%
4	13.14%	16	14.28%	28	14.45%	40	14.51%
5	13.44%	17	14.31%	29	14.46%	41	14.52%
6	13.65%	18	14.33%	30	14.46%	42	14.52%
7	13.79%	19	14.35%	31	14.47%	43	14.52%
8	13.90%	20	14.36%	32	14.48%	44	14.53%
9	13.99%	21	14.38%	33	14.48%	45	14.53%
10	14.06%	22	14.39%	34	14.49%	46	14.53%
11	14.11%	23	14.40%	35	14.49%	47	14.54%
12	14.16%	24	14.41%	36	14.50%	48	14.54%

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 14.54% of the future economic loss.

Impacts of Superannuation Changes on Personal Injuries Damages – 2021 Update

Approaches adopted in other States

In previous years we have limited our review of decisions to the jurisdictions of New South Wales and Queensland. In this paper we have undertaken a review of the decisions since 2019 in all other states / territories. We have not listed all decisions on the calculation of superannuation losses but instead a selection which would appear representative of the differing approaches adopted in each jurisdiction.

Australian Capital Territory

The decisions we reviewed from the ACT suggested the Courts were consistent in their approach. In this regard we note the following decisions:

- *Roberson v Icon Distribution Investments Limited and Jemena Networks (ACT) Pty Ltd trading as ActewAGL Distribution* [2020] ACTSC 320 which adopted 11% for past economic loss and 11.5% for future.
- *Hauraki v Steinhoff Asia Pacific Limited trading as Freedom Furniture* [2021] ACTSC 54 which adopted 11%.
- *Hall v Martin* [2020] ACTSC 233 which adopted 11.5% and importantly acknowledged that self-employed persons and contractors are not entitled to superannuation losses.
- *Friend v Britton* [2020] ACTSC 185 which adopted 11.5%.

Victoria

The decisions we reviewed from Victoria are mixed and would not appear to have taken the approaches in either New South Wales or Queensland. The following are a selection of decisions reviewed:

- *Da Costa v Bitu-Mill* [2021] VSC 48 past losses of superannuation were agreed as being 9% of past losses, whereas future losses were agreed at 7.6% of the future economic loss. It was not apparent why there was different rates adopted.
- *Watson v Gippsland Community Health & Anor* [2021] VCC 651 the losses of superannuation would appear to have been calculated at a rate of 8.7% of economic loss.
- *Waks v Cyprys & Ors* [2020] VSC 54 which calculated losses as being 9.5% of economic loss.
- *Talent v Patterson's Earthmoving Pty Ltd* [2020] VCC 1681 the losses of superannuation were calculated as being 9.5% of economic loss.

Impacts of Superannuation Changes on Personal Injuries Damages – 2021 Update

South Australia

The decisions we reviewed from South Australia were of interest due to the differing approaches adopted. The following are a selection of decisions reviewed:

- *Sloan v Service Stream Limited* [2020] SADC 98 which adopted 11%.
- *Clutterbuck v Pollifrone* [2021] SADC 15 which adopted calculations of 11% of the gross past loss but 9.5% of future economic loss (i.e. net of tax). It is not apparent for differing approaches and rates.

Tasmania

The decisions we reviewed from Tasmania indicated an adherence to the issues outlined in *Najdovski*.

- *Keller v Phillips* [2019] TASSC 35 which adopted 11%.

Western Australia

The decisions we reviewed from Western Australia undertook calculations which were, in our opinion, the most accurate assessment of any losses of superannuation.

In this regard we note the decisions undertook calculations in accordance with the longstanding decision of *Jongen v CSR Ltd* (1992) Aust Torts Rep 81-192. The following are a selection of decisions:

- *Stanton v Insurance Commission of Western Australia* [2020] WADC 10 which calculated the losses based on 9.5% of gross income less the 15% contributions tax.
- *Meldrum v Vassallo* [2020] WADC 71 based on 9.5% of gross income less the 15% contributions tax.

Conclusion

Our review of decisions would appear to suggest that with the exception of Victoria, jurisdictions have attempted to take account of (i) the fact superannuation is taxed on a concessional basis (i.e a flat 15%) as compared to ordinary income which is taxed up to 47% (as outlined in the *Najdovski* approach); and / or (ii) proposed changes in superannuation contribution rates.

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

Michael J Lee

07 3228 4091 or mlee@vincents.com.au

James Thorburn

07 3228 4268 or jthorburn@vincents.com.au

 **VINCENTS**