Impacts of superannuation changes on personal injuries damages– 2022 Update

Michael J Lee CA (Accredited Forensic Accounting Specialist)
James Thorburn CA (Accredited Forensic Accounting Specialist)

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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 2021 Updates"). We also comment on decisions made by the Courts during the prior year.

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 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%.

We have previously noted 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 2021 the Courts would appear to continue to use both approaches:

- *Longbottom v L & R Collins Pty Ltd* [2021] QSC 242 which adopted the agreed rate of 11.33%.

- *Dearden v Ryan & Anor* [2022] QSC 111 which adopted 11.55% which appeared to be the rate for 11 years in our 2021 paper.

- *Kickbusch v Lehane & Anor* [2022] QDC 16 which adopted 11.64% which appeared to be the rate for 14 years in our 2021 paper.

- *Brockhurst v Rawlings [2021]* QSC 217 which was calculated in accordance with *Jongen* v *CSR Ltd* (1992) Aust Torts Rep 81-192.

- *Ackers v Cairns Regional Council* [2021] QSC 342 based on 12.5% of gross income which was the rate for local government employees however no tax deducted.

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New South Wales

In our 2021 paper we noted that during the period July 2020 to June 2021 the Courts had predominantly reverted to the *Nadjovski* approach rule of thumb of 11% of future economic loss.

Since July 2021 our review of the decisions of the NSW Courts suggests there has been no consistent approach. In this regard we note the following decisions:

- *Bol'Shakov v Fulton Hogan Industries Pty Ltd* [2021] NSWDC 613 which adopted 14.23% appeared to be 21 years on our 2020 paper.

- *Monahan v Bellevarde Constructions Pty Ltd & Ors* [2022] NSWDC 50 which adopted 11%.

- *Dean v Pope* [2021] NSWDC 670 which was inclusive of superannuation.

The PIC

Since our previous paper New South Wales has established and operated the Personal Injuries Commission. The following are a selection of decisions from the members of the Commission:

- *White v AAI Limited t/as GIO* [2021] NSWPIC 449 which adopted the agreed rate of 11%

- *Judges v AAI Limited t/as GIO* [2021] NSWPIC 538 which adopted 11% for past and 14.51% for future losses which was the rate for 38 years in our 2021 paper.

- *Evans v Allianz Australia Insurance Limited* [2022] NSWPIC 99 which adopted 11.25% for past losses and 14.18% for future losses which was the rate for 19 years in the 2020 paper.

- *Gray v QBE Insurance (Australia) Limited* [2022] NSWPIC 247 which adopted a rate of 11%.

- *Higgins v IAG Limited t/as NRMA Insurance* [2022] NSWPIC 344 agreed 11% for past. Future losses inclusive of superannuation losses.

- *Pham v Insurance Australia Limited t/as NRMA* Insurance [2022] NSWPIC 320 which adopted 11.5% for past losses and 14.39% for future losses which was the rate for 22 years in the 2021 paper.

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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	10.50%	13	11.77%	25	11.88%	37	11.92%
2	10.75%	14	11.79%	26	11.88%	38	11.92%
3	11.00%	15	11.80%	27	11.89%	39	11.92%
4	11.25%	16	11.81%	28	11.89%	40	11.93%
5	11.40%	17	11.82%	29	11.90%	41	11.93%
6	11.50%	18	11.83%	30	11.90%	42	11.93%
7	11.57%	19	11.84%	31	11.90%	43	11.93%
8	11.63%	20	11.85%	32	11.91%	44	11.93%
9	11.67%	21	11.86%	33	11.91%	45	11.93%
10	11.70%	22	11.86%	34	11.91%	46	11.93%
11	11.73%	23	11.87%	35	11.91%	47	11.94%
12	11.75%	24	11.88%	36	11.92%	48	11.94%

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 11.94% 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	12.83%	13	14.38%	25	14.52%	37	14.57%
2	13.14%	14	14.40%	26	14.53%	38	14.57%
3	13.44%	15	14.42%	27	14.53%	39	14.57%
4	13.75%	16	14.44%	28	14.54%	40	14.58%
5	13.93%	17	14.45%	29	14.54%	41	14.58%
6	14.06%	18	14.46%	30	14.54%	42	14.58%
7	14.14%	19	14.47%	31	14.55%	43	14.58%
8	14.21%	20	14.48%	32	14.55%	44	14.58%
9	14.26%	21	14.49%	33	14.56%	45	14.59%
10	14.30%	22	14.50%	34	14.56%	46	14.59%
11	14.33%	23	14.51%	35	14.56%	47	14.59%
12	14.36%	24	14.51%	36	14.56%	48	14.59%

Table 3

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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 14.59% of the future economic loss.

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 our last paper we extended our review to other jurisdictions. In this paper we have undertaken a review of the decisions since 2021 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

There was only one decision we reviewed from the ACT which dealt with superannuation losses being *Rubino v Ziaee* [2021] ACTSC 331. The court used a buffer inclusive of superannuation.

Victoria

The decisions we reviewed from Victoria are mixed and adopted different approaches. The following are a selection of decisions reviewed:

- *Xu v Diver Foods Pty Ltd* [2021] VCC 824 which adopted 9.5% of gross wages.

- *Lonergan v Trustees of The Sisters of Saint Joseph & Anor* [2021] VSC 651 which adopted 11% and the *Njadwoski* approach.

- *PCB v Geelong College* [2021] VSC 633 which adopted the actual rates and on gross wages less contributions tax of 15%.

- *Biggs v O'Connor* [2021] VSC 826 in which losses were inclusive of superannuation.

South Australia

There was only one decision we reviewed from South Australia which was *Plumridge v Pandelis* [2022] SADC 42. The Court adopted 9.5% of losses until 30 June 2025 and 12% thereafter.

Tasmania

There was only one decision we reviewed from Tasmania which was *Scattergood v Commonwealth* [2022] TASSC 21. The Court adopted 11% of gross future earnings but also acknowledged increases rates of time.

Western Australia

Consistent with our prior paper cases in Western Australia undertook calculations which were, in our opinion, the most accurate assessment of any losses of superannuation and in accordance with the longstanding decision of *Jongen* v *CSR Ltd* (1992) Aust Torts Rep 81-192.

There was only one decision we reviewed from Western Australia which was *Dugan* v *Pitcher* [2021] WADC 106 which calculated the losses based on 9.5% of gross income less the 30% for contributions tax.

Other Observations

During our review of the decisions across Australia we observed a prevalence of decisions in which the Courts, correctly, refused to allow for a loss of superannuation on the basis the claimant was self-employed.

Examples included:

- *Avery -v- Player* [2021] WADC 69
- *Sally James v USM Events Pty Ltd* [2022] QSC 63

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.

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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

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