

# VINCENTS

## *Impacts of superannuation changes on personal injuries damages*

2023 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 2022 Updates”). We also comment on decisions made by the Courts during the prior year.

## The contribution rates

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

| Period                       | Rate          |
|------------------------------|---------------|
| 01 July 1992 to 30 June 1993 | 3.00% / 4.00% |
| 01 July 1993 to 30 June 1994 | 3.00% / 5.00% |
| 01 July 1994 to 30 June 1995 | 4.00% / 5.00% |
| 01 July 1995 to 30 June 1996 | 5.00% / 6.00% |
| 01 July 1996 to 30 June 1998 | 6.00%         |
| 01 July 1998 to 30 June 2000 | 7.00%         |
| 01 July 2000 to 30 June 2002 | 8.00%         |
| 01 July 2002 to 30 June 2013 | 9.00%         |
| 01 July 2013 to 30 June 2014 | 9.25%         |
| 01 July 2014 to 30 June 2021 | 9.50%         |
| 01 July 2021 to 30 June 2022 | 10.00%        |
| 01 July 2022 to 30 June 2023 | 10.50%        |
| 01 July 2023 to 30 June 2024 | 11.00%        |
| 01 July 2024 to 30 June 2025 | 11.50%        |
| 01 July 2025 onwards         | 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<sup>1</sup> 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 publication of our previous papers 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.

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<sup>1</sup> See *Todovoric v Waller* (1981) 150 CLR 402

Since July 2022 the Courts would appear to continue to use both approaches:

- *Norsgaard v Aldi Stores (A Limited Partnership)* [2022] QDC 260 adopting actual rates on past losses and 11.82% on future losses.
- *Mason v State of Queensland* [2023] QDC 80 adopting 9.5% on past losses and 12% on future losses.
- *Nkamba v Queensland Childcare Service Pty Ltd* [2022] QDC 292 adopting 9.5% on past losses and 11.33% on future losses.
- *Amos v Miki Stowers t/as Essy Tree Lopping Services* [2023] QDC 127 adopting 9.5% on past losses and 11% on future losses.
- *Chapman v Wide Bay Hospital and Health Service* [2022] QDC 271 agreed 9.5% on past losses and 10.5% on future losses.

### **New South Wales**

In our 2022 paper we noted that during the period July 2022 to June 2023 the Courts had predominantly reverted to the *Nadjovski* approach rule of thumb of 11% of future economic loss.

Since July 2022 our review of the decisions of the NSW Courts suggests there has been no consistent approach. In this regard we note the following decisions:

- *SR v Trustees of the De La Salle Brothers* [2023] NSWSC 66 which adopted 11%.
- *Hammond v Blackstock* [2023] NSWDC 51 which adopted 11% for past losses and 14.5% for future losses.
- *Osman By His Tutor Osman v Clement* [2022] NSWDC 385 which adopted 11.1% for future losses.
- *Gomez v Woolworths Group Limited* [2023] NSWDC 221 which was inclusive of superannuation.
- *Finniss v State of New South Wales (No. 1)* [2023] NSWDC 83 which adopted 11% for past losses and 14% for future losses.
- *Fletcher v Neal* [2022] NSWDC 595 which adopted 11% for past losses and 14% for future losses.

### ***The NSW PIC***

As noted in our previous paper New South Wales established and operates the Personal Injuries Commission which hears the majority of personal injury matters. The following are a selection of decisions from the members of the Commission:

- *Majstorovic v AAI Limited t/as GIO* [2023] NSWPIC 185 which was inclusive of superannuation.
- *BKH v Insurance Australia Limited t/as NRMA Insurance* [2023] NSWPIC 66 adopted 10.54% for past losses and the commission used a buffer inclusive of superannuation for future losses.
- *McAllister v AAI Limited t/as GIO* [2022] NSWPIC 638 adopted 11% for past losses under the *Najdovski* approach and 14.0% for future losses.
- *Issa v QBE Insurance (Australia) Limited* [2022] NSWPIC 517 adopted 11% for past losses and 14.42% for future losses.
- *Aranui v Insurance Australia Limited t/as NRMA Insurance* [2023] NSWPIC 105 adopted 11% for past losses and 14.5% for future losses.
- *BBX v Insurance Australia Limited t/as NRMA Insurance* [2022] NSWPIC 635 adopted 11% for past losses and the commission used a buffer inclusive of superannuation for future losses.

## **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 publication of our previous paper and the current levels of employer sponsored contributions (see Table 1) we set out below the future weighted average rates of employer sponsored superannuation contributions.

August 2023

### ***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 August 2023).

| Years to retirement | Average Super % | Years to retirement | Average Super % | Years to retirement | Average Super % | Years to retirement | Average Super % |
|---------------------|-----------------|---------------------|-----------------|---------------------|-----------------|---------------------|-----------------|
| 1                   | 11.00%          | 13                  | 11.88%          | 25                  | 11.94%          | 37                  | 11.96%          |
| 2                   | 11.25%          | 14                  | 11.89%          | 26                  | 11.94%          | 38                  | 11.96%          |
| 3                   | 11.50%          | 15                  | 11.90%          | 27                  | 11.94%          | 39                  | 11.96%          |
| 4                   | 11.63%          | 16                  | 11.91%          | 28                  | 11.95%          | 40                  | 11.96%          |
| 5                   | 11.70%          | 17                  | 11.91%          | 29                  | 11.95%          | 41                  | 11.96%          |
| 6                   | 11.75%          | 18                  | 11.92%          | 30                  | 11.95%          | 42                  | 11.96%          |
| 7                   | 11.79%          | 19                  | 11.92%          | 31                  | 11.95%          | 43                  | 11.97%          |
| 8                   | 11.81%          | 20                  | 11.93%          | 32                  | 11.95%          | 44                  | 11.97%          |
| 9                   | 11.83%          | 21                  | 11.93%          | 33                  | 11.95%          | 45                  | 11.97%          |
| 10                  | 11.85%          | 22                  | 11.93%          | 34                  | 11.96%          | 46                  | 11.97%          |
| 11                  | 11.86%          | 23                  | 11.93%          | 35                  | 11.96%          | 47                  | 11.97%          |
| 12                  | 11.88%          | 24                  | 11.94%          | 36                  | 11.96%          | 48                  | 11.97%          |

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 11.97% 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                   | 13.44%          | 13                  | 14.53%          | 25                  | 14.59%          | 37                  | 14.62%          |
| 2                   | 13.75%          | 14                  | 14.54%          | 26                  | 14.60%          | 38                  | 14.62%          |
| 3                   | 14.06%          | 15                  | 14.54%          | 27                  | 14.60%          | 39                  | 14.62%          |
| 4                   | 14.21%          | 16                  | 14.55%          | 28                  | 14.60%          | 40                  | 14.62%          |
| 5                   | 14.30%          | 17                  | 14.56%          | 29                  | 14.60%          | 41                  | 14.62%          |
| 6                   | 14.36%          | 18                  | 14.56%          | 30                  | 14.61%          | 42                  | 14.62%          |
| 7                   | 14.40%          | 19                  | 14.57%          | 31                  | 14.61%          | 43                  | 14.62%          |
| 8                   | 14.44%          | 20                  | 14.58%          | 32                  | 14.61%          | 44                  | 14.63%          |
| 9                   | 14.46%          | 21                  | 14.58%          | 33                  | 14.61%          | 45                  | 14.63%          |
| 10                  | 14.48%          | 22                  | 14.58%          | 34                  | 14.61%          | 46                  | 14.63%          |
| 11                  | 14.50%          | 23                  | 14.59%          | 35                  | 14.61%          | 47                  | 14.63%          |
| 12                  | 14.51%          | 24                  | 14.59%          | 36                  | 14.62%          | 48                  | 14.63%          |

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 14.63% 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 2021 paper we extended our review to other jurisdictions. In this paper we have undertaken a review of the decisions since 2022 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 were only two decisions we reviewed from the ACT which dealt with superannuation losses being:

- *Maher v Russell* [2022] ACTSC which adopted 11% and the *Najdovski* approach.
- *ND v AB (No 3)* [2022] ACTSC 197 the court used a buffer inclusive of superannuation.

### **Victoria**

The decisions we reviewed from Victoria suggest the Courts in that state continue to apply a percentage of the gross wages (as opposed to, for example, in NSW where the adopted superannuation percentage is multiplied by the assessed net income loss). The following are a selection of decisions reviewed:

- *McGiffin v Fosterville Gold Mine* [2022] VSC 665 which adopted 10.0% of gross wages.
- *Mill v Adgemis Investments Pty Ltd* [2022] VCC 1892 which appears to have adopted 9.5% of gross wages.

### **South Australia and Tasmania**

We did not find any decisions that dealt with a loss of superannuation in these jurisdictions.

### **Western Australia**

Consistent with our prior paper the Courts 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 were only two decisions we reviewed from Western Australia which were:

- *Tristram-Howard v Morris Corporation (Aust) Pty Ltd* [2023] WADC 60.
- *Pringle -v- Tabloid Pty Ltd* [2023] WADC 18.

Both adopted 9.5% on past losses and 10.0% on future losses less contributions tax of 15%.

### **Other Observations**

Similar to previous years, 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:

- *Allianz Australia Insurance Limited v Davison* [2023] NSWPI 269
- *Kaoutal v QBE Insurance (Australia) Limited* [2022] NSWPI 553
- *Dykes v Insurance Australia Limited t/as NRMA Insurance* [2022] NSWPI 618
- *Albrecht v AAI Limited t/as GIO* [2022] NSWPI 701



## Conclusion

Our review of decisions would appear to suggest that like previous years with the exception of Victoria, jurisdictions have continued to attempt 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) legislated changes in superannuation contribution rates.

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