IMPACT OF CHANGES IN SUPERANNUATION RATES ON PERSONAL INJURY DAMAGES

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The Changes

On 29 March 2012 the Superannuation Guarantee (Administration) Amendment Act 2012 received Royal Assent. As a result, pursuant to subsection 19(2) the rates of compulsory employer sponsored superannuation support increased from the current 9% to the following for the years commencing 01 July 2013:

Period	Rate
Year starting on 01 July 2013	9.25%
Year starting on 01 July 2014	9.50%
Year starting on 01 July 2015	10.00%
Year starting on 01 July 2016	10.50%
Year starting on 01 July 2017	11.00%
Year starting on 01 July 2018	11.50%
Year starting on or after 01 July 2019	12.00%

Table 1

What does this mean for the assessment of future economic loss and future loss of superannuation? The conceptual answer to that question is not, upon investigation, as simple as just increasing the future loss of superannuation to reflect the increased contribution percentages.

The Issue

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. If history is used as the judge in this matter it would appear that this may be the case.

Historically

Set out below is an extract from the *"Bills Digest no. 77 2011–12"* that accompanied the Superannuation Guarantee (Administration) Amendment Bill 2011:

In general terms, over the period 1987–88 to 2005–06:

- real unit labour costs declined in each consecutive year except in 1995-96 and 1996-97, years when the Superannuation Guarantee increased consecutively by 1 percentage point
- real wages increased in each consecutive year except for a decline in 1999-00, a year when the Superannuation Guarantee was unchanged, and
- employment increased in each consecutive year.

Figure 2: Trends in selected economic measures, 1987–88 to 2005–06
Real wages, employment and real unit labour costs (index)
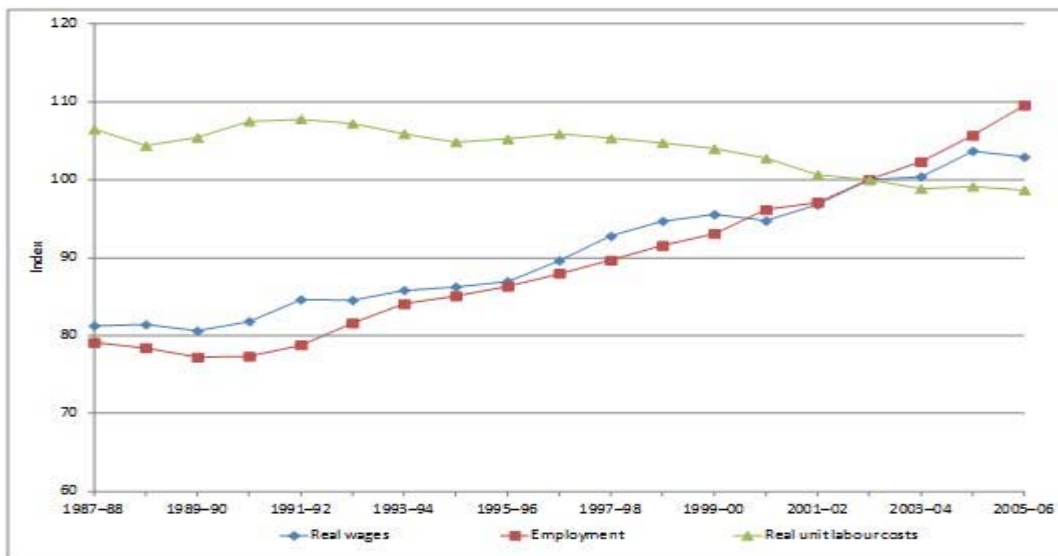
It is apparent from the above data that the introduction of Superannuation Guarantee and subsequent increases in the mandated rates led to a real decrease in cash wages (real unit labour costs). Simply stated part of the real increase in wage rates were directed to increases in compulsory superannuation contributions.

Conceptually what does this mean?

If history is to be used as a guide to what will happen in the years ahead it is possible that wage increases for the "phase in" period for the increase in Superannuation Guarantee will see reduced levels of increases in real wage growth.

For example:

If it is accepted that real total labour costs will grow by 3% per annum during the years to 2020 then the allocation of this total labour cost growth may be broadly distributed as follows:

Period	Total Labour Cost Increase	Increase in Superannuation	Residual Increase in cash wages
Year starting on 1 July 2013	3.00%	0.25%	2.75%
Year starting on 1 July 2014	3.00%	0.25%	2.75%
Year starting on 1 July 2015	3.00%	0.50%	2.50%
Year starting on 1 July 2016	3.00%	0.50%	2.50%
Year starting on 1 July 2017	3.00%	0.50%	2.50%
Year starting on 1 July 2018	3.00%	0.50%	2.50%
Year starting on or after 1 July 2019	3.00%	0.50%	2.50%

Table 2

Obviously with the diverse nature of the Australian industrial relations system it is probable that the issue identified above will be dealt with at an industry by industry or workplace by workplace basis.

How big is the theoretical impact on total future economic damages?

The result of the above conclusion is that, conceptually, for the years ended 30 June 2014 to 2020 real cash wage deflation may need to be allowed for in the assessment of future economic loss (loss of wages) with a corresponding mandated increase in the amount allowed for future loss of superannuation. While it might appear that this reallocation will result in no net change to future loss damages the varying taxation regimes that apply to income and superannuation yield small changes in the total losses calculated. The following table sets out the magnitude of the changes in total future losses calculated at different weekly earnings levels and years to retirement:

	Average Weekly Increase / (Decrease) in Economic Loss and Superannuation							
	Years to retirement							
	5	**10**	**15**	**20**	**25**	**30**	**35**	**40**
$ 200	$(0.47)	$(0.88)	$(1.03)	$(1.10)	$(1.14)	$(1.17)	$(1.20)	$(1.21)
$ 400	$(0.41)	$(0.92)	$(1.11)	$(1.20)	$(1.25)	$(1.29)	$(1.32)	$(1.34)
$ 600	$(0.13)	$(0.25)	$(0.29)	$(0.31)	$(0.32)	$(0.33)	$(0.34)	$(0.34)
$ 800	$ 1.31	$ 1.98	$ 2.32	$ 2.49	$ 2.59	$ 2.66	$ 2.70	$ 2.74
$1,000	$ 1.33	$ 2.48	$ 2.90	$ 3.11	$ 3.24	$ 3.33	$ 3.39	$ 3.43
$1,200	$ 1.60	$ 2.97	$ 3.48	$ 3.73	$ 3.89	$ 3.99	$ 4.06	$ 4.11
$1,400	$ 1.71	$ 3.19	$ 3.74	$ 4.01	$ 4.17	$ 4.28	$ 4.36	$ 4.42
$1,600	$ 2.63	$ 4.89	$ 5.72	$ 6.14	$ 6.39	$ 6.55	$ 6.67	$ 6.76
$1,800	$ 2.95	$ 5.50	$ 6.44	$ 6.90	$ 7.19	$ 7.37	$ 7.51	$ 7.61
$2,000	$ 3.28	$ 6.10	$ 7.15	$ 7.67	$ 7.98	$ 8.19	$ 8.34	$ 8.45
$2,200	$ 3.61	$ 6.72	$ 7.86	$ 8.44	$ 8.78	$ 9.01	$ 9.17	$ 9.29
$2,400	$ 3.94	$ 7.33	$ 8.58	$ 9.20	$ 9.58	$ 9.83	$10.01	$10.14
$2,600	$ 4.27	$ 7.94	$ 9.30	$ 9.97	$10.38	$10.65	$10.84	$10.99
$2,800	$ 4.59	$ 8.55	$10.01	$10.73	$11.17	$11.46	$11.67	$11.83
$3,000	$ 4.92	$ 9.16	1$0.72	$11.50	$11.97	$12.28	$12.51	$12.68

Table 3

It can be seen from the table above that the changes in total future damages are in most cases not material.

For example:

For a claimant with a future loss of $800 before tax per week (calculated as $1,800 less $1,000) over 30 years the increase in the total losses will be approximately $4.04 per week (ie. $7.37 - $3.33).

How should the Rule of Thumb be applied?

The so called "rule of thumb" applied to the assessment of loss of superannuation, whereby a percentage is applied to loss of earnings to arrive at loss of superannuation, will also need to be reviewed in light of the changes set out in the Superannuation Guarantee (Administration) Amendment Act 2012.

Under section 56 of the Civil Liability Act 2003 (Qld) the following is provided in relation to the assessment of loss of superannuation:

"56 Damages for loss of superannuation entitlements

(1) The maximum amount of damages that may be awarded to an employee for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable (in accordance with this part) for the deprivation or impairment of the earning capacity on which the entitlement to the contributions is based.

(2) The relevant percentage is the percentage of earnings that is the minimum percentage required by a written law to be paid on the employee's behalf as employer superannuation contributions."

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 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	9.00%	13	10.98%	25	11.47%	37	11.64%
2	9.13%	14	11.05%	26	11.49%	38	11.65%
3	9.25%	15	11.12%	27	11.51%	39	11.66%
4	9.44%	16	11.17%	28	11.53%	40	11.67%
5	9.65%	17	11.22%	29	11.54%	41	11.68%
6	9.88%	18	11.26%	30	11.56%	42	11.68%
7	10.11%	19	11.30%	31	11.57%	43	11.69%
8	10.34%	20	11.34%	32	11.59%	44	11.70%
9	10.53%	21	11.37%	33	11.60%	45	11.71%
10	10.68%	22	11.40%	34	11.61%	46	11.71%
11	10.80%	23	11.42%	35	11.62%	47	11.72%
12	10.90%	24	11.45%	36	11.63%	48	11.72%

Table 4

If these percentages are applied without any adjustment to future wage losses then the result will be an increase in the overall level of damages assessed by an amount equal to the difference between the above percentages and 9% multiplied by the award for future economic loss. For example:

On a future loss of wages of $400,000 calculated over 30 years the increase in the claim for future loss of superannuation will be in the order of $10,240 (being (11.56% - 9%) x $400,000).

While 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. The following table summarises the actual percentages that future loss of superannuation bears to future loss of wages based on a range of notional ("but for") and actual ("residual") after tax earnings using the current 9% and the 2020, 12% superannuation contribution rates:

Residual Earnings (a/t per week)	Current — Notional Earnings (a/t per week)					As at 2020 — Notional Earnings (a/t per week)				
	200	600	1,000	1,400	1,800	200	600	1,000	1,400	1,800
-	7.6%	8.4%	9.7%	10.4%	10.8%	10.2%	11.2%	12.9%	13.8%	14.5%
200		8.8%	10.2%	10.8%	11.2%		11.7%	13.6%	14.5%	15.0%
600			11.6%	11.9%	12.1%			15.5%	15.8%	16.1%
1,000				12.1%	12.3%				16.2%	16.4%
1,400					12.4%					16.6%
1,800										

Table 5

By way of example:

For a claimant with a future loss of $800 after tax per week (calculated as $1,800 less $1,000) the correct percentage to apply to future economic loss to arrive at future loss of superannuation is as follows:

Current Rates   -   12.3%

As at 2020 Rates   -   16.4%

It is important to note that no legislated "rule of thumb" applies in relation to claims made pursuant to the Workers Compensation and Rehabilitation Act 2003 (Qld) however the Court appears to routinely adopt the rule of thumb approach.

What might the Courts do?

The proceeding analysis centres on the conceptual approach to the assessment of loss of superannuation in light of historical data surrounding real wages growth and in light of mandated superannuation changes.

However a review of the judicial decisions as applying to loss of superannuation around the time of the previous changes in mandated superannuation contribution rates reveals the following varying approaches:

(i)   Generally the adoption of a "rule of thumb" approach;

(ii)   The application of varying percentages to past and future periods;

(iii)   Decisions where the mandated percentage at the time of judgement (eg. 7%) was applied to both past and future loss (see *Gates v Ralph M Lee Pty Ltd* [2000] QSC 463);

(iv)   Decisions where 7% was allowed for past loss and 8% allowed for the entirety of future loss (see *Reid v Basson* [2000] QSC 310); and

(v)   Decisions where 9% was allowed for both past and future loss of superannuation (see *Jones v Eagle Ford Pty Ltd* [2000] NSWSC 1084).

However, generally the review of the judicial decisions reveals the most common approach as being:

(i)   No mention of potential cash wage deflation in relation to the assessment of income losses;

(ii)   In relation to the calculation of **past loss of superannuation** - The application of a range of percentages from the average rate of superannuation contributions applying from the accident to judgment to the maximum of 9%; and

(iii)   In relation to the calculation of **future loss of superannuation** - The application of a range of percentages from the rate mandated at the date of judgment to the maximum rate of 9%.

Other Issues

The method of calculating a plaintiff's loss of superannuation by applying a percentage to the sum assessed for future economic loss, <u>is limited to the calculation of loss under an Accumulation Fund where employer contributions are made in accordance with the Superannuation Guarantee Administration Act.</u> Therefore before assessing a plaintiff's loss of superannuation benefits, the following must be determined:

(i)   What type of fund the plaintiff would have been a member of, if not for the accident; and

(ii)   What level of contributions would have been provided by the plaintiff's employer on behalf of the plaintiff, if not for the accident.

Examples of superannuation funds that if the courts simply allow a legislated fixed percentage of the sum assessed for future economic loss, could result in the assessment being materially incorrect (either overstated or understated) are as follows:

- **BHP Superannuation Fund** (Defined Benefit Fund)
- **Xstrata Wages Employees Superannuation Plan** (Accumulation fund – current contributions 12%)
- **Military Superannuation and Benefits Scheme** (Defined Benefit Fund)
- **State Public Sector Superannuation Scheme – (Q-Super)** (Defined Benefit Scheme)
- **State Public Sector Superannuation Scheme – (Q-Super)** (Accumulation fund – current contributions up to 18%)
- **Queensland Local Government Superannuation Fund** (Defined Benefit Fund)
- **Australia Post Superannuation Scheme** (Defined Benefit Fund)

In summary I note that situations in which superannuation <u>should not</u> be calculated as a percentage (ie. 9% as detailed above) of the sum assessed for future economic loss are as follows:

(i)   If the plaintiff is a member of a Defined Benefit Fund.

(ii)   If the employer's level of contributions are in excess of those required under the SGAA.

(iii)   If the plaintiff would have received a material level of earnings over and above their ordinary times earnings (ie. Overtime and bonuses).

(iv)   If not for the accident, the plaintiff would have been employed however as a result of the accident will be restricted to self-employment.

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Currently it is not clear how funds which provide contributions in excess of the minimum levels (such as those outlined above) may change to take account of the mandated increases. However the following possibilities exist:

(i)   The funds increase the superannuation contributions to match the mandated superannuation increases (eg. the State Public Sector Superannuation Scheme – (Q-Super) current contributions may increase up to 21%); or

(ii)   The funds increases the superannuation contributions by amounts less than the mandated superannuation increases; or

(iii)   The funds do not match the mandated superannuation changes and accordingly no wage deflation need be taken into account

Conclusion

Conceptually the correct approach would appear to be an assessment of future losses allowing for the likely reallocation of future wage increases to mandated employer superannuation contributions. However given the materiality of the differences in future losses and the historical approach adopted by the Courts it would appear that calculations of this nature are unlikely to be undertaken.

For claims subject to the provisions of the Civil Liability Act 2003 (Qld) the application of the "rule of thumb" approach has essentially been mandated and the question then arises as to the appropriate percentage to be employed. With reference to Table 4 it would appear that this percentage is now required to be considered in light of the number of remaining years of employment for a claimant. For example, for the most extreme case of a 20 year old worker injured with a working life of an additional 47 years the appropriate weighted percentage would appear to be 11.72% of the future economic loss.

The adoption of the percentages set out in Table 4 may also need to be viewed in light of the decision in *Najdovski v Crnojlovic* [2008] NSWCA 175 wherein the New South Wales Court of Appeal found in relation to section 15(c) of the Civil Liability 2002 (NSW) (a similar provision to section 56 of the Civil Liability Act 2003 (QLD)) as follows:

"It is therefore clear that the purpose of s 15C, as envisaged in the Ipp Report, was to simplify calculations and not to impose an arbitrary cap on the amount allowed by way of superannuation entitlements."

"The ambiguity of purpose may thus be resolved by rejecting the literal interpretation proposed by the respondent and allowing the calculation of superannuation contributions to be made by taking the relevant percentage of gross ordinary time earnings which are treated as the value of lost earning capacity."

Based on the above reasoning the Court 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 4 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	11.00%	13	13.42%	25	14.02%	37	14.23%
2	11.16%	14	13.51%	26	14.04%	38	14.24%
3	11.31%	15	13.59%	27	14.07%	39	14.25%
4	11.54%	16	13.65%	28	14.09%	40	14.26%
5	11.79%	17	13.71%	29	14.10%	41	14.28%
6	12.08%	18	13.76%	30	14.13%	42	14.28%
7	12.36%	19	13.81%	31	14.14%	43	14.29%
8	12.64%	20	13.86%	32	14.17%	44	14.30%
9	12.87%	21	13.90%	33	14.18%	45	14.31%
10	13.05%	22	13.93%	34	14.19%	46	14.31%
11	13.20%	23	13.96%	35	14.20%	47	14.32%
12	13.32%	24	13.99%	36	14.21%	48	14.32%

Table 6

If you have any questions in relation to the content of this document please do not hesitate to contact either Mark Thompson (3228 4023) or Michael Lee (3228 4091).