

VINCENTS

Impacts of superannuation changes on personal injuries damages

2024 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 2023 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 rate¹ 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.

¹ See *Todovoric v Waller* (1981) 150 CLR 402

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

- *Welsh v Biggin Pty Ltd (No 2)* [2023] QSC 211, Agreed 9.5% on past losses and 11% on future losses.
- *Eden v Jamieson & Anor* [2023] QSC 240, No submissions from Counsel, Crow J assessed 9.5% on past losses and 11.25% on future losses.
- *Carey-Schofield v Hays & Civeo* [2024] QSC 60. Agreed 10% on past losses and 11.78% on future losses. It is not apparent how the 11.78% was determined.
- *Towell v Mooney & Allianz Australia Insurance Ltd* [2023] QDC 130 Agreed 9.5% on past losses and 11% on future losses.
- *Bilson v Vatsonic Communications Pty Ltd (ACN 093 786 004)* [2024] QDC 42, 10% on past losses and 11.77% on future losses. This appeared to be comparable to circa 22 years 2021 paper.

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. In the 2023 paper we noted during the period July 2022 to June 2023 our review of the decisions of the NSW Courts suggests there has been no consistent approach.

Our review of the decisions since July 2023 indicated a return to the modified *Nadjovski* approach utilising claimant's age at the date of trial and the number of years until retirement. In this regard we note the following decisions:

- *De Vries v JNC Group Australia Pty Limited* [2023] NSWSC 777, 11% on past losses and 14.52% on future losses. This appeared to be 27 years as outlined in our 2022 update.
- *Kucinskis v Lane (No 2)* [2024] NSWSC 544, 14.63% on future losses. This appeared to be 43 / 44 years as outlined in our 2023 update.
- *Hodson v Hurex Pty Ltd and Lederer Pty Ltd* [2024] NSWDC 143, 12% on past losses and 14.54% on future losses. This appeared to be 14 years as outlined in our 2023 update.
- *Zamagias v Saltalamaccia* [2023] NSWDC 553, 11.75% on past losses and 14.57% on future losses. This appeared to be 19 years as outlined in our 2023 update.

Some exceptions to the return to the modified *Nadjovski* approach were *Furner v Jackson* [2023] NSWSC 914 and *Rindfleish v Agrigrain Pty Ltd* [2023] NSWDC 543 which adopted 11% on past and future losses.

The NSW PIC

As noted in our previous papers New South Wales established and operates the Personal Injuries Commission which hears the majority of personal injury matters.

Of note was the volume of decisions where the losses (particularly future losses) were inclusive of superannuation. Examples included:

- *Walker v AAI Limited t/as GIO* [2024] NSWPIC 253
- *Debono v QBE Insurance (Australia) Limited* [2024] NSWPIC 87
- *Salmon v AAI Ltd t/as GIO* [2023] NSWPIC 406
- *Javed v Allianz Australia Insurance Limited* [2024] NSWPIC
- *Yas v QBE Insurance (Australia) Limited* [2024] NSWPIC 238
- *WU v AAI Limited t/as GIO* [2024] NSWPIC 297
- *Aguilera v AAI Limited t/as GIO* [2024] NSWPIC 323
- *Donaldson v QBE Insurance (Australia) Limited* [2023] NSWPIC 655
- *Ashraf v AAI Limited t/as AAMI* [2023] NSWPIC 392
- *Scott v AAI Limited t/as GIO* [2023] NSWPIC 509

There were other decisions from the members of the Commission which calculated a separate head of loss. They included:

- *Mossman v Insurance Australia Limited t/as NRMA* [2023] NSWPIC 377, agreed 12% for past losses and 14% for future losses.
- *Romero v CIC Allianz Insurance Limited* [2024] NSWPIC 113, agreed 11% for past losses and 14.42% for future losses. It is not apparent how the 14.42% was determined.
- *Zjadic v AAI Limited t/as GIO* [2024] NSWPIC 105 assessed 11% on future losses.
- *Tunks v CIC Allianz Insurance Limited* [2024] NSWPIC 194 assessed 11% on past losses and 13% on future losses.

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 July 2024).

Years to retirement	Average Super %	Years to retirement	Average Super %	Years to retirement	Average Super %	Years to retirement	Average Super %
1	11.50%	13	11.96%	25	11.98%	37	11.99%
2	11.75%	14	11.96%	26	11.98%	38	11.99%
3	11.83%	15	11.97%	27	11.98%	39	11.99%
4	11.88%	16	11.97%	28	11.98%	40	11.99%
5	11.90%	17	11.97%	29	11.98%	41	11.99%
6	11.92%	18	11.97%	30	11.98%	42	11.99%
7	11.93%	19	11.97%	31	11.98%	43	11.99%
8	11.94%	20	11.98%	32	11.98%	44	11.99%
9	11.94%	21	11.98%	33	11.98%	45	11.99%
10	11.95%	22	11.98%	34	11.99%	46	11.99%
11	11.95%	23	11.98%	35	11.99%	47	11.99%
12	11.96%	24	11.98%	36	11.99%	48	11.99%

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 11.99% 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	14.06%	13	14.62%	25	14.64%	37	14.65%
2	14.36%	14	14.62%	26	14.64%	38	14.65%
3	14.46%	15	14.63%	27	14.64%	39	14.65%
4	14.51%	16	14.63%	28	14.64%	40	14.65%
5	14.54%	17	14.63%	29	14.65%	41	14.65%
6	14.56%	18	14.63%	30	14.65%	42	14.65%
7	14.58%	19	14.63%	31	14.65%	43	14.65%
8	14.59%	20	14.64%	32	14.65%	44	14.65%
9	14.60%	21	14.64%	33	14.65%	45	14.65%
10	14.61%	22	14.64%	34	14.65%	46	14.65%
11	14.61%	23	14.64%	35	14.65%	47	14.65%
12	14.62%	24	14.64%	36	14.65%	48	14.65%

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 14.65% 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 2023 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 three decisions we reviewed from the ACT which dealt with superannuation losses being:

- *Meas (by his litigation guardian Adcock) v Tipping* [2023] ACTSC 187 14.54% on future losses. This appeared to be 47 years as outlined in our 2021 update.
- *Alananzeh v Zgool Form Pty Ltd* [2024] ACTSC 16, buffer inclusive of superannuation losses.
- *Tattersall v Dormakaba Australia Pty Ltd* [2023] ACTSC 390, buffer inclusive of superannuation losses.

Victoria

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

South Australia

There were only two decisions we reviewed from South Australia which dealt with superannuation losses being:

- *Pastuch & Ors v Transport Accident Commission* [2023] SADC 150. The calculations in accordance with *Jongen v CSR Ltd* (1992) Aust Torts Rep 81-192.
- *Raccanello & Ors v Motor Accident Commission* [2023] SADC 84 12% on future losses.

Tasmania

There were only two decisions we reviewed from Tasmania which dealt with superannuation losses being:

- *Munting v Pollard* [2024] TASSC 30, 11.5% on past losses and 12% on future losses.
- *Steen v Trustees of the Diocese of Tasmania* [2024] TASSC 3, 10% on future losses.

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 three decisions we reviewed from Western Australia which were:

- *Fabbri v Masters Home Improvement Australia Pty Ltd* [2023] WADC 97
- *Carusi v St Mary's Anglican Girls School Inc* [2023] WADC
- *PLA (a pseudonym) v DEF (a pseudonym)* [2024] WADC 53

Fabbri and *PLA* deducted the current contributions tax of 15% whereas *Carusi* deducted the former 30% tax.

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:

- *Forostenko v Springfree Trampoline Australia Pty Ltd* [2024] QSC 1
- *Burnett v Manhattan Homes Pty Ltd* [2023] NSWSC 1431
- *Agno v Insurance Australia Limited t/as NRMA* [2023] NSWPIC 375

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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