



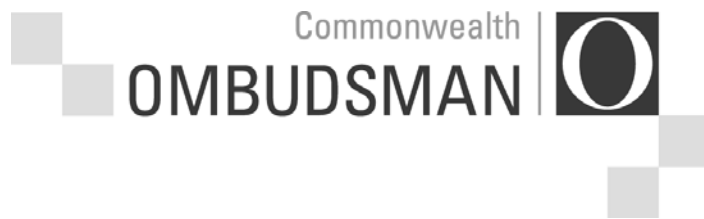
## Child Support Agency change of assessment decisions

Administration of change of assessment decisions  
made on the basis of parents' income,  
earning capacity, property and financial resources

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Report by the Commonwealth Ombudsman  
under the *Ombudsman Act 1976*

Report No. 01 / 2004



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Report by the Commonwealth Ombudsman  
Professor John McMillan  
under the *Ombudsman Act 1976*

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## Reports by the Ombudsman

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ISBN 0-9750680-3-2

Date of publication: May 2004

Publisher: Commonwealth Ombudsman, Canberra Australia

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## EXECUTIVE SUMMARY

The Commonwealth Ombudsman receives a large number of complaints about the Child Support Agency (CSA) each year. As a result of issues that emerged in individual cases, the Ombudsman's office identified a need to undertake a broader investigation of one aspect of the CSA's operations. Specifically, the office examined the administrative procedure for making a 'Change of Assessment' to a person's child support payment.

The *Child Support (Assessment) Act 1989* (Cth) contains a formula to be applied in calculating the amount of child support to be paid by one parent to another. The formula takes account of the situation of most families, but can result in inequities where there are special circumstances. Three such examples are, firstly, if a parent incurs extraordinary expenses to spend time with the children (such as long distance travel); secondly, if a parent incurs extra costs because the children have special needs; or, thirdly, if the statutory formula does not accurately pick up the income, earning capacity, property or financial resources of either parent.

To account for these special circumstances, the child support legislation enables either parent to apply to the CSA for a change to the default assessment arising from the application of the statutory formula. In all, there are ten reasons under which a parent may apply to have an assessment changed. The change of assessment process is unavoidably complex, discretionary and divisive. In 2002-03 the CSA dealt with 32 976 change of assessment applications – roughly 5% of the active child support cases registered with it.

The Ombudsman's office identified a need to initiate an investigation into the decisions made in change of assessment cases. The investigation looked at 1156 decisions, made over a six month period, in which a change of assessment decision was made on the basis of parents' income, earning capacity, property and financial resources. Among the main findings in the report are –

- the highest proportion of applications for a change of assessment (over one third) were cases in which one of the parties (usually the paying parent) was self-employed or had a business income;
- nearly one quarter of the change of assessment decisions made by the CSA were given a rating which suggested the need for an improved standard of decision-making (specifically, the decision was rated as being not reasonably open to the decision maker, not the best possible decision, or not possible to categorise);
- there were noticeable regional differences in the nature and style of the decision making, including in the overall standard of decision making, the level of investigation undertaken by the decision maker, and the reasoning underlying the decisions.

This report makes twelve recommendations for improvement to the change of assessment process. The main theme in those recommendations is the need for the CSA to initiate greater monitoring of decisions, development of guidelines, and training of decision makers.

The Department of Family and Community Services, which has portfolio responsibility for the CSA, provided a response to the report that agreed to all recommendations (with a qualification to one recommendation). The twelve recommendations and the Department's response are at Appendix C.

## PART 1: BACKGROUND

1.1 The Child Support Agency (CSA) affects the lives of over 1.2 million parents,<sup>1</sup> assessing and collecting child support in respect of approximately 1.5 million children.<sup>2</sup> It is an agency that, unlike many other government departments, deals with issues that arise between two private parties who may be in conflict with each other. Those conflicts can be of a highly sensitive nature, encompassing family relationships and separation and the financial complications that arise there from. Many of the issues were identified in the recent Parliamentary report, *Every picture tells a story*.<sup>3</sup>

1.2 The Commonwealth Ombudsman receives a large number of complaints about the CSA each year. As a result of issues that emerged in individual cases, my office identified the need to undertake a broader investigation on one particular aspect of the CSA's operations.

### The Change of Assessment process

1.3 The Child Support Scheme (CSS) generally assesses the amount of child support that is to be paid by one parent to the other on the basis of a formula. The formula is applied to the income of each parent and takes into account the number of children in each parent's care and the amount of time the child support children spend with each parent.

1.4 The formula is a one-size-fits-all approach that, while it takes into account the situations of most families, can result in inequities where there are special circumstances. This can occur, for example, where a parent incurs extraordinary expenses to spend time with the children (such as long distance travel), where a parent incurs extra costs because the children have special needs, and where the assessment does not take into account the income, earning capacity, property or financial resources of that parent.

1.5 When the CSS commenced in 1989, parents had to apply to a court (with Family Court of Australia jurisdiction) for a departure from the formula assessment. However, since 1992, parents have been able to apply directly to the CSA for an administrative Change of Assessment (previously known as a departure or review), using one or more of a number of 'Reasons' that are set out in the child support legislation.<sup>4</sup> The number of Reasons under which parents can apply for a Change of Assessment (COA) has expanded over time, so that there are now ten Reasons available. The full list of Reasons and their descriptions, as paraphrased in CSA publications, are set out at Appendix A.

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<sup>1</sup> CSA (2003) *Child Support Scheme: Facts and Figures: 2001-2002*, p 17.

<sup>2</sup> *Ibid*, p 18.

<sup>3</sup> House of Representatives Standing Committee on Family and Community Affairs (December 2003) *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*, para 6.215.

<sup>4</sup> *Child Support (Assessment) Act 1989* Part 6A and s 117.



1.6 The individual circumstances of both parents and their families are considered by a Senior Case Officer (SCO), who decides whether one or more Reasons have been established. If a Reason has been established, the legislation provides that the SCO must then determine whether it would be 'just, equitable and otherwise proper' to change the assessment.<sup>5</sup> To do this, the SCO must consider the impact a change would have on the parents and the children (for example, whether a change would cause financial hardship for either of the parents and/or the children), as well as the impact on the community (that may result from an increase or reduction in family assistance). Thus, while the decision of a SCO will be closely guided by the provisions of the child support legislation, the principles (if any) arising from judgments of the Family Court of Australia, internal CSA guidelines, and the individual circumstances of each case, there is often scope for discretionary judgment and evaluation by a SCO.

1.7 The Change of Assessment caseload of the CSA is illustrated in the following figures. As at 30 June 2003, there were 663 734 active cases registered with CSA, in respect of which a change of assessment application could be made (called 'Stage 2' cases). In 2002 – 2003, the CSA finalised 32 976 COA applications (that is, about 5 per cent of stage 2 cases).

### **Reason 8 decisions**

1.8 The most common Reason for a COA is Reason 8 when 'the income, earning capacity, property or financial resources of one or both of the parents' is not properly reflected in the formula assessment. COA decisions based on this Reason seem to be one of the most contentious areas of decision making for the CSA. It is also a common cause of complaint to this office.

1.9 The child support formula is applied to the incomes of both parents in setting an assessment. A parent's child support income is usually the sum of their previous taxable income and their supplementary income, although a default income can be set if this information is not available. Parents who experience a drop in income can lodge an estimate, which will result in CSA amending the amount of their assessment from the date of lodgement onwards.

1.10 However, there are circumstances in which a parent's previous or estimated child support income will not reflect his or her current income or capacity to earn a higher income, or take into account other financial resources they have at their disposal. Parents may apply for a COA under Reason 8 when 'the income, earning capacity, property or financial resources of one or both of the parents' is not reflected in the assessment.

1.11 In many cases, this Reason is used to adjust the income being used in the formula assessment where a parent has gained employment, changed employment or ceased employment. In such circumstances, the adjustment is designed to reflect more accurately the parent's actual circumstances, rather than their last taxable income. However, Reason 8 is also commonly

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<sup>5</sup> *Ibid*, s 98C.

used in a number of other situations that may be less straightforward. These include:

- where a parent has voluntarily left employment to study or for some other reason, but retains a capacity to earn a higher income;
- where a parent operates a company, business, family trust or other entity that can reduce the taxable income that might otherwise be available if the parent was a 'Pay As You Go' taxpayer;
- where a parent has resources available that may be used to help support the children, for example, a large termination or redundancy payment, a compensation payment or an inheritance;
- where a parent has seasonal work, for example, working in high income employment for six months of the year and not working at all for the other half of the year;
- where a parent has salary sacrificing arrangements in place with an employer that reduces taxable income, for example, through voluntary superannuation contributions;
- where a parent receives other benefits from an employer, such as the private use of a vehicle, accommodation or allowances that are not fully used for work purposes;
- where part or all of a parent's income is non-taxable, for example where a parent serves overseas with the defence forces or is a member of the defence force reserves, or receives a non-taxable pension.

## PART 2: COMPLAINTS TO THE OMBUDSMAN

2.1 A decision to change an assessment because the income, earning capacity or available resources of a parent are not reflected in the formula assessment can be difficult to make, particularly where there is incomplete financial information about one or both of the parents and/or the available information is disputed between the parents. As well as resolving these issues, the SCO must also decide (under the legislation) that it would be 'just, equitable and otherwise proper' to change an assessment. It is to be expected, perhaps, that one or other party will feel that the resulting decision of the SCO is unfair. That in turn gives rise to many of the complaints received by the Ombudsman.

### Case Study 1

Ms S complained to the Ombudsman about the outcome of a COA process. She raised a number of issues, including the decision to set a new child support assessment based on the earning capacity of both Ms S and the paying parent.

The payer had experienced unemployment and low income periods. He had recently obtained full-time, secure employment and expected to earn a far higher income than that on which the assessment was based. In addition, his conditions of employment provided for significant pay increases each year.

Ms S had two child support children of primary school age, as well as two children under school age in her current relationship. She had returned to work for twenty-five hours a week after the birth of her third child. Some time after her fourth child was born, Ms S returned to work for thirteen hours a week.

The SCO increased the payer's earning capacity to reflect his current income (but not the future increases, though any increase in income after the decision ended, would be identified in tax returns and picked up in normal formula assessments). The SCO also decided that Ms S could return to twenty-five hours a week employment, based on her previous work patterns. That would increase her income enough to reduce the amount of child support payable. This assessment was set for a period of two years.

While such a decision may be open to the SCO to make, it raised concerns that requiring a parent with primary caring responsibility for four young children to increase her work hours was not in keeping with community standards or the CSA's guidelines. The CSA did not accept our suggestion to review the decision because it considered that Ms S could apply for a new COA, thus enabling new information as well as her pre-existing situation to be considered. Ms S did this and the assessment was changed, but only from the date of the decision and not for the past period (as to a SCO's power to backdate a decision, see Part 4).

2.2 When investigating a complaint from an individual about a COA decision, the Ombudsman does not second-guess the merits of the decision by displacing the SCO's judgement on what decision should be made. The focus, instead, is on whether it was a decision that was reasonably open to be made by the SCO, particularly whether there was any procedural defect in how the SCO reached the decision. In an exceptional case, we may suggest that the CSA change a decision if we have formed an opinion that it was not reasonably open to the SCO to make. As well as looking at individual decisions, we often identify broader issues or consider that decisions generally may have been better. Typical issues that have arisen in, or as a result of, our investigations include:

- information given to parents about the effect that certain actions, such as leaving employment to study, may have on their assessments;
- decisions that place income capacity at the same level as previous earnings when the person has not been employed for some years;
- setting income capacity at a higher level than previous earnings;
- inequitable outcomes where a paying parent has more than one case and income is treated differently in each;
- not taking into account the parent's caring responsibilities for their children.

2.3 This office has also been aware, in investigating complaints across CSA Regional offices and made by many different SCOs, of inconsistencies in the treatment and consideration of COA applications.

2.4 Based on this experience, I decided to conduct a broader investigation, using the 'own motion' powers conferred by section 5(1)(b) of the *Ombudsman Act 1977*, to consider the quality of decisions made by SCOs. Our conclusions are based on empirical research, while also drawing on the general investigation experience of my office.

2.5 My office has received the full cooperation and support of the CSA in conducting this investigation. Through a process of regular feedback and the CSA's own improvement initiatives, some of the issues identified during the investigation have already been addressed by the CSA.

### **Case Study 2**

Mr B accepted redundancy from his employer of fourteen years and considered a return to full-time study. He called the CSA and asked how his redundancy package and intention to study would affect his child support assessment. As Mr B did not have a child support case registered (payment of child support was based on a private arrangement between the two parties), the CSA was only able to give general advice about the circumstances of the case. The CSA advised Mr B that, hypothetically (if the case were registered with the CSA), he could lodge an estimate of income with the CSA, which would reduce his assessment to the minimum amount.

On the basis of this advice, Mr B left the workforce, enrolled in full time study, and reduced his child support payments. The other parent then registered the case with the CSA and applied for a change of assessment based on Mr B's capacity to earn a higher income. The SCO decided that Mr B had voluntarily reduced his income; the SCO set a child support rate based on Mr B's ability to use his termination payment to continue to contribute to the care of his child.

We considered that, when asked by a paying parent about the impact of a voluntary reduction in employment income and/or a termination payment, it should be standard practice for CSA officers to include information that it would be open to the other parent to seek a change of assessment on the basis of the payer's previous income or lump sum payment. It was, therefore, suggested to the CSA that it apologise to Mr B for providing incorrect information and take steps to ensure that officers provided adequate information about this issue when asked.

## PART 3: INVESTIGATION METHODOLOGY

### Defining the scope

3.1 As initially conceived, this investigation was to look at the way in which SCOs, who make COA decisions, determine a parent's capacity to earn a higher income than that reflected by the parent's taxable income.

3.2 Narrowly defined, this could have constrained the investigation to those decisions where a parent was not working, or not working to his or her full capacity – that is, cases where a parent had reduced his or her income by voluntarily ceasing work, changing employment or reducing hours of work, or by not pursuing efforts to obtain employment or higher paying employment, despite opportunities to do so.

3.3 However, in reality, in most applications made under Reason 8, SCOs will give some consideration to the parents' earning capacity. In some of the cases where capacity was not considered, it may in fact have been a relevant factor that could have been taken into account. As a result, in examining individual COA decisions, it can be very difficult to distinguish between those that are based on a parent's actual income and/or resources and those that only – or also – have regard to the parent's earning capacity.

3.4 I also held the view that other related decisions, such as where a parent was able to reduce his or her taxable income through the use of companies or trusts, were equally controversial and subject to complaints to this office.

3.5 On the basis of these considerations, I decided to take a broader view, extending the investigation to include all Reason 8 decisions that considered financial resources and/or income that would not be assessed under the child support formula as personal taxable income and were, for this reason, contentious in their nature. This meant that most Reason 8 decisions were considered, with two exceptions: those where a parent had obtained employment during the child support period and the SCO changed the assessment on the basis of the parent's actual, current income; and those where there was no consideration of a parent's earning capacity and no need to consider that capacity.

### Components

3.6 There were two components of the investigation. The first was to identify and analyse the complaints received by this office about COA decisions that involved consideration of a parent's income, earning capacity, property or financial resources, other than the income that would normally be used in the assessment. The second was to consider all of the relevant COA decisions made by CSA over a six month period. Analysis was confined to decisions that were based on applications under Reason 8 only. Regard was had to CSA instructions and guidelines, as well as relevant Family Court of Australia cases.

3.7 Applications and decisions made on the basis of more than one reason were excluded because many parents often include Reason 8 in their applications even when primarily applying for a COA for another reason or reasons. To have included these cases would have yielded a volume of decisions that was too large for analysis in this kind of project. It would also be difficult to tell from decisions based on a number of reasons, the net impact of earning capacity on the outcome.

3.8 In analysing the decisions made over the six month period, from 1 June to 30 November 2002, each decision was read and given a rating in terms of its quality. The ratings are indicative only and are generally based only on reading the decision, although some queries were raised with the CSA and further information obtained. It should be noted that consideration of each decision was not as detailed as an investigation by this office would have entailed and my office did not obtain all of the information that would have been collected as part of an investigation. Therefore, the ratings given can only be considered to be indicative and, necessarily, reflect the subjective evaluation by the reader of each decision. They were as follows:

- (1) good decision;
- (2) better explanation needed and/or grammar/spelling/other editing errors;
- (3) not able to determine whether good decision or not;
- (4) better decision could have been made, but outcome would be same/close;
- (5) concern with decision, but open to SCO;
- (6) decision was not reasonably open to SCO.

3.9 In rating the decisions, the rating of six in cases was only used where, on the information available to this office, it was considered that it would be likely that, had my office received a complaint from one of the parents, we would have suggested that the CSA reconsider the decision. As stated earlier, we would only ask for such a reconsideration where we form the view that it was not reasonably open to the SCO to make such a decision. The results of this analysis are presented in Table 1.

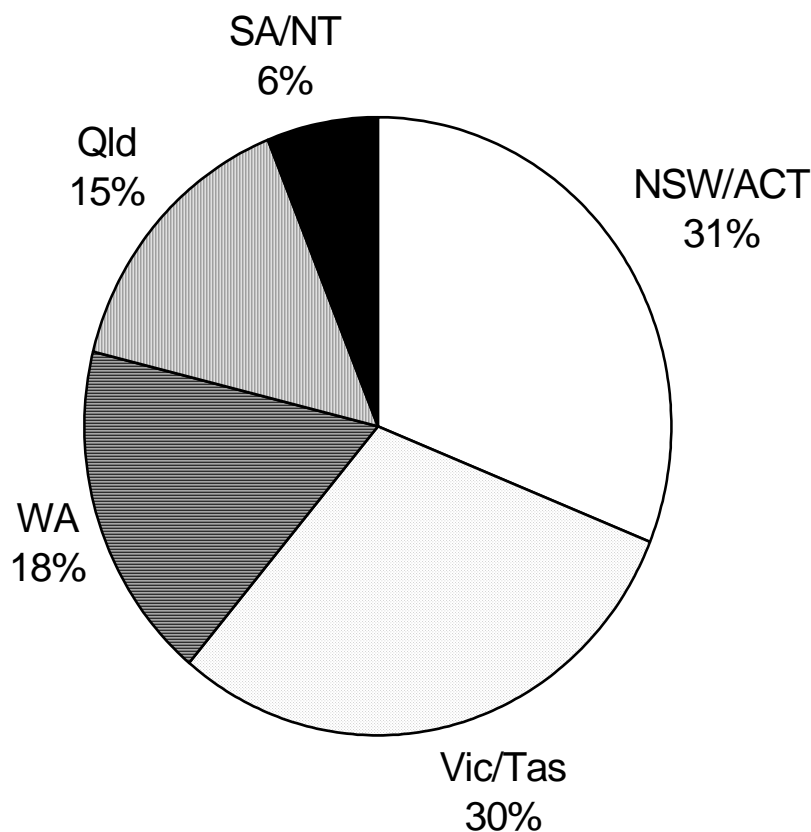
3.10 Although the decisions were categorised in this way so that the overall quality of decision making could be considered, the in-depth analysis of each decision enabled a great deal of analysis of the quality and consistency of decision making. In doing so, the analysis indicated many differences in the treatment of COA processes and decision making across the CSA regions, as well as specific concerns and errors in decision making. These are discussed in detail in Parts 4 -6 of this report.

## PART 4: WHAT THE RESEARCH REVEALED

### Overview

4.1 In all, 1156 decisions were analysed, with 678 (58 per cent) initiated by applications from payee parents and 470 (41 per cent) by payer parents. The remaining 8 cases (or less than 1 per cent) were cases where the child support liability of both parents was equal. This could occur in situations where parents have a similar income and share the care of the children or each have sole care of one child. In these circumstances, the assessments would be offset against each other, so that neither parent would be required to pay the other parent child support. A parent in this type of situation may feel that the other parent has a greater earning capacity or financial resources and is able to make a greater financial contribution to the care of the child or children. The figures for Reason 8 applications (including applications made for another reason as well) were 46 per cent from payers and 54 per cent from payees. Graph 1 below shows the proportion of COA decisions examined in each CSA Region.

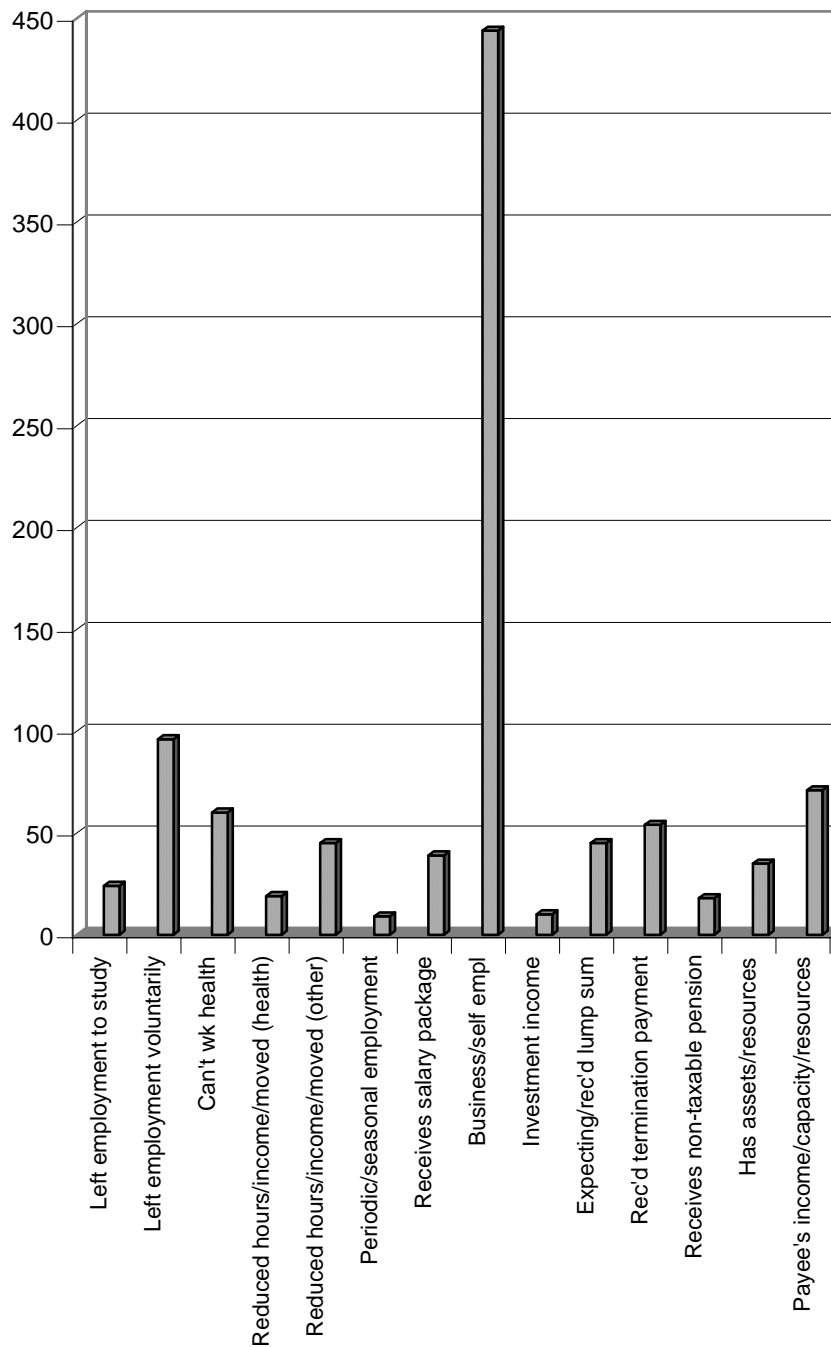
**Graph 1: Cases examined by CSA Region**





4.2 The basis upon which a change was sought to an assessment varied considerably among the decisions that were examined. Graph 2 below indicates that strictly-defined earning capacity issues, such as where a parent left employment or reduced their hours of work voluntarily, made up only a small number of the cases examined. The greatest number of applications were based on the need to consider income derived, or financial resources available, from companies, trusts, businesses, contracting and/or other forms of self employment; such factors were present in more than one-third of all decisions analysed.

**Graph 2: Factors in income or capacity considered in COA process**



4.3 The overall quality of decision making, as shown in Table 1 below, was reasonable, with 71 per cent of all decisions being rated as good (category 1), a further 3 per cent as needing only a better explanation or editing for spelling and grammar (category 2) and another 3 per cent as having a defensible outcome even though a better decision could have been made (category 4). Table 1 also indicates that there is considerable room for improvement, with nearly one-quarter of decisions being rated as either not reasonably open to the decision maker, not the best possible decision or not possible to categorise (3, 5 and 6).

**Table 1: CSA Region by quality of decisions**

	CSA region					
	<i>NSW/ACT</i> (n=361) %	<i>Vic/Tas</i> (n=344) %	<i>WA</i> (n=212) %	<i>Qld</i> (n=172) %	<i>SA/NT</i> (n=67) %	<b>Total</b> (n=1156) %
<b>(1) Good decision</b>	68	73	75	68	76	71
<b>(2) Better explanation needed</b>	4	1	1	3	3	3
<b>(3) Unclear</b>	3	10	9	9	5	7
<b>(4) Defensible outcome</b>	5	2	1	3	7	3
<b>(5) Concerns with decision, but open</b>	12	10	11	12	7	11
<b>(6) Not reasonably open</b>	8	4	3	5	2	5
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

4.4 Some of the regional differences were noteworthy. The SA/NT region seemed to have a much higher overall quality of decision making, with 86 per cent of decisions being rated in categories 1, 2 and 4, as being a 'good' decision, having a defensible outcome, or needing only presentational improvement; the comparable figure in the other regions was between 74 and 78 per cent. Further, only 9 per cent of the decisions made in SA/NT were categorised as 5 or 6 (a better decision should have been made or the decision was not reasonably open to the SCO); the comparable figure for other regions was between 14 and 20 per cent.

4.5 Decisions made in Qld and NSW/ACT were rated more often as being of poorer quality than decisions in other regions. However, in NSW/ACT, the decisions were clearer and more easily able to be categorised, so it is possible that if the decisions in all Regions that were unclear (category 3) ultimately belonged in the last two categories, this would result in a similar pattern in as in NSW/ACT.

### **Regional differences**

4.6 While the Ombudsman's office recognises that the CSA has improved the consistency across regions of treatment of COA applications and decisions in recent times, our investigation suggests that many regional differences remain. Some examples of these differences present in the cases examined are set out below.

- The start date of COA decisions varied: for example, while some decisions started from the date that the application was made or received, other start dates were used, such as a date after the application was made (giving the respondent time to be made aware that the application had been made), the date of the conference, or the date of the decision. It should be acknowledged that a SCO must set a start date that is just, equitable and otherwise proper and differences are, therefore, to be expected. However, in the decisions examined, the reason for the choice of start date was often not clear.
- The types and levels of investigation conducted by SCOs and administrative officers varied, for example, when identifying sources of income and resources, and clarifying medical evidence with doctors.
- There was a difference in the approach taken in cases where there was some financial information, but that information was, in some way, incomplete. It seemed that some regions took a more conservative approach to income than other regions.
- There were different approaches taken in cases where it was open to the SCO to make a 'contrary' decision (for example, where a paying parent had applied for a reduction in child support, but the SCO considered that the assessment was actually too low).
- There were different approaches to identifying when decisions could be made on the papers, without giving the parents the option of participating in a conference.
- Varying amounts of evidence or information were required from parents to show the income or capacity of the other parent. There also seemed to be a lack of consistency between regions in accepting or refusing to accept information from one parent concerning the other, without documented evidence, in situations where that other parent had not responded to, or refuted, the claims made.
- Different amounts of contact were made, or attempted to be made, with parents, for example, to request participation in conferences, follow up conferences and opportunities to provide additional information.
- The amount of detailed information that was included in decisions varied.

4.7 While some of the practices do not seem to be incorrect in isolation, they can lead to inconsistencies when the organisation is viewed nationally. That is, the problems are not in the manner in which applications are dealt with, but simply that an applicant with identical circumstances may be treated differently in one region to another.

### Case Study 3

In one of the decisions analysed by this office, Mr J was assessed to pay the minimum amount of \$260 per year to Ms H to support their child. Ms H applied to have the assessment increased on the basis that Mr J operated a business and earned a high income through the cash economy and not declared as taxable income. Mr J did not respond to the application and did not provide any information to the CSA or the SCO.

In a case of this kind, it can be difficult for a payee parent to substantiate a claim that the other parent is earning an undeclared cash income and, without any evidence, a SCO will generally not increase the assessment. However, in this case, the CSA used its powers to ascertain that Mr J had travelled overseas five times in the preceding six years, had withdrawn an amount sufficient to purchase the business at the time alleged by Ms H, that large amounts were regularly deposited into two accounts operated by Mr J, and that Business Activity Statements lodged with the Australian Tax Office indicated that Mr J made a small profit from the business.

The SCO set a new child support income amount for Mr J, which allowed for the cash that had passed through his account and some profit from the current business. The Ombudsman's office considered that this decision was appropriate. However, analysis of other similar decisions indicated that a similar outcome may not have occurred if the matter had been dealt with in another CSA region.

4.8 The analysis undertaken by the Ombudsman's office has identified particular areas where decision making could be improved in each region. In some cases, the CSA has already taken specific action to inform SCOs of correct practices. This occurred, for example, in one region in which SCOs were not passing on relevant financial information from one parent to the other, even where that information was directly relevant to the decision. This was because the SCOs in that region believed that to do so would be in contravention of privacy principles. Once the issue was identified from the decisions analysed by the Ombudsman's office, the CSA took immediate action to ensure that SCOs in that region understood that, for reasons of procedural fairness, parents are entitled to view the financial information provided by the other party to the proceedings.<sup>6</sup> It would seem that the CSA,

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<sup>6</sup> *Child Support (Assessment) Act 1989* s 98H; and Part 2.4 of CSA's Online Technical Guide (also at Appendix 2).

as a national organisation, would benefit from a more formal process in dealing with specific regional training needs.

### **Recommendation 1**

That the CSA monitor consistency of decision making across regions and develop training programs that address areas of weakness, enhance consistency and are adapted to meeting specific areas of need in each region.

### **Previous decisions**

4.9 In the analysis of the decisions, it became clear that many parents going through a COA process had gone through the process previously. I considered it important to look at some features of those earlier cases, including whether the decisions themselves in some way increased the need for a parent to return for a further decision, and the way in which earlier decisions influenced the outcome in later processes.

4.10 The impression formed by my office was that it became inevitable for many parents who used the process once to continue to seek to have an assessment altered to meet the particular circumstances of their case. These repeat cases do not seem to be having a cumulative effect (that is, a build up of cases from year to year that have entered into a cycle of COA), shown by the fact that there has not been a noticeable growth in COA applications to the CSA in recent years.

4.11 Significantly, a total of 431 COA applications (or 37 per cent of the cases examined) came from parents who had been through the process in the past; in some, the effect of the decision had ended, while in others one of the parents believed that the effect of an existing decision should be changed. These seemed mainly to be for the same (or include the same) reason, to do with the income, earning capacity or resources of one of the parents. In some cases, though, the earlier decision(s) had been made for other reason(s) or it was not possible to identify the reason(s) for previous processes.

4.12 A SCO would generally consider any previous decisions relating to the parties when making a new determination and often set a new assessment that was based on, or exactly the same as, the earlier decision(s). In some cases, it seemed that SCOs extended the previous decisions even when new financial information had become available or circumstances had changed. However, the extension of decisions was often appropriate and also served to give parents some certainty about their own financial circumstances.

4.13 Table 2 below shows that around 40 per cent of repeat applications were initiated by payees and 60 per cent by payers. This is the reverse of the pattern in Reason 8 applications generally, in which 61 per cent were initiated by payees. There were more payee than payer applications in each region, with the narrowest differential in WA (48 and 52 per cent respectively).

**Table 2: Repeat COA decisions instigated by payees and payers**

	CSA region				
	<i>NSW/ACT</i> (n = 126) %	<i>Vic/Tas</i> (n = 117) %	<i>WA</i> (n = 84) %	<i>Qld</i> (n = 71) %	<i>SA/NT</i> (n = 31) %
<b>Payee</b>	37	38	48	39	42
<b>Payer</b>	63	62	52	61	58
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

4.14 The quality of decision making seemed to be higher in these repeat cases, with 80 per cent of these cases considered to be good decisions (compared to 71 per cent of cases overall) and only 9 per cent considered to be decisions that could have been better or were not reasonably open to the SCO (compared to 16 per cent of cases overall). A possible explanation may be that the issues raised in the applications had been considered on more than one occasion and by more than one decision maker, so that there was inherently better quality control. Another contributing factor may have been that many of the applications were refused on the basis that there was a decision already in place and that the applicant had not provided any new information to support a change. In these cases, a SCO has the discretion to refuse an application without sending it to the other parent for comment, as the COA process is not a review mechanism. This means that these decisions would generally not be as complex as some others that SCOs are asked to consider, increasing the likelihood that the quality of the outcomes would be higher.

4.15 A factor in almost one-third (32 per cent) of the repeat cases involved payers whose income was derived from a business, company or trust. Other common factors were payers who had voluntarily left employment (9 per cent of repeat cases), and cases where health issues were raised (7 per cent).

### **How the changes were made**

4.16 Where a SCO intends to increase or reduce an assessment, the change can be made in a number of different ways to achieve the same initial result. However, some mechanisms are easier to understand than others, some will allow for greater flexibility in the parents' circumstances without the need for further review, and some will result in changes to the amount of child support paid during the time that the decision is in place. Analysis of the way in which changes were made in decisions is useful in considering whether practices in particular regions, or by different SCOs, could result in inconsistent outcomes for parents.

4.17 When a SCO makes a decision to change a child support assessment, they may set a new rate of child support or they can change a particular component of the child support formula. For example, changes can be made to the income amount of one or both of the parents, to the child support percentage to be applied to the income, to the level of the exempt income (the amount allowed for self support before the percentage of child support is taken from a paying parent's income), or to a combination of those factors.

4.18 The advantage to a parent of changing a component of the child support formula, rather than setting a new child support amount, is that it can lessen the need for the parent to return for a new change of assessment when his or her circumstances change. The example below is a clear illustration of this advantage. Changing the formula, rather than the amount to be paid, can also be a better option where a parent is unable to lodge an estimate for some time after a decision has expired.<sup>7</sup>

#### **Example**

Ms Y and Mr Z have two child support children who primarily reside with Ms Y. Ms Y applied for a COA as Mr Z operates a business with a number of business expenses that reduce his taxable income. The SCO decided that, while the deductions were legitimate for taxation purposes, some of them should be added back in for child support purposes. The SCO calculated that, after adding back these expenses, Mr Z's income was around \$75 000. On this basis, the SCO set the child support assessment at \$16 754 for a period of two years.

Ten months later Mr Z and his partner had a baby. Under a normal formula assessment, the amount allowed for self support (the exempt income) would be increased, so that the child support normally payable on an income of \$75 000 would be \$13 789. The exempt income is also indexed every twelve months, meaning that an automatic adjustment would thereafter occur.

In this case, Mr Z must reapply for a new COA to consider his changed circumstances. If the SCO had set Mr Z's child support income amount at \$75 000 in the first decision, an adjustment could have been made to the amount of child support to be paid, without a need for a further application.

4.19 Of the 827 decisions that were examined and involved a change in the assessment (the remaining decisions involved no change), the main mechanisms to change assessments used by SCOs were to change the child support income amount (49 per cent) or the rate of child support (43 per cent).<sup>8</sup> It was also interesting to note that 6 per cent of cases where there

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<sup>7</sup> The CSA has proposed legislative changes to address this issue for consideration by Parliament.

<sup>8</sup> A SCO is able to use more than one mechanism in any particular decision, so that totals exceed 100 per cent.

were changes to the assessment involved adjustments to more than one component of the formula or child support amount set.

4.20 It seems that, where possible, it is preferable for SCOs to adjust assessments using a component of the formula and that, in cases involving consideration of parents' income and/or earning capacity, the most appropriate component to change is the child support income amount. While this seems to occur in around half of the assessments that are changed, the inquiry undertaken by my office suggests that SCOs should be given further encouragement to use this mechanism wherever possible.



## PART 5: SETTING INCOME AND CAPACITY

5.1 SCOs have a great deal of discretion when making decisions about a parent's income or earning capacity, particularly in cases where there is limited or conflicting financial information or the income or earning capacity of a parent is uncertain. This is so that a SCO can consider the individual circumstances that have resulted in the application for a COA. In such cases, a SCO may need to make assumptions about the financial circumstances of a parent, accept some evidence and reject other evidence and/or undertake some independent investigation of the parent's financial circumstances. The CSA has wide powers to do this, including through accessing information from the Australian Tax Office, banks and other financial institutions, superannuation funds and employers.

5.2 The need to consider each application on its own merits and take into account the individual circumstances of each parent means that decisions are made in isolation. It is possible that different approaches and practices will develop between regions and SCOs. It is thus a matter of concern that a parent who applies for a COA in one location would get a different outcome than if the application had been made in another location, or had been determined by another SCO.

5.3 The inquiry by my office has identified a number of issues where it seems that varying practices have developed, resulting in inconsistencies in decision making, and where there seems to be room for greater guidance to be given to decision makers.

### **Treatment of business income**

5.4 The treatment of income from self-employment, partnership, companies and trusts has been a significant area of complaint to my office, and was the most prevalent cause for consideration of income in the decisions that were analysed. While specific areas of concern are identified and dealt with elsewhere in this and the previous chapter, the nature and complexity of income arrangements from these sources warrants some broad discussion.

5.5 Where possible, a SCO will base consideration of income from a parent's business or company entities on the amount of drawings or income paid to the parent. The SCO will then consider any other amounts that may be added. These may include any extra available profit, indirect benefits the parent may have received (for example, tax deductions from operating a home office), any expenses that the business may have claimed that would not necessarily be available to a PAYG taxpayer (such as depreciation) and any payments of personal expenses by an entity (for example, accommodation costs).<sup>9</sup>

5.6 Quite often, however, in the decisions that were analysed, there was not enough financial information for a SCO to make an informed decision about the income that could be attributed to the parent. The parent and/or entity

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<sup>9</sup> Detailed guidelines used by the CSA are set out in Appendix B.

may not have lodged tax returns for some years, there may not have been up-to-date financial accounts and records available, or a parent may have refused to make the necessary information available. In other cases, where all of the relevant financial information was provided and supported a view that the income of a parent was low, the SCO considered whether the parent had a capacity to earn a higher income than that derived through the business; for example, the SCO may have considered that the parent had chosen to leave higher paid employment to start a business or had the potential to earn a higher income.

5.7 In such cases, SCOs made decisions in any one of a number of different ways. One was to consider past income, including income prior to the commencement of the business or company. Another was to take account of the amount paid to other employees of the business or company doing similar work to the parent. Others included making a finding that the business was effectively being used to split the income of the parent with another person, or that the parent could earn a higher amount if employed in his or her usual occupation or an occupation for which he or she had relevant qualifications.

5.8 We had a number of concerns about the way SCOs sometimes made decisions about a parent's capacity to earn in circumstances where there was a low business income, there was little information about the income derived through the business, or there were complex financial arrangements in place.

5.9 It seems that while significant written guidance is provided to SCOs making decisions about the treatment of income, the amount and manner of investigations of the source and extent of income derived from self-employment, partnerships, companies and trusts is not clearly defined. I am concerned that this may lead to inequitable decisions.

## **Recommendation 2**

That the CSA put detailed guidelines in place, to be used across regions including, but not limited to, setting out the level of investigation that should be undertaken in cases where income is derived from self-employment, partnerships, companies and trusts, the treatment of income from particular sources, and the treatment of earning capacity where businesses operated prior to separation.

### **Setting earning capacity with limited information**

5.10 There were a number of different approaches used by SCOs to make decisions in cases where there was very little information about either the actual income or the earning capacity of one or both of the parents. This could occur, for instance, in cases where a parent did not respond to an application, had not lodged income tax returns for several years and/or had complex financial arrangements.

5.11 Where, in these types of cases, a SCO considered that a parent did have an income and/or earning capacity that was not reflected in the assessment, yet the SCO could not accurately determine the amount of that income or capacity, a number of more general measures could be utilised. These included using research into the costs of children and apportioning

those costs between parents, using the median income of child support payers, using a measure of Average Weekly Earnings, and using an award rate or guide for the type of employment. As shown in Table 3 below, there seemed to be a direct correlation between which of these were relied upon and the region in which the decision was made.

**Table 3: Use of particular methods to set income by region**

	<b>Costs of children</b>	<b>Median income</b>	<b>AWE</b>	<b>Award/guide</b>
<b>NSW/ACT</b>	19	5	4	8
<b>Vic/Tas</b>	1	4	14	2
<b>WA</b>	1	0	5	13
<b>Qld</b>	1	1	2	3
<b>SA/NT</b>	0	0	0	1
<b>Total cases</b>	<b>24</b>	<b>10</b>	<b>25</b>	<b>27</b>

5.12 Table 3 shows that the use of costs of children in determining child support assessments was favoured in NSW/ACT (19 of the 24 cases where decisions set earning capacity at a percentage of the costs of supporting the child support children), but little used elsewhere. Vic/Tas favoured the use of a measure of Average Weekly Earnings (14 of the 25 cases where that measure was used), while WA tended to rely on award rates or guides for the type of industry or employment (13 of the 27 cases).

5.13 Where an application was made by a payee parent for an increase to the assessment, a payer parent who did not respond to the application and/or did not provide relevant information to the CSA about their financial circumstances could be advantaged by the process. In many such cases, SCOs felt that because there was not enough evidence to determine income or capacity, an increase in the amount of child support had to be conservatively arrived at or the application refused completely. However, some SCOs, primarily in NSW/ACT and to a lesser extent in Qld, SA/NT and WA (though not at all in Vic/Tas) took the approach that where there was no response, the evidence of the applicant would be accepted unless it was refuted. The SCOs generally included information in the decision that if the payer did not agree, a new application could be made and another SCO would look at any evidence not previously available to the CSA.

5.14 This approach seemed to ensure that one parent's claims were not dismissed because the other affected parent did not cooperate with the process. At the same time, it allowed a new decision to be made if more accurate details became available showing that the affected parent was unreasonably disadvantaged.

### Recommendation 3

That the CSA take steps to inform SCOs that financial information can be accepted from an applicant about the other parent where there is no contradictory information available to the CSA and there are no other special circumstances that need to be considered.

### Costs of children

5.15 From the cases analysed by this office, it is clear that COA decisions generally make some reference to the costs of children, usually in the context of considering whether it would be just, fair and otherwise proper to change the assessment. In a few cases, as shown in Table 3 above, the new assessments were set at a percentage of the costs of children. This was primarily in NSW/ACT, with 19 such decisions (5 per cent of the cases in the study), compared to two such decisions in Queensland and one each in Vic/Tas and WA. There were no cases in SA/NT in the period studied where child support was set on the basis of costs of children.

5.16 Two costs of children measures are primarily used by SCOs in making decisions, known as the Lee and Lovering tables. The reason for the use of these particular measures is that they are used by the Family Court of Australia in its considerations and, therefore, set the standards for the CSA. However, the use of these tables is not free of difficulty.

5.17 The most fundamental difficulty is that basing the amount of child support on any generic measure of costs of children seems to be contradictory to the first objective of the Child Support Scheme, which is that 'parents share in the cost of supporting their children according to their capacity'<sup>10</sup>. It can be difficult to explain this objective to a paying parent who believes that the assessment is set at a higher amount than needed to support the children; the difficulty is exacerbated if the assessment decision is premised on ascertaining the costs of children.

5.18 There is also a problem with using either the Lee or Lovering tables to consider the costs of children. These tables are widely viewed as being outdated and irrelevant. For example, as early as 1994, a parliamentary committee expressed a number of concerns with the use of these tables and recommended that new research be undertaken into the costs of children.<sup>11</sup> In response, the Department of Family and Community Services commissioned new costs of children research from the Budget Standards Unit at the University of New South Wales.<sup>12</sup> The Department later also

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<sup>10</sup> Government Response to the Report of the Joint Select Committee on Certain Family Law Issues (November 1997) *Child Support Scheme – an examination of the operation and effectiveness of the Scheme*, p 3.

<sup>11</sup> Joint Select Committee on Certain Family Law Issues (November 1994) *Child Support Scheme: An examination of the operation and effectiveness of the Scheme*, Canberra: AGPS, p 303.

<sup>12</sup> Saunders P et al (March 1998) *Development of Indicative Budget Standards for Australia* Sydney: Social Policy Research Centre, University of NSW.

commissioned the National Centre for Social and Economic Modelling (NATSEM) to model the costs of children, using a different methodology, based on average spending in families with varying incomes.<sup>13</sup>

5.19 Neither the Budget Standards or NATSEM research appears to have been adopted for use by either the Family Court or the CSA. This may be partly because the measures are indicative, so that there could be difficulties in generalising the measures across all family types and sizes, to apply in individual circumstances. The recent Parliamentary report, *Every picture tells a story*, has recommended that further research be undertaken into the costs of children.<sup>14</sup>

5.20 Finally, there seems to be very limited use of costs of children research in most regions in actually setting an assessment. It would seem that there is little benefit in the inclusion of a reference to such costs simply as a routine, and there are other ways that SCOs could approach setting an amount of child support in cases where there is limited financial information available for one or both of the parents.

### **Use of average incomes**

5.21 Where a SCO considers that a parent has a capacity to earn a greater income than set by the current assessment, but the SCO is unable to determine the amount that is currently being earned or that may potentially be earned, one option is to use a measure of average income. In doing this, SCOs may use either the median income of all child support payers (which is a measure that the CSA uses to set formula assessments in some cases), or a measure of Average Weekly Earnings (AWE). As shown in Table 3 above, the cases analysed for the purpose of this report showed a greater reliance by SCOs on measures of AWE: SA/NT was the only region not to use any measure of average income to set new rates of child support over the six months considered.

5.22 There are a number of AWE measures, and they can differ considerably. For example, the measures for Male Total Average Weekly Earnings and AWE for full time employees are generally higher than Ordinary Average Weekly Earnings for All Employees (because lower female wages and the inclusion of part time workers brings down the average). In addition, SCOs may use a measure of AWE that is applicable to a particular State or local area.

5.23 Measures of AWE were more likely to be used in Vic/Tas cases than in any other region. As shown in Table 3, AWE was used to determine the capacity of parents to pay child support in fourteen of the cases examined in

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<sup>13</sup> Percival R, Harding A and McDonald P (March 1999) *Estimates of the costs of children in Australian families 1993-94: Report prepared for the Department of Family and Community Services by the National Centre for Social and Economic Modelling (NATSEM) University of Canberra*, Policy Research Paper No 3, Canberra: FaCS.

<sup>14</sup> House of Representatives Standing Committee on Family and Community Affairs (December 2003) *op cit*, para 6.215.

that region, more than in all the other regions combined. There was very little use of AWE in other regions.

5.24 As shown in Table 3, median income of child support payers was rarely used to set new child support, and mainly in NSW/ACT and Vic/Tas (5 and 4 cases respectively). There was only one case in Queensland and none in the other two regions.

5.25 It may be more appropriate to use the median income for child support payers than the population as a whole, because there is a higher representation of low income parents in the Child Support Scheme than in the population as a whole. However, it should also be considered that approximately one-third of payers are unemployed or not in the labour market. Using a median income that includes a significant proportion of child support payers that do not have a taxable income, when a decision has been made by a SCO that the parent in a particular case has a capacity to earn an income, may be somewhat contradictory. It seems that, while this should not prevent SCOs from setting child support assessments at the median income of payers, it is a matter that SCOs should be aware of and consider when using the measure.

5.26 Using any measure of average income can have limitations in that a person's individual capacity rarely falls neatly into an average. It could be argued that there are few people who earn an 'average' income. For example, low income earners may earn far less than the average even if employed full time, and rates of pay can vary between urban and rural areas, between States and Territories, and between regions.

#### **Case Study 4**

Ms L was the paying parent in a case where the SCO used the median income of child support payers to determine her capacity to earn. Most child support payers are male, and in statistical terms male income is higher than female income. Just as male income is higher than female income in the broader community, it is likely that the income of male child support payers would be statistically higher than female child support payers. This means that the median child support income measure is still likely to have an inbuilt bias towards male earnings. It seems that the SCO did not consider that it may have been inappropriate to apply this measure (of male income) to a female paying parent.

#### **Industry wages and salaries**

5.27 An alternative to using measures of average income, whether for child support payers or the population as a whole, is the use of the award rate or guide for wages in the occupation for which SCOs consider the parent has a capacity to earn a higher income. Using awards and guides would, on the face of the matter, be a more reliable indicator of capacity. As indicated in Table 3 above, such guides were the preferred mechanism for SCOs in WA (13 cases), where limited reference was made to AWE (5 cases) and none to median income of payers. There was some use in other regions, such as

NSW/ACT (8 cases) and to a lesser extent in the other regions. There was little use in Vic/Tas which, as discussed above, dominated in consideration of average income measures.

#### Recommendation 4

That the CSA undertake further detailed analysis of the different mechanisms for setting assessments in cases where actual or past income cannot be applied, and provide SCOs with more guidance and training in changing assessments in such circumstances. In doing so, the CSA should consider whether preference should be given to particular sources of information, for example, the use of occupational guides or awards, in preference to measures of costs of children or average income.

#### Payee requests and payer offers

5.28 Another mechanism that was used to set levels of child support, was to set the assessment at an amount requested by a payee parent, an offer made by a payer parent, or at an amount that was agreed between the parents. Table 4 below shows that it was more common for SCOs to accept the requests of payees than the offers of payers, with these exceptions: in Vic/Tas, both were given roughly equal weight; and in WA, there was a high incidence of basing decisions on both requests and offers.

**Table 4: Treatment of parents' offers and requests**

	CSA region				
	NSW/ACT	Vic/Tas	WA	Qld	SA/NT
<b>Parents agreed to amount</b>	7	6	0	3	1
<b>Amount offered by payer</b>	6	12	10	1	2
<b>Amount requested by payee</b>	18	15	10	6	4
<b>Total</b>	<b>31</b>	<b>33</b>	<b>20</b>	<b>10</b>	<b>7</b>

5.29 In a number of cases in the study, the SCO had sufficient information to make a determination based on the parent's income or capacity, but deferred to the suggestions of parents. I am concerned that the fairest outcome may not have been achieved in some of those cases. This is particularly so in cases where a request, an offer or an agreement between the parents was expected, even though financial information available to the SCO suggested that the decision would result in lower payments to support the children than would be the case if the SCO based the assessment on that financial information. These differences could be significant; in some cases it seems

that the payee may not have known that the amount they requested or agreed to accept was less than it would be if based on the payer's actual income. That is, it is not clear that the decision to request or agree to accept a particular amount was an informed decision. Even where payees were aware of the difference and were quite willing to accept the lower amount, it was not necessarily clear that the SCO gave sufficient regard to whether basing the decision on the parents' views would meet the objectives of the Child Support Scheme.

5.30 The relevant objectives are that parents share in the cost of supporting their children according to their capacity and that Commonwealth involvement and expenditure is limited to the minimum necessary for ensuring children's needs are met.<sup>15</sup> The latter objective relates to the impact of child support payments on government-provided family assistance payments and must be part of a SCO's consideration of whether the decision would be 'otherwise proper'.<sup>16</sup>

5.31 Doubtless, it is reasonable to take into account the requests and offers of parents, particularly where parents can reach an agreement. Generally, this can lead to better relationships between parents and with their children. It is also understood that SCOs must make difficult decisions in weighing up these kinds of considerations with the need to ensure that the objectives of the Scheme are met.

5.32 Because of these competing requirements, I do not believe that it is appropriate to make a specific recommendation about the way that such cases should be treated. The CSA's attention should be paid to these kinds of decisions as part of the CSA's usual monitoring and quality control measures.

### **Contrary decisions**

5.33 Legislative changes, effective from July 1999, have provided for SCOs to make decisions that are 'contrary' to COA applications.<sup>17</sup> That is, a SCO can change the assessment in a way that was opposite (or contrary) to the parent's application. This could happen, for example, where a paying parent applies for a reduction to the assessment, but the SCO instead decides to apply an increase.

5.34 However, it seems from our investigation that SCOs are either unaware of the mechanism or are reluctant to utilise it. This was particularly noticeable in the Vic/Tas region, where there were a number of decisions in which the SCO clearly indicated a belief that the circumstances of the applicant were contrary to those set out in the application, but did not make a change because the SCO did not seem to know that this mechanism was available.

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<sup>15</sup> These objectives, which are widely accepted, were spelt out in the Government Response to the Report of the Joint Select Committee on Certain Family Law Issues, *op cit*, p 3.

<sup>16</sup> CSA's Online Technical Guide, also at Appendix B.

<sup>17</sup> *Child Support (Assessment) Act, 1989* s 98S(2).



Of the 344 decisions made in the region over the six months, only one decision was contrary to that specified in the application.

5.35 It also seems that many SCOs are generally reluctant to use this mechanism, even when aware of it. This may be because of a procedural fairness concern that a parent may not be aware of the SCO's intention to make such a decision and has not, therefore, been given an adequate opportunity in the process to respond. I consider that principles of procedural fairness would be met as long as the parent is advised of the SCO's rationale and likely adverse decision, and is given an opportunity to respond prior to that decision being made.

5.36 Overall, my office found that there were 35 cases where a contrary decision should have been considered by the SCO. Although this only represents 3 per cent of the cases examined, this is a significant amount as it would be expected that there would be only a small number of COA applications where a contrary decision would be warranted. Further, it is nearly three times as many as the twelve cases in which a contrary decision was actually made.

### **Recommendation 5**

That the CSA provide training and guidance to SCOs to increase awareness of the provisions empowering a contrary decision to be made, including guidance on the requirement of procedural fairness where a contrary decision is in contemplation.

### **Backdating decisions**

5.37 Administrative assessments generally cannot be backdated by the CSA to before the date the Agency is notified of a change in circumstances by a parent. However, SCOs may backdate a decision to make a change to an assessment where there is a good reason to do so. This mostly occurs in situations where a payer parent has lodged an estimate, which affects the assessment for the prospective period, but has had a lower income for a previous period and for some reason was unable to lodge the estimate sooner. For example, the parent may have been unaware of the estimate process, was incapacitated, or for some other reason was unable to contact the CSA. An important consideration for SCOs in deciding whether to backdate is the effect a change will have on the parents, for example, whether backdating will create a debt for the payer or an overpayment for the payee.

5.38 Where a SCO decides that the assessment should only apply prospectively, a number of events can trigger the start date. These include the date of application for the COA, a period of a week (or some other time) after the application was lodged (allowing time for the respondent to be made aware of the application), the date of the conference between the SCO and the parents, or the date of the SCO's decision.

5.39 Approximately one-third of the cases examined in this study involved backdating to before the date of application. Where decisions were backdated, it was for an average of six months and a median of four months.

5.40 Two issues were identified in the analysis of the decisions. Firstly, it seemed that there was scope for greater consistency in defining when a prospective decision should start, that is, whether it should be from the date of application, the date of hearing, the date of the decision, or some other date.

5.41 Secondly, and more importantly, was the reluctance of SCOs to create a debt for payer parents by backdating. The impact on a payer parent is a relevant factor in deciding whether a decision is 'just and equitable', but the interests of the payee parent are also factor in that decision. A failure to backdate can result in an unfair outcome for a payee parent, particularly in situations where it seemed that a payer had taken specific steps to reduce their taxable income, for example, through the creation of a company, and had been paying a reduced rate of child support for some time. While it could be argued that a payee in this situation could have applied for a COA sooner, they may not have been aware of the payer's circumstances or of the COA process.

#### **Case Study 5**

Ms S sought an increase in the amount that Mr H was required to pay in support of their child. The assessment in place at the time was at the minimum rate of \$260 per year.

Ms S was able to show that Mr H was in full-time employment, but that his salary was not paid to him, but to a company in which he and his brother were the shareholders and in which Mr H was the only employee. Mr H denied that he was employed, but this was contradicted by the employer, who confirmed that Mr H had worked there full time since February 2002 and gave details that his salary was \$65 000.

There was also evidence from another employer that, between March 1999 and April 2001, Mr H had been paid wages in excess of \$100 000. Mr H's company declared income in that year of a similar amount. However, Mr H had been assessed on his personal taxable income of \$15 000.

The SCO decided to increase the assessment from the month in which Ms S applied for the change of assessment – May 2002 – to reflect Mr H's employment earnings, but did not backdate the assessment for any part of the earlier period on the basis that it would not be fair to do so.

#### **Recommendation 6**

That the CSA provide training and guidance to SCOs to assist them to make decisions about when and how it is appropriate to backdate decisions.

## PART 6: OTHER ISSUES IDENTIFIED

### Quality control issues

6.1 A problem that was identified, that may not be serious but possibly costly for the CSA, is the quality control that occurs when a COA application is received, before it is allocated to a SCO for a decision. A number of instances were identified by the research where parents' issues could have been resolved through administrative action, without the need for a COA.

6.2 An apt example was where a paying parent had not lodged income tax returns for some time, and the CSA had set a 'default' income amount for the payer. While the CSA guidelines indicate that, where a taxable income is not available, the Agency can set an amount based on the best available information, the Agency is reluctant, it seems, to make a change thereafter until the parent lodges either an income tax return or an income tax declaration. In these circumstances, a parent who for some reason is unable to comply with this requirement or a payee parent who has accurate information about the payer's income, may be asked to apply for a COA, so that the income and earning capacity of the payer may be considered.

6.3 This seems to be unnecessary where evidence is provided about a parent's actual income. The CSA's guidelines provide for the default income to be changed.

#### Case study 6

Ms B, a child support payee, applied for an increase in the amount of child support because Mr G, the payer in the case, had not lodged a tax return since 1999 and the CSA had set an administrative assessment based on a default income of around \$38 000, commensurate with Mr G's last known taxable income.

The CSA had details of Mr G's current employer, who advised the SCO that Mr G's salary was in excess of \$42 000. Although Mr G had not responded to the COA application, CSA records indicated that he had previously asked that he be assessed on an income of \$50 000. The SCO increased the income to \$50 000 for 12 months from the date of application and by an additional \$2000 in each of the following two years.

It seems that the COA process was unnecessary as the CSA could take executive action to increase the assessment.

6.4 Another quality control issue is relates to whether a SCO should make a decision on the papers or, instead, hold a conference for the parties or invite them to provide additional information in support of their submissions. While it is a CSA practice to invite the parties to specify what kind of conference they wish to have, a SCO may decide that the application should be refused on the basis of the application alone. There seems to be differences between CSA

Regions in the types and quantity of cases that are refused prior to a conference.

6.5 A number of cases were identified where we considered that a decision to refuse to change the assessment, prior to a conference, should not have been made on the application alone. Examples included:

- cases where a paying parent argued that they had special circumstances for backdating a change (estimates can be lodged prospectively, but not backdated through the administrative process) and was not given an opportunity to provide additional information to support their claim;
- cases where a paying parent sought reductions based on the actual income, but it was clear that the income or earning capacity was higher than the income on which they were currently assessed (SCOs cannot make ‘contrary’ decisions without giving a parent the opportunity to make representations); and
- situations where it seemed that the responding parent would have an interest in lodging a cross application to have a contrary decision made.

**Recommendation 7**

That procedures for determining applications that may be decided on the papers be standardised across CSA Regions.

**Recommendation 8**

That procedures for determining applications that may be decided on the papers include a quality control process to ensure that such decisions are appropriate in the circumstances.

6.6 The CSA has advised that once a COA process is complete, the written decision is provided by the SCO to the responsible administrative area. The quality of the decision is then checked, sent out to parents, and action is taken to implement any changes that form part of the decision. Based on the cases in this study, my office found that there is inadequate quality control to ensure that decisions make sense, are logically able to be implemented, have the results intended by the SCO, and do not contain typing and grammatical errors.

6.7 It is evident from these grammatical and typing errors that not all decisions are being read (carefully) by CSA administrative staff responsible for quality control. Some of these errors were significant and made it difficult for the decision to be understood, particularly when SCOs cut and pasted standard paragraphs into their decisions, but then failed to make relevant changes so that the statements made sense. This occurred, for example, in cases where the father had primary care of the children and the mother was the paying parent, but SCOs used sentences that implied the reverse, failing to change ‘he’ to ‘she’ and ‘she’ to ‘he’, so that it was difficult to distinguish which parent was the payee and which was the payer.

6.8 More importantly, a number of decisions contained errors that had potentially serious consequences for parents. In some cases, dates were mistyped (for example, one case was identified where the decision was intended to be in place for only one month, but a typing error on the front page extended it for an extra year to thirteen months). In other cases, dates were omitted altogether, or figures were transposed, so that the wrong income amount was set (for example, in one case, a SCO had found that a parent had an income of \$35 000, but the decision set the child support income amount at \$53 000).

### **Recommendation 9**

That all decisions are checked and edited by CSA administrative officers to ensure professional presentation and that the intentions of the SCO are accurately reflected.

### **Multiple cases**

6.9 There are approximately 38 000 paying parents who have more than one child support case.<sup>18</sup> Where a parent applies for a COA, the SCO will consider the circumstances of both parents in that particular case and may make a change to the assessment. The decision will not have any impact on any other child support case to which either of the parents is a party, and the parent(s) in any such case(s) will not be informed by the CSA that any change has been made. While this is appropriate for most reasons for which parents apply for a COA, where an application is made under Reason 8, inequities may arise when this practice is followed.

6.10 This is because a parent may be found to have a higher income than assessed in one case, but may still be assessed on a lower income in another case. For example, the SCO may decide that a payer parent who has left work to study should be assessed on their previous, rather than their current, income. This may result in that payer being assessed to pay a significantly higher amount of child support in the case that the SCO has determined. In the meantime, where the payer has another child support case, the other assessment will continue at the reduced rate. If the payer parent is considered to have a capacity to earn a higher income, it would seem reasonable that the payer would have the same income in any other child support case.

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<sup>18</sup> Child Support Agency and Attorney-General's Department (undated) Facts and Figures 2001-2002, p 17.

**Case Study 7**

Mr M complained about a number of COA decisions that had been made based on his capacity to earn. He had been retrenched from a position in which his taxable income had been around \$25 000, and some time later had not regained employment. Mr M had three child support cases and there had been a number of COA and objection decisions relating to two of the payee parents. There were a number of decisions in each of those two cases, originally increasing Mr M's earning capacity to approximately \$30 000, but with varying dates of effect in the two decisions, with later decisions in the second case reverting back to a formula assessment. The assessment in the third child support case remained at the minimum amount of \$260 per year.

We considered that it was inequitable that Mr M's child support income was set at different amounts in his three cases. Generally speaking, a person either has a capacity to earn a higher income or not, and this does not change depending on the circumstances of each case.

Where a parent has a particular child support income, that income should be reflected in each of the parent's child support cases, unless there are special circumstances. That said, there is a practical legal obstacle to be overcome, in that the CSA cannot automatically apply a COA determination across all cases. We had discussions about this issue with the CSA and informally suggested a Registrar Initiated Change of Assessment (RICA) process, whereby the CSA can undertake a COA process without an application by either of the parents. The CSA indicated that it would consider this proposal.

The view of this office is that the RICA process is the most appropriate mechanism to deal with situations where a parent has more than one child support case and their assessment in one of those cases is increased, whether because of income, earning capacity or other resources. The RICA process could be used to ensure that there is equity across each of the parent's child support cases. There may be some situations in which such a difference is fair; a RICA would also allow for those individual circumstances to be considered.

**Recommendation 10**

If a parent with more than one child support case is determined in a COA process to have a higher income, earning capacity or greater resources than reflected in the child support assessment, but no application for a COA has been made in the parent's other case(s), the CSA should use the Registrar Initiated Change of Assessment process to determine whether the assessment in the other case(s) should be similarly changed.

## **Caring responsibilities**

6.11 An initial concern of this office, in initiating this project, was that a parent who had primary care of a child or children could be determined to have a higher earning capacity than indicated by their actual income. Few such cases were identified in the decisions for a six month period: there were, in fact, very few cases where the SCO determined that a parent had an increased capacity even though they had caring responsibilities for their children. In some of the cases where such decisions were made, the circumstances seemed to be so subjective that, while the SCO's decision seemed reasonably open, another decision or decisions may have been equally as open. The following two case studies illustrate this problem.

### **Case Study 8**

Ms M and Mr W shared care of their children on a week-by-week turnabout. Mr W was initially the payer in the case, but had reduced his hours of work and was no longer required to pay child support. Ms M applied for an increase in child support to the previous level.

Mr W argued that Ms M had moved some distance away and the children were attending school close to her new home. Taking the children to school and picking them up required an additional two hours a day of travel in the weeks in which he had care.

The SCO decided that Mr W had flexible working hours and did have the capacity to increase his income significantly, particularly during the weeks that the children were in their mother's care.

### **Case Study 9**

Ms J applied for an increase in the level of child support paid by Mr L for their child, who resided with Ms J. Mr L was no longer working and had given an estimate of income to the CSA, resulting in a reduction to the assessment to \$5 per week. Ms J believed that Mr L had left work voluntarily and continued to have a capacity to earn a higher income.

Mr L responded that his partner had recently had a baby and they had decided that she would return to work and Mr L would stay at home to provide primary care to their child.

The SCO agreed with Ms J that Mr L had a higher earning capacity and increased his assessment to the previous level.

6.12 It is possible that the very fact that this is not an issue that comes up very often means that SCOs have less experience dealing with such circumstances. The difficulty in making decisions in these cases, combined

with the likelihood that this is an emerging issue that SCOs may increasingly be asked to consider, may create a need for more guidance and a greater understanding of these situations.

### **Recommendation 11**

That the CSA develop a process to identify emerging issues that arise through COAs, and develop training and guidance for SCOs to assist in making decisions where a caring parent's earning capacity is considered or in dealing with other situations that do not frequently occur.

### **Interaction with income support and family assistance**

6.13 A number of complaints received by this office, together with a number of cases examined in this investigation, suggested that some SCOs may not be fully aware of how the Child Support Scheme interacts with income support paid by Centrelink and family assistance provided through the Family Assistance Office. Some of the issues identified in the investigation have previously been raised with the CSA and were addressed through informal discussion. However, the complexity of the interaction between the systems suggests that there is scope for providing further information and assistance to SCOs.

#### **Family assistance**

6.14 A payee parent who is entitled to Family Tax Benefit (Part A) (FTB(A)) is subject to an income test, which reduces the family assistance entitlement, according to the amount of child support that is received. This income test, known as the Maintenance Income Test, is applied where a parent receives more than \$1127.85 per year (for the first child, plus \$375.95 for each additional child). Child support over this amount reduces entitlement to FTB(A) by fifty cents in each dollar that is received, down to the 'base rate' of FTB(A). Where a parent is entitled only to the base rate of FTB(A), whether because of the Maintenance Income Test or the effect of other income, additional amounts of child support do not have any further impact on the family assistance to which that parent may be entitled.<sup>19</sup>

6.15 When SCOs are deciding whether to change an assessment, part of the process is to consider the effect that any change may have on the amount of FTB(A) to which a parent may be entitled, that is, the impact of making the change on the community, through a publicly funded payment. To do this properly, SCOs need to understand how the Maintenance Income Test works. In some of the decisions examined, SCOs gave incorrect information in the decisions about the way that FTB(A) would be affected.

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<sup>19</sup> Commonwealth Department of Family and Community Services and Department of Education, Science and Training (2003) A Guide to Commonwealth Government Payments 20 September to 31 December 2003, p 3.



6.16 Another aspect of the child support impact on FTB(A) is the way in which the amount of child support income is calculated by the Family Assistance Office. If a person receives their FTB(A) in instalments during the year, unless the person elects otherwise, Centrelink calculates the amount of FTB(A) to be paid taking account of the child support that the parent is entitled to receive. However, the person can elect to have their FTB(A) instalments based on the child support as it is received. Centrelink then adjusts FTB(A) payments each time Centrelink is notified of a child support payment by the CSA. This means that a parent who is not being paid the assessed amount of child support can receive higher amounts of FTB(A).

6.17 The two methods of calculating FTB(A) can cause some confusion for SCOs. For example, in one decision, the SCO accepted the payee's application to have the assessment reduced on the basis that she was not receiving any child support, but her FTB(A) payments were being reduced on the basis of her entitlement. Whether or not it was appropriate to reduce the assessment in any case, the payee should have been advised to contact Centrelink so that she could receive FTB(A) on the basis of her child support income, rather than the amount of child support that she was assessed to receive.

#### **Case Study 10**

Ms S and Mr C had one child, who lived with Ms S. Mr C was assessed to pay an annual rate of child support of \$3191, which was subsequently reduced to \$260. He was, in fact, paying far higher amounts of support to Ms S.

Ms S was receiving FTB(A) calculated by the Family Assistance Office on her entitlement to \$3191 per year. However, because she actually received more than this, there was an overpayment of FTB(A), which she subsequently had to repay. Ms S applied for a COA to reflect the amount of FTB(A) that she actually received, to prevent any further overpayments.

The SCO decided to increase the assessment to reflect the amount that was actually received. However, it seems that neither the SCO, nor the administrative officers who processed the application, understood that Ms S could simply have asked the Family Assistance Office to pay her FTB(A) on the amount of child support that she received, rather than the amount to which she was entitled.

#### **Recommendation 12**

That the CSA ensure that SCOs and CSA administrative officers understand all aspects of the interaction between government payments and child support.

## APPENDIX A: REASONS UNDER WHICH A CHANGE OF ASSESSMENT MAY BE MADE<sup>20</sup>

**Reason 1:** It costs you more than 5 per cent of your child support income to have contact with the children.

**Reason 2:** It costs you extra to cover the children's special needs.

**Reason 3:** It costs you extra to care for, educate or train the children in the way that you and the other parent intended.

**Reason 4:** The child support assessment does not take into account the income, earning capacity or financial resources of the children.

**Reason 5:** The children, the payee or someone else has received, or will receive, money, goods or property from the payer for the benefit of the children.

**Reason 6:** You are the payee, you have sole care of the children, and it costs you more than 5 per cent of your child support income amount for child care, for children younger than 12 years of age at the start of the child support period.

**Reason 7:** You have necessary expenses in supporting yourself that affect your ability to support the children.

**Reason 8:** The child support assessment does not take into account the income, earning capacity, property or financial resources of one or both of the parents.

**Reason 9:** You have a legal duty to maintain another person or other children.

**Reason 10:** You have earned additional income for the benefit of resident children.

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<sup>20</sup> As set out in CSA COA application and response forms.

## APPENDIX B: CSA CHANGE OF ASSESSMENT GUIDELINES

### REASON 8

Note: The information below is copied from the Child Support Agency's website, [www.csa.gov.au](http://www.csa.gov.au). Reason 8 is part of Chapter 2.6: Change of assessment in special circumstances. The Chapter describes the issues that CSA has to consider when making a decision to change an assessment under part 6A of the Assessment Act.

#### **Reason 8 - income, earning capacity, property and financial resources of parents**

##### ***Context***

A payer or payee can apply for a change of assessment in special circumstances if the child support assessment is unfair because of the income, earning capacity, property or financial resources of one or both parents

##### ***Legislative references***

Sections 3(2), 66, 98E, 98C, 98S, 117(2)(c)(i) and 117(4) to 117(9) *Child Support (Assessment) Act 1989*

*Fringe Benefits Tax Assessment Act 1986 (FBTAA)*

*Income Tax Assessment Act 1936 (ITAA)*

*A New Tax System (Fringe Benefits Reporting) Act 1999 (Fringe Benefits Reporting Act)*

##### ***Explanation***

There may be a reason for changing the assessment if, in the special circumstances of the case, the assessment of child support results in an unjust and inequitable level of financial support to be provided by the payer for the child because of the income, earning capacity, property or financial resources of either parent (section 117(2)(c)(i)).

Parents can apply for a change of assessment using this reason. CSA can also initiate a change of assessment using this reason.

##### ***'Special circumstances'***

As a child support assessment is generally calculated using the most recent taxable income CSA will be satisfied that there are special circumstances if a parent's current income is not adequately reflected in the child support assessment (whether it is more or less than the income used).

CSA can also be satisfied that there are special circumstances if one parent has substantial property or financial resources that have not been properly taken into account in the child support assessment (*Ross and McDermott (1998) FLC 98-003*).

Although child support is calculated using a 'child support income amount' CSA is not limited to this amount in considering an application for a change of

assessment. Income, earning capacity, property and financial resources which do not necessarily form part of a parent's taxable income can be added or excluded from a child support assessment (*Carey and Carey (1994) FLC 92-489*).

***Additional income, earning capacity, property or financial resources***

Each application will be determined according to the individual circumstances of the case.

However, there is a range of circumstances that may form the basis of an application under this reason. It may be that a parent:

- has substantial property but a small child support income amount;
- has changed employment and their income has changed;
- has legitimately arranged their financial affairs to minimise tax;
- receives income which is not assessable or is exempt from tax;
- has a greater earning capacity than that reflected in the child support income amount;
- received a lump sum payment that is not included in the child support income amount.

In some cases, a parent's financial circumstances or the issues associated with the case may be too complex to be determined by CSA. In these cases CSA may refuse to change the assessment and recommend that the parent apply to a court for an appropriate determination of the level of child support (section 98E).

When making a decision under this reason, CSA must disregard any entitlement of the payee to an income-tested pension, allowance or benefit. Generally, CSA must also disregard the income, earning capacity, property and financial resources of any person who does not have a duty to maintain the child. However, CSA will consider the capacity of a parent to earn or derive income including a consideration of assets that do not produce, but are capable of producing, income (section 117(7)).

***Unfair or 'unjust and inequitable' assessment based on taxable income***

Once CSA has determined that the parent's income, earning capacity, property and financial resources are not reflected in the child support assessment, it must decide whether this produces an unfair result.

CSA can consider the total financial circumstances of a parent and decide whether the child support income amount correctly reflects their capacity to support their children. Before arriving at a view that the level of child support is unfair CSA will compare any change in the parent's income against any change in the parent's commitments and expenditure at the time of the application (*Ross and McDermott(1998) FLC 98-003*).

This element of the reason, in relation to whether the assessment results in an 'unjust and inequitable level of child support', is narrower than the 'just and equitable' elements under section 98C of the Act. Here, the comparison of the income, earning capacity, property and financial resources to the child support assessment may be based on quantum.

**Example**

CSA may determine that a parent has an income that is marginally greater than the child support income amount but, overall, it does not render the assessment unjust and inequitable. Similarly, it may be established that property exists but, overall, the value of the property does not render the assessment unjust and inequitable.

**Unemployment**

Where a payer has become unemployed they may lodge an estimate of their future income, e.g. a government benefit. In most cases their assessment will be reduced to the minimum rate of \$260 per year. Where a payee becomes unemployed the reduction of income can increase the amount of child support payable by the liable parent.

There may be special circumstances where one parent believes the unemployed parent has substantial assets or became unemployed voluntarily. If the parent has become unemployed voluntarily or their employment is otherwise terminated but they voluntarily do not re-enter the workforce special circumstances may also be established.

Being unemployed and without income is not, in itself, an adequate response to an application under this reason. In respect of the unemployed or under-employed parent, CSA may enquire as to the 'ability of' and 'opportunity for' that person to seek and gain employment (*DJM and JLM (1998) FLC 92-816*).

In determining the extent of the parent's earning capacity, CSA may consider the following (*Scott and Scott (1994) FLC 92-457*):

- the circumstances in which the parent became unemployed or without income;
- the reasons for the unemployment or loss of income;
- the nature of the parent's previous employment;
- the efforts which they have subsequently made to obtain employment;
- the property or financial resources that are, or ought reasonably to be, available to the parent.

CSA may consider the parent's qualifications, skills, age and employment history.

**Example**

A parent who has been caring for children and has not been in the paid workforce for many years may have difficulty entering the workforce.

A parent who has been in the same job for 20 years, and is made redundant, may have similar difficulty.

On the other hand, a parent who is qualified in an occupation in high demand would be expected to enjoy considerable flexibility in their choice of employment.

The other relevant consideration is whether or not there are any special, local or other factors that affect a parent's employment or under-employment. Opportunities for employment vary from place to place and between occupational groups.

**Example**

In 1998-99 there were considerable redundancies within the coal mining industry. Many coalmines were in remote places and opportunities for alternative employment in those areas were limited.

CSA may consider the following in determining a person's earning capacity:

- whether there is a history of unemployment;
- whether there is an associated medical reason;
- whether the termination resulted from a lack of work;
- whether or not it is a seasonal industry;
- whether a redundancy was voluntary or involuntary;
- whether others' employment was terminated at the same time;
- whether there was a dismissal and the reasons for that dismissal;
- whether the dismissal was unfair and whether there is any union or court action following the unfair dismissal;
- whether a partner was transferred to another city or location;
- whether employment was surrendered to pursue another job;
- whether there is a correlation between the unemployment and the commencement of the child support liability or previous decision of a Senior Case Officer, etc.

In relation to continuing unemployment, CSA may consider the following in determining a person's earning capacity:

- whether there is a history of unemployment,
- whether there are any ongoing medical reasons,
- whether any efforts have been made to find new employment,
- whether the person has undertaken retraining.

Documentation which should be available to CSA to substantiate claims relating to unemployment include:

- separation certificates and termination statements,
- a 'job diary', as required by Centrelink for some 'Newstart' beneficiaries,
- medical certificates and medical reports,
- copies of job applications and responses.

### ***A return to study***

A parent might decide to leave their employment (or reduce their hours of employment) in order to undertake study. This decision can alter the parent's income and earning capacity. However, the needs of the child have priority and a parent who decides to undertake a course of study cannot assume that this decision reduces their obligation to provide child support.

It is not a sufficient response to such an application for a parent to merely state that they have now decided to undertake a course of study. Neither is it a sufficient response for a parent to merely state that they have left their employment only because they did not enjoy it (*Rowe v Rowe*, unreported decision of Fogarty J, 12/12/94). Even though a parent has made a decision to enter upon a course of study in good faith, this will not necessarily mean that the child should be deprived of financial support. (*DJM and JLM and Rowe v Rowe* (unreported decision of Fogarty J, 12/12/94 and *Stojanovich and Stojanovich* (1990) FLC 92-134).

CSA will consider the parent's 'ability to' and 'opportunity to' seek and gain employment. In deciding whether the parent's reduced income (as a result of undertaking a course of study) should be reflected in the child support assessment, CSA can consider the following relevant factors:

- the reasons for undertaking the course of study;
- the length of the course of study;
- the need or necessity to undertake the course of study;
- whether consideration was given to the parent's obligation to support the children during the period of study;
- the needs and situation of the child at the time of the application and during the period of study;
- the manner in which the parent will support himself or herself during the period of study;
- whether the parent left their previous employment voluntarily or contributed to a current period of unemployment;
- whether part-time work or part-time study was available;
- the length of time the parent had been planning to undertake the course of study;
- the likelihood of securing employment, and of deriving increased income, after the course of study;
- the qualification that would be awarded on completion of the course of study.

#### **Example**

The payer, M, is 21 years old and works in the building construction industry. M has a broken history of employment, working for only a few weeks at a time although the work is well paid. M has no recognised qualifications and did not complete the HSC but has recently returned to high school to seek better and more permanent work. M has moved in with a parent, has sold a car and has no substantial assets. M receives Austudy and expects to obtain work in the building construction industry during the holidays. M has lodged an estimate

of income but the other parent, F, has lodged an application to change the assessment.

CSA may decide that it is reasonable to leave the child support income amount at the amount estimated by M. There is a high likelihood that M's ability to, and opportunity to, gain employment will be increased as a result of the course of study. M's ability to provide ongoing child support should also be considered.

During the change of assessment process M demonstrated that they had:

- planned to return to study for a period of one year;
- returned to study to complete secondary education which would provide them with a better chance of finding permanent employment;
- considered their obligation to pay child support and planned to work during the holidays to supplement their income and provide ongoing child support;
- reduced their other ongoing expenses.

### **Example**

A payer, F, who is 47 years old, is made redundant after being employed in one occupation for many years. F wishes to upgrade skills in order to re-enter the workforce in a different industry. F applies for a change of assessment during a period where the industry is undergoing a significant downturn. F's redundancy was not voluntary but was the result of downsizing within the company. However, F received a significant payment for the redundancy. F proposed to use this amount to fund the course of study.

F's ability to gain employment in the relevant industry has diminished as a result of the economic environment; and F's ability to gain employment in a wider field is limited. There is a high likelihood that F's ability to, and opportunity to, gain employment will be increased as a result of the course of study.

CSA will consider the following in deciding the parent's earning capacity:

- the course of study is for 3 years and a substantial income in that field is only achieved about 5 years after completion of the course;
- although the redundancy was not voluntary, F intended to retire from the industry at the age of 50 and had not previously contemplated a course of study;
- the redundancy payment was substantial and should be considered when determining F's financial situation;
- the likelihood of F finding work, taking into account F's age upon completion of the course, is difficult to determine;
- there were no compelling reasons, health or otherwise, for F to seek work of a different nature;
- the child is in their last 3 years of secondary school education.



### **Example**

A payer, M, is a well-qualified person in secure employment in the 'information technology' industry. After receiving a child support assessment M leaves work to study a post-graduate degree. M states that they have been working in the same position for 5 years and that the only avenue for advancement was to move to a management position. M proposes to undertake a full-time MBA for one year.

In this case, CSA may decide that it is reasonable to reduce the assessment for the duration of the course of study. M already has an established ability to, and opportunity to, gain employment in the IT field as a programmer. However, M demonstrated that the company required him to complete an MBA before advancing to a management position; and that the prospect of advancement within the company was good. In making a decision CSA would also consider the following:

- M had the ability to maintain a substantial income by undertaking part-time work in addition to the full-time study;
- that the course of study lasted for one year with a high likelihood of advancement and increased income on completion of the course;
- there was one child whose age was such that the child's expenses over the following year would be small (compared to their expenses for the period following the proposed year of study);
- that, prior to separation, the parents had always intended that M return to study.

### ***Caring for a child***

Where a parent has responsibility for children of a new relationship, that parent may be unable to continue to contribute to the level of support previously provided for the children of the child support assessment. CSA will consider the parent's 'ability to' and 'opportunity to' work. In some cases, a parent's abilities or opportunities to work may have been reduced by the fact that they have now left the workforce to care for another child or be on maternity/paternity leave.

CSA may consider the following relevant facts over and above those considered in other earning capacity cases:

- the age, health and number of children being cared for,
- the practical availability of child-care,
- the economic cost of child-care compared with income available to be earned.

### ***Asset rich but income poor***

In some cases a parent might have substantial property and assets but a low child support income amount. CSA may consider the parent's property and assets, as well as any income, in deciding the appropriate rate of child support to be paid (*Abela and Abela (1995) FLC 92-568* and *Bendeich and Bendeich (1993) FLC 92-355*).

CSA will consider a parent's capacity to contribute to supporting a child taking into account that child support is intended to meet the day-to-day needs of the child.

It is not sufficient for a parent to say that they are unable to pay child support because neither they nor their assets produce income or will only produce income at some point in the future. CSA will consider whether the parent has the capacity to restructure their financial affairs to produce an income stream from which to contribute to child support. In these cases, CSA may:

- identify the relevant assets, determine ownership of such assets and enquire as to any structures designed to divest assets;
- consider whether the assets are income-producing assets and, if so, when such income will be produced;
- ascertain the value of the assets;
- ascertain the parent's ability to convert the assets, or some of the assets, to cash;
- consider the parent's ability to finance his or her lifestyle;
- consider the impact of any property settlement on the parent's assets.

CSA does not have to identify any specific source, property or asset from which a parent should meet the obligation to contribute to child support. CSA need only consider the parent's financial resources as a whole, including any capacity to borrow against the assets (*Dwyer v McGuire (1993) FLC 92-420*).

#### ***Low income from a family business***

CSA may consider the following in determining the parent's earning capacity and 'ability to' and 'opportunity to' work:

- the parent's ability to work elsewhere including: qualifications, experience and work skills, geographical factors, age and state of health, attempts made to work outside the family business;
- the income which a parent might derive from doing the same job elsewhere;
- consideration of past or current ability to maintain a particular lifestyle and acquire assets;
- identification of additional benefits obtained from the business;
- whether or not the business has been structured to minimise a parent's income including: the degree of control which the parent has over the business or the person who is entitled to the profits of the business, or whether income splitting is occurring;
- the person who actually does the work of the business.

Where a parent claims that they are accepting a low, current income in anticipation of a future interest in a business CSA must consider that child support is intended to assist the payee to meet the immediate expenses of maintaining the child. The prospect of a future benefit cannot vary the obligation to currently contribute to child support (*Dwyer v McGuire (1993) FLC 92-420*).

CSA may determine whether, after considering the relevant factors and the facts of the case, a parent's income or earning capacity is greater or lower than the amount upon which they have been assessed. Alternatively, CSA

may decide that the parent's financial resources give the parent a greater capacity to contribute to child support than that reflected in the assessment.

### ***Alienation of income and a 'corporate veil'***

A reduction of a parent's taxable income by alienation of personal services income or other income will result in an artificially reduced or increased child support liability.

### ***Alienation of income***

Generally, income is alienated when the income generated or derived by a person is attributed to others and, consequently, reduces the first person's taxable income. Personal services income, or income derived through personal exertion, can be defined as income that an individual earns predominantly as a direct reward for their personal efforts. Personal services income paid to a company, trust or partnership is also alienation of income.

Alienation of personal services income may give rise to a reason for changing the assessment if it results in an unjust and inequitable determination of the child support liability (section 17(2)(c)(i)).

The ATO has a published view in respect of the taxation consequences of arrangements that seek to alienate a person's taxable income. The ATO may make decisions concerning these arrangements for the purposes of taxation legislation and may have regard to the principles outlined in the publications. CSA may consider these principles in deciding whether such arrangements exist but can make a different decision about how they should be treated for the purposes of the Assessment Act.

Many of the concepts relating to alienation are based on the term 'personal services income'.

Some common examples of income from personal services are:

- salary and wages;
- income derived by a professional person who practises on their own account without professional assistance;
- income payable under a contract where the payment under the contract relates wholly or principally to the labour of the person concerned; and
- income derived by a professional sportsperson or entertainer through the exercise of their particular skills.

Where personal income is included in the taxable income of people other than the person who earned it the ATO considers that the tax avoidance provisions apply to cancel any tax benefits (Part IV of the *Income Tax Assessment Act 1936*). If the ATO is satisfied that such an arrangement was entered into primarily, or predominantly, to avoid liability for income tax by the means of the splitting of income, then the arrangement will be ineffective for income tax purposes. The tax benefit arising out of the arrangements will be removed.

### ***Where incorporation does not reduce personal income***

In certain circumstances the ATO accepts that interposing a company, trust or partnership has no adverse taxation effects. For example, the incorporation of a professional practice that does nothing more in relation to income tax than

reduce a professional person's income by the amount of an appropriate superannuation cover.

A professional practitioner may operate through a trust structure provided that the trust structure achieves the same result for income tax purposes as an incorporated professional practice. The ATO requires that the professional practitioner be the sole beneficiary of the trust.

CSA may have regard to these principles in determining whether such arrangements exist but make a different decision about how they should be treated for the purposes of the Assessment Act.

### ***How CSA identifies income that is alienated***

In determining whether personal services income has been alienated through a company, trust or partnership, CSA will consider the following factors:

- the nature of the parent's activities;
- the extent to which the income depends upon the parent's own skill and judgment;
- the extent to which the company's assets, or trust's assets, are used to derive the income;
- the number of employees and others engaged in the income-producing activity;
- the time at which the company, trust or partnership was established;
- any other relevant matters.

### ***Where are the ATO's views on alienation of income found?***

- IT 2121: Family Companies and Trusts in relation to Income from Personal Exertion. This sets out the way in which the Commissioner will deal with such arrangements, the features of such arrangements and some relevant case law.
- TR 94/8 Income Tax: whether business is carried on in partnership (including 'husband and wife' partnerships). This states that the question is one of fact and it outlines factors that will be taken into account by the Commissioner. In particular, the existence of a partnership is evidenced by the actual conduct of the parties towards one another and towards third parties during the course of carrying on a business.
- IT 2330: Income Splitting. This ruling is concerned with partnerships that involve professional services.
- IT 2503: Incorporation of Medical and Other Professional Practices deals with companies which have been incorporated to take over the activities of professional practices. Whilst this ruling refers to incorporation of medical and other professional practices, the Commissioner applies similar principles to other cases in which personal services income is derived through an interposed company or trust.
- TR 2001/7 Income tax: the meaning of personal services income.
- TR 2001/8 Income tax: what is a personal services business?

- TR 2002/D5 Income tax: deductions that relate to personal services income.
- TR 2002/D7 Income tax: attribution of personal services income.

***How these issues apply to a change of assessment decision***

Whether a company's, a trust's or a partnership's income is derived from the personal exertion of a parent needs to be examined in each case. The primary issue is the extent of the connection between the parent and the income derived and the services rendered by the interposed entity.

***Income other than personal services income***

There may be cases involving corporate, trust or partnership arrangements which involve the alienation of income other than personal services income (e.g. rental income). In these cases CSA will examine the structure of the company, trust or partnership. CSA may take into account any relevant taxation ruling or guideline which has been issued by the ATO, but may make a different decision on how the facts are applied to child support.

CSA will consider whether the arrangement alienates income which should properly have been included in the child support income amount (in respect of companies refer to *Stein and Stein (1986) FLC 91-799*, in respect of trusts refer to *Harris and Harris (1999) FamCA 1228* and also *Ashton and Ashton (1986) FLC 91-777*; in respect of partnerships refer to *Dwyer v McGuire (1993) FLC 92-420*). CSA may conclude that a company or trust is the alter ego of the parent; or that a company or trust is a sham for the purposes of the Assessment Act or that a partnership is ineffective.

In relation to a company structure, CSA can consider the following factors:

- whether the parent is actually running the business;
- whether the parent is the 'head and brains' of the company; and
- whether the parent exercises control of the company and the extent of such control (*Letcher and Secretary of Social Security (Administrative Appeals Tribunal, Sydney, 15 September 1995)*).

In relation to a trust structure, CSA can consider the following factors:

- the trust deed;
- the settlor, the trustee and the beneficiaries of the trust;
- whether the arrangement only gives the appearance of creating legal rights or obligations or whether the arrangement was never intended to create such rights or obligations;
- whether any income from the trust has been applied directly or indirectly for the benefit of the parent;
- whether the parent has actual control of the assets of the trust and the income.

In relation to a partnership, CSA can consider the following factors:

- the parties' mutual intention to act as partners is essential in demonstrating the existence of a partnership;
- the terms of any written or oral partnership agreement;

- the parties' conduct including the extent to which the all parties are involved in the conduct of the business or partnership, their contributions to the capital and asset base of the partnership, etc.;
- the amount of distribution to the parent and the partners including any entitlement to a share of the net profits, etc.;
- the amount of any salary paid to a parent and the partners and the reasonableness of any salary;
- that there is a 'joint' nature to the parties' conduct including the existence of bank accounts, business accounts, liability for business debts, ownership of business assets, etc.;
- other indications of a business partnership including separate and distinct business records, a registered business name and features indicating that there is public recognition of the partnership, etc.;
- any other relevant factor.

### ***Income in the form of undistributed profits***

A parent may be retaining profits in a company, trust or partnership structure instead of distributing them to themselves or others. This has the effect of reducing the parent's taxable income.

Alternatively, a parent may pay an unreasonably high wage to an associated person through the company that reduces the income that could be paid to the parent. In determining whether a wage is reasonable CSA will consider the following factors:

- the number of hours worked;
- the duties performed;
- the hourly rate of remuneration; and
- the amount paid commercially for the type of work undertaken.

### ***Self employment and business expenses***

A parent may be involved in a business as a sole trader in person or under a trading name. A business may deduct certain expenses from income for tax purposes and as a result legitimately may have a reduced income or may run at a loss. These expenses can result in an assessment that does not recognise the financial resources available to the parent. In these cases, assessing child support on the basis of taxable income can result in an unjust and inequitable level of child support.

### ***What are business expenses?***

Common examples of business expenses include:

- expenses that are partly business and partly private, e.g. telephone, home office or motor vehicles;
- salary and wages paid to employees;
- depreciation of property, plant and equipment;
- capital deductions related to primary production;
- prior year losses and capital losses.

In deciding whether the level of child support is 'unjust and inequitable' CSA will consider whether the parent has a greater capacity to pay child support as

a result of the deductions or as a result of having certain costs defrayed by being tax deductible. CSA should consider the net resources available to the parent after the claim for business expenses as well as the real resources.

### ***Salary and wage earner offsetting business losses***

A parent who is a salary or wage earner may operate a business as well as receiving a salary or wage. Expenses relating to the business activity may legitimately be offset against salary or wage income. This can result in a reduced taxable income and a reduced child support assessment. CSA will consider a parent's full capacity to contribute to child support when deciding a change of assessment in these cases.

After considering the individual circumstances of the case and the factors below CSA may decide that the offsetting of business expenses has led to a taxable income which does not accurately reflect the parent's capacity to contribute to child support.

In determining the parent's capacity to pay child support CSA can consider the following:

- the nature of the business activity;
- the parent's qualifications for running such a business including the parent's previous business experience and skill;
- the parent's financial situation prior to establishing the business;
- the income which the business is likely to produce or is producing;
- the time at which the business was established;
- the asset to which the business expenses relate;
- the income available to the parent through salary and wages;
- any other relevant matters.

### ***Expenses partly for business purposes and partly for private purposes***

Where an expense is partly business and partly private the expenses must be apportioned. Parents who are self-employed or who operate a business might claim expenses that may otherwise be considered private as a legitimate income tax deduction. Examples include the fixed-costs component of telephone expenses such as the rental and connection fees, home office expenses or motor vehicle expenses. These deductions are generally not available to parents who derive income solely from salary and wages.

Where CSA decides that the parent has a greater capacity to pay child support as a result of the deductions a reason to change the assessment may be established.

### ***Salary and wages paid to relatives or associated persons***

A parent who operates a business may legitimately deduct the wages or salaries paid to employees. The income of an employee can be considered to be the income of the parent where the employee is the parent's new spouse, de facto partner or a family member. In deciding whether the reason is established in relation to a salary and wage payment, CSA will consider the following matters:

- the number of hours worked;

- the duties performed and qualifications of the person to perform the work;
- whether the rate of remuneration is proportional to the employee's contribution; and
- the amount paid commercially for the type of work undertaken.

### ***Depreciation***

Depreciation represents the loss or expense attributed to the use of business property or equipment. A claim for depreciation can result in a parent having additional 'cash in hand' that can be considered as a resource available to a parent. In cases that involve depreciation, CSA will determine whether receiving a benefit through claiming depreciation expenses results in an increased capacity to contribute to child support. If a parent spends the benefit of depreciation on day-to-day living expenses or recreational expenses the Reason may be established. On the other hand, if the money or benefits are used or set aside for replacing equipment then the reason may not be established. CSA will consider a parent's complete financial situation and the individual circumstances of the case.

CSA can also consider the asset that is the subject of the depreciation expense, whether the asset is used for both business and private activities and whether the written down value is a reflection of market value. A luxury car leased as a work vehicle might also be used for private purposes.

### ***Primary production***

Some taxation incentives for the improvement of primary production properties provide deductions by allowing a percentage of the cost or a write-off over a period of time. Examples include the costs of conserving or conveying water, deductions for telephone costs over a 10-year period and outright deductions for measures that prevent land degradation.

Proof of this kind of expenditure alone will not establish a reason to change a child support assessment. However, a reason may be established if the payer has developed a capital structure of primary production that results in the parent being asset rich/income poor. A parent may have additional financial resources and a greater capacity to provide child support.

### ***Other capital expenses***

The principles above apply equally to any business in which there is substantial expenditure on the acquisition or development of plant and equipment. A parent may claim that capital investment is warranted at present as it will produce a higher income and therefore higher child support in the future. In each case CSA will consider the parent's complete financial situation and the individual circumstances of the case as well as the extent of the capital investments.

### ***Prior year losses and capital losses***

For taxation purposes some deductions may be claimed during a year even though there has not yet been any direct expense in that year.



**Example**

Where a taxpayer has a tax loss (more deductions than income) it may be able to be deducted from income received in later years.

There are also special rules for capital losses. They may be carried forward indefinitely to be deducted against any future capital gain.

In either case, the result is that a person may have a lower taxable income in a future year and therefore a lower (or higher) assessment of child support.

In these cases CSA will determine the parent's capacity to contribute to child support. CSA may consider the relationship between the loss and the actual expenditure.

**Example**

Capital gains losses from 1989 may be carried forward and offset against a capital gain in 1998. As the loss occurred 9 years earlier a parent may have additional financial resources in 1998. The parent has received a benefit in that year without incurring the related expenditure. CSA may decide that the parent has a capacity to contribute to child support that is not reflected in the parent's taxable income and the reason may be established.

However, it is possible that parents may have made arrangements with creditors to repay an outstanding debt caused by the earlier loss. Any repayments will be taken into account in deciding whether there is a reason to change the assessment.

If the debts or losses have been dealt with in a family law property settlement CSA will consider the terms of the settlement in deciding whether there is a reason to change the assessment.

***More complex structures involving businesses***

Parents may use a number of different structures to minimise their taxable income. For example, a parent may operate one business as a sole trader but operate associated activities through a company and trust structure. Sometimes the structure used during the parents' relationship is different to the structure used after the relationship has ended. A business may have operated as a family business, as a partnership or as a sole trader during the relationship. After the relationship ends a parent may restructure the business as a company or trust which produces a lower taxable income although the business activity had not changed.

Where there has been an historic pattern of earnings at a particular level and a restructuring results in a lower level of taxable income CSA may assess the level of child support with reference to the earlier capacity (*DJM and JLM (1998) FLC 92-816*).

Parents may use complex business structures in order to minimise the child support income amount. Where the issues raised by the application for

change to an assessment are too complex CSA can refuse to change the assessment and recommend that the parent apply to a court having jurisdiction under the Act (section 98E).

***Changes that reflect a parent's capacity to pay***

Where a parent's financial circumstances are not complicated, and the financial element can be easily identified and isolated CSA may increase the parent's child support income amount.

**Example**

If business income is reduced by \$10,000 as a result of depreciation and that amount is then expended on day-to-day living expenses the expense may be considered as an additional resource and added back to the parent's child support income.

Where a parent's business is used to provide a new spouse, partner or family member with a level of income which is considered disproportionate or unjustified CSA may add back the proportion of the income which exceeds a reasonable level of remuneration.

**Fringe benefits, Defence Force benefits and allowances**

***Fringe benefits***

A fringe benefit is a benefit that is provided to an employee or an associate of the employee (such as a family member) as part of the employment arrangement. An employee can be a current, future or former employee. The term 'benefit' is broad and includes any right, privilege, service or facility.

Common examples of fringe benefits provided from employment are:

- provision of a car, house or equipment for private purposes;
- giving somebody ownership of something, e.g. items of clothing;
- permitting somebody to enjoy a privilege or facility, e.g. a discounted loan or discounted airfares;
- provision of a service, e.g. use of skill or labour.

Some benefits are expressly excluded from the definition of a fringe benefit and do not give rise to any fringe benefit tax liability (section 136(1) FBTA). Examples include:

- payments of salary or wages;
- approved employee share acquisition schemes;
- employer contributions to complying superannuation funds;
- eligible termination payments (e.g. a 'company' car given or sold to an employee on termination);
- some Defence Force Benefits.

An employer has to pay tax on the taxable value of a fringe benefit. The taxable value of a fringe benefit is usually reduced by the amount of any

payment by the recipient or employee towards the fringe benefit. There are specific valuation rules for each category of a fringe benefit (Part III FBTA). Income derived by the provision of a fringe benefit within the meaning of the FBTA is exempt income and is not taxable income (refer to section 23L of the ITAA).

However, the Fringe Benefits Reporting Act provides that from 1 April 1999 employers are required to report on an employee's group certificate all fringe benefits with a total taxable value of more than \$1,000 a year. The 'total taxable value' means the amount that the employer paid or assigned as the value of the benefit. However, the 'grossed up taxable value' (which is the total taxable value as determined by the employer multiplied by a figure pre-determined by the ATO) will appear on the employee's group certificate. The 'grossed up taxable value' will be a larger amount than the 'total taxable value'.

For child support assessments commencing after 30 June 2000, child support liabilities are based on taxable income and a 'supplementary' amount comprised of amounts including the reportable fringe benefits received by parents. The reportable fringe benefits total included in an employee's group certificate (being the 'grossed up taxable value') will be included in the supplementary amount in the payer's child support income amount and used to calculate the child support assessment.

The inclusion of fringe benefits in the calculation of the child support income amount has the effect of increasing the child support assessment. It is unlikely since 1 July 2000 that special circumstances will exist where an increase of the liability is applied for relying on the payment of fringe benefits.

In some cases a parent may consider lodging an application to reduce their assessment on the basis that their income, earning capacity, property and financial resources are not properly reflected in the child support assessment because such fringe benefits have been included. The fact that fringe benefits have been included in the child support income amount will not, in itself, be a reason to change the assessment. In order to show a reason to change an assessment a parent must show that other circumstances affect their capacity to meet the assessed level of child support or that the nature of the benefit received does not provide them with an actual, additional capacity to contribute to child support.

In deciding if the benefit provides the person with an additional capacity to contribute to child support CSA can consider the individual circumstances of the case including:

- whether the fringe benefit is unusual, or peculiar to the parent's employment;
- whether the fringe benefit is one which cannot be 'repackaged' or converted into salary or wages;
- whether the parent would ordinarily have incurred a similar level of expense for the same kind of 'benefit' provided by the reportable fringe benefit.

If the only reason for a change to an assessment is that the benefit does not provide the parent with an additional capacity to contribute to child support and CSA is satisfied that the parent would have incurred the same kind (or similar kind) of expense but would not have incurred the expense to the extent reflected by the amount of the reportable fringe benefit CSA may reduce the child support income amount by the difference of the reportable fringe benefit and the estimated expenditure.

CSA may also give consideration to Reason 7 ('necessary commitments in supporting oneself') and consider it appropriate to reduce the child support assessment for an appropriate period to enable the parent to rearrange their salary package or financial affairs. In deciding what is an appropriate period CSA will consider the individual circumstances and the parent's commitments in supporting himself or herself.

### ***Fringe benefits received before 30 June 2000***

Before 30 June 2000 fringe benefits received by a parent were not reflected in, or included in, child support income amounts. A parent who receives a fringe benefit has an increased financial capacity because they do not have to spend part of their wages on usual expenditure such as a car or housing.

CSA can consider if a parent could restructure their remuneration package to take the fringe benefit as wages and be in a position to use those monies to meet the child's needs. In making a decision to change an assessment for this reason any fringe benefits received by a payee who is not a parent of the child, or fringe benefits received by a spouse or partner, are not relevant.

The final decision will depend on the circumstances of the case and any other reasons under consideration. In changing assessments for periods prior to 1 July 2000 it may be appropriate to add the grossed-up value of the fringe benefit to the child support income amount of the parent who received it.

### ***Treatment of Defence Force Benefits exempt from fringe benefits reporting***

Certain benefits provided by the Australian Defence Force (ADF) to its personnel are exempt from the fringe benefits reporting requirements. These benefits are provided to ADF members in recognition of the need for service mobility and the effect this can have on the members' families. The benefits that are excluded from reportable fringe benefit requirements include:

- housing assistance;
- reunion travel for members' dependents;
- education assistance for school aged children in critical years of schooling;
- allowances paid to families with special needs;
- overseas living allowance that compensates for cost of living differences;
- funeral costs;
- the entitlement to removal expenses upon the breakdown of a marriage.

The benefits listed above will not be included as a supplementary amount and added to the child support income amount. Other ADF allowances are reportable. They are those that have clear personal benefit such as

subsidised home loans, private use of official cars or free travel which is not part of reunion travel.

CSA will take into consideration Government policy regarding the exemptions from reportable fringe benefits. CSA will not consider it fair to change the assessment based on an application which relies solely on the fact that one parent is in receipt of ADF allowances or benefits which are not reportable fringe benefits.

However, in cases where other reasons or circumstances exist, CSA may take into consideration the receipt of ADF benefits and allowances when deciding whether it is fair or just and equitable and otherwise proper to make a particular change to the child support assessment.

### ***Defence Force Allowances***

Australian Defence Force personnel serving in war-like zones receive tax-free salary and additional allowances in the nature of travel allowances paid as compensation for the increased cost to personnel of serving in a war-like zone.

Where an assessment is affected by a reduction in a parent's taxable income for this reason the other parent can apply for a change to their assessment. If the only reason for the change of assessment application relates to the tax-free salary and allowances and there are no other circumstances peculiar to the case, CSA will increase the assessment as if the parent's salary was not tax exempt. CSA will generally not include the non-taxable allowances in deciding a child support income amount.

If the parent applying for a change to the assessment raises other grounds, or the other parent makes a cross-application CSA will consider all aspects of the case and consider whether it would be just and equitable and otherwise proper to make a change.

### ***Lump sum payments received by a parent***

Where a parent receives a substantial amount of money (a 'lump sum') that would otherwise not form part of their child support income amount, and therefore is not included in their assessment of child support, the lump sum may be taken into account in deciding whether an assessment should be changed.

Such payments may arise as a consequence of the parent:

- being retrenched from their employment;
- drawing funds from a superannuation fund;
- receiving a distribution from a deceased estate;
- being compensated for some loss or damage;
- being successful in a lottery or some other gambling venture.

In each case it will be necessary to decide whether receiving the money makes the amount of child support payable unjust and inequitable.

A relevant factor (but not the sole factor) is whether or not the payment results in one parent being in a better financial position compared to the other parent. However, the fact that there is a discrepancy in the parents' financial positions

does not automatically mean that there is a reason to change the assessment (*Hampson and Lightfoot (1997) FLC 92-775*). It will depend on the circumstances of each case.

### ***Superannuation***

Where a payment is received because a parent has drawn money from their superannuation fund CSA will consider whether their entitlement was taken into account in any property settlement between the parents. It may be unjust for a payer to pay child support based on a taxable income which includes a lump sum payment having regard to the earlier distribution of superannuation and property between the parents (*Carey and Carey (1994) FLC 92-489*).

However, if the parent lacks a substantial earning capacity and is making an inadequate contribution to child support CSA may still consider any superannuation received by the parent in deciding that parent's contribution. CSA will also consider whether the superannuation has been drawn prior to retirement because of severe financial hardship.

### ***Compensation***

Where a lump sum is received because of compensation for a personal injury there may be a reason to change the assessment because the payment compensates the parent for past loss of wages or a reduction of future earning capacity (*Harris and Harris (1991) FLC 92-254*).

Where the amount of compensation is set by way of private settlement it can be difficult to establish the portion of the compensation which relates to loss of wages or a decrease in future earning capacity. In these cases a decision by Centrelink concerning the period during which the parent is precluded from applying for social security benefits can be of assistance.

The cost of the parent's future needs may be increased and a part of the compensation, if not all, may need to be preserved to meet those costs. The parent's cost of meeting their future needs will need to be ascertained to decide the extent to which the parent's capacity to contribute to the financial support of the child has been increased because of the compensation payment.

### ***Windfall***

Amounts received as a windfall (e.g. a distribution from a deceased estate or success in a lottery or other gambling venture) are not assessable as taxable income. They do not form part of the child support income amount and are not taken into account in a formula assessment.

There may be a reason to change an assessment if it is likely that a windfall will increase the parent's capacity to contribute to the costs of the child's care.

The decision will depend on the circumstances of the case and any other reasons under consideration.

***Can financial resources be invested for future capacity to pay child support?***

In some cases a parent, who may have financial or capital resources, may claim that they should be able to expend capital resources in investments now in the expectation that future child support might be more valuable. A similar argument is frequently made about returning to study. It is not sufficient for a parent to say that they are in a different situation to a wage and salary earner, for example, because their income has been converted to - or is tied-up in - property or assets. Child support is intended to meet the day-to-day needs of the child (*Dwyer and McGuire (1993) FLC 92-420*). In these cases CSA will decide whether the parent has a capacity to restructure their financial situation to provide support.

## APPENDIX C: RESPONSE BY THE DEPARTMENT OF FAMILY AND COMMUNITY SERVICES (FACS) TO THE OMBUDSMAN'S RECOMMENDATIONS

Note: The Child Support Agency is a division within the Department of Family and Community Services.

### **Recommendation 1**

That the CSA monitor consistency of decision making across regions and develop training programs that address areas of weakness, enhance consistency and are adapted to meeting specific areas of need in each region.

#### ***FaCS response***

CSA agrees to investigate and address regional training needs.

### **Recommendation 2**

That the CSA put detailed guidelines in place, to be used across regions including, but not limited to, setting out the level of investigation that should be undertaken in cases where income is derived from self-employment, partnerships, companies and trusts, the treatment of income from particular sources, and the treatment of earning capacity where businesses operated prior to separation.

#### ***FaCS response***

CSA agrees to provide additional training in relation to understanding and interpreting financial information and how to construct income capacity.

### **Recommendation 3**

That the CSA take steps to inform SCOs that financial information can be accepted from an applicant about the other parent where there is no contradictory information available to the CSA and there are no other special circumstances that need to be considered.

#### ***FaCS response***

CSA agrees with this recommendation.

### **Recommendation 4**

That the CSA undertake further detailed analysis of the different mechanisms for setting assessments in cases where actual or past income cannot be applied, and provide SCOs with more guidance and training in changing assessments in such circumstances. In doing so, the CSA should consider whether preference should be given to particular sources of information, for example, the use of occupational guides or awards, in preference to measures of costs of children or average income.



***FaCS response***

CSA agrees and notes that occupational guides or awards are available to Senior Case Officers.

**Recommendation 5**

That the CSA provide training and guidance to SCOs to increase awareness of the provisions empowering a contrary decision to be made, including guidance on the requirement of procedural fairness where a contrary decision is in contemplation.

***FaCS response***

CSA agrees with this recommendation.

**Recommendation 6**

That the CSA provide training and guidance to SCOs to assist them to make decisions about when and how it is appropriate to backdate decisions.

***FaCS response***

CSA agrees with this recommendation and recognises the need to reinforce that all decisions need to be just and equitable, and otherwise proper.

**Recommendation 7**

That procedures for determining applications that may be decided on the papers be standardised across CSA Regions.

***FaCS response***

CSA agrees with this recommendation.

**Recommendation 8**

That procedures for determining applications that may be decided on the papers include a quality control process to ensure that such decisions are appropriate in the circumstances.

***FaCS response***

CSA agrees with this recommendation.

**Recommendation 9**

That all decisions are checked and edited by CSA administrative officers to ensure professional presentation and that the intentions of the SCO are accurately reflected.

***FaCS response***

CSA agrees with this recommendation.

**Recommendation 10**

If a parent with more than one child support case is determined in a COA process to have a higher income, earning capacity or greater resources than

reflected in the child support assessment, but no application for a COA has been made in the parent's other case(s), the CSA should use the Registrar Initiated Change of Assessment process to determine whether the assessment in the other case(s) should be similarly changed.

***FaCS response***

CSA agrees with this recommendation, but notes that it could have resource implications and therefore have an impact on other CSA priorities if the number of cases involved is large.

**Recommendation 11**

That the CSA develop a process to identify emerging issues that arise through COAs, and develop training and guidance for SCOs to assist in making decisions where a caring parent's earning capacity is considered or in dealing with other situations that do not frequently occur.

***FaCS response***

CSA agrees with this recommendation.

**Recommendation 12**

That the CSA ensure that SCOs and CSA administrative officers understand all aspects of the interaction between government payments and child support.

***FaCS response***

CSA agrees that CSA client service officers and SCOs need additional guidance in this area.

## APPENDIX D: LIST OF ACRONYMS

CSA	Child Support Agency
FaCS	Department of Family and Community Services
ATO	Australian Taxation Office
ADF	Australian Defence Force
FAO	Family Assistance Office
NATSEM	National Centre for Social & Economic Modelling
SCO	Senior Case Officer
COA	Change of Assessment
CSS	Child Support Scheme
RICA	Registrar Initiated Change of Assessment
PAYG	Pay As You Go taxpayer
AWE	Average Weekly Earnings
FLC	Family Law Case
FBTAA	Fringe Benefit Tax Assessment Act 1986
ITAA	Income Tax Assessment Act
TR	Taxation Ruling
FTB(A)	Family Tax Benefit (Part A)
MBA	Masters of Business Administration



